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A TREATISE

ON THE LAW OF

CARRIERS

BY THE

EDITORIAL STAFF OF THE MICHIE COMPANY

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE

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CARRIERS

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§§ 3424-3425. Duty of Carrier to Transport—§ 3424. In General.—The law raises an implied contract on the part of common carriers of passengers to transport and deliver to the passengers their baggage.[1] But a carrier is bound only to carry the personal baggage of passengers;[2] what is not baggage is not within the implied contract.[3] In some states, the matter is regulated by statute.[4] Of course, in order to fix upon the carrier liability as a carrier for the bag-

1. **Duty of carrier to transport baggage.**—*Georgia.*—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468; Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156.

Illinois.—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Maine.—Wilson *v.* Grand Trunk Railway, 56 Me. 60, 96 Am. Dec. 435; Wood *v.* Maine Cent. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339.

New York.—Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478; Glasco *v.* New York Cent. R. Co., 36 Barb. 557.

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Oregon.—Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Tennessee.—Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

2. **Duty applies only to personal baggage.**—Metz *v.* California, etc., R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405. See post, "What Constitutes Baggage," §§ 3429-3445.

3. Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

4. *California.*—Cal. Civ. Code, §§ 2181, 2183, defines luggage as articles intended

gage, the owner must stand in relation of passenger to the carrier, the carriage of the baggage being incidental to the carriage of the owner as a passenger.[5] So where a carrier received luggage under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and that the transportation of the luggage was consequently paid for, and without intending to make any charge for the transportation, and the owners of the luggage erroneously supposed that in purchasing tickets to the destination of the baggage, over another road, they had paid for the transportation by the carrier to which they delivered the baggage, there was no implied contract for the transportation of the baggage.[6]

Custom to Carry Passengers Only.—Where a transfer company, for a given fare charged and paid, undertakes to transport a passenger and his baggage, it is immaterial whether it was the general custom of the company simply to carry passengers, and not to hold itself out as offering to carry baggage without further compensation.[7]

Discrimination.—In the exercise of its duty to transport the baggage of passengers, the carrier must not discriminate against any passenger in the time or manner of the receipt or discharge of the baggage, or otherwise.[8]

§ 3425. Effects in Custody of Passenger.—It is the common-law right of a passenger to take with him into a passenger car his personal baggage appropriate to the journey and its object.[9] But a carrier may make reasonable rules as to what may be carried into its passenger cars.[10] A person entitled by the terms of his ticket to "personal passage" on a railroad car has not the right to carry with him packages of groceries for the use of his family.[11] A railroad company which did not hold itself out as a carrier of such goods is not obliged to afford to a passenger the privilege of carrying quantities of money, he retaining its custody in the baggage car, the use of which the railroad company had leased to an express company for the purpose of carrying such articles.[12]

§§ 3426-3428. Rules of Carrier—§ 3426. In General.—A carrier may make and enforce all reasonable rules relating to the transportation and

for the use of a passenger while traveling, and requires a railroad company to check and carry the same free of charge in a regular baggage car. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

Iowa.—Code, § 2077, requires the carrier to carry the ordinary baggage of a passenger. McElroy *v.* Iowa Cent. R. Co., 133 Iowa 544, 110 N. W. 915, 23 R. R. R. 466, 46 Am. & Eng. R. Cas., N. S., 466.

Oklahoma.—Wilson's Rev. & Ann. St. 1903, §§ 708, 709, requires a carrier to carry a reasonable amount of luggage for each passenger, consisting of articles intended for the use of the passenger while traveling, or for his personal equipment. Choctaw, etc., R. Co. *v.* Zwirtz, 73 Pac. 941, 13 Okla. 411, 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914.

5. **Relation of passenger must exist.**—Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

6. Beers *v.* Boston, etc., R. Co., 67 Conn. 417, 34 Atl. 541, 32 L. R. A. 535, 52 Am. St. Rep. 293.

7. **Custom to carry passengers only.**—City Transfer Co. *v.* Draper, 115 Ga. 954, 42 S. E. 221.

8. **Discrimination.**—Kates *v.* Atlanta, etc., Cab Co., 107 Ga. 636, 34 S. E. 372.

9. **Effects in custody of passenger.**—Runyan *v.* Central R. Co., 41 Atl. 367, 61 N. J. L. 537, 42 L. R. A. 284, 68 Am. St. Rep. 711.

Provision in ticket not affecting right.—Upon a ticket delivered to a passenger was printed "Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to $1 per lb." Held, that the reference to baggage was notice merely of the limit of accommodations and responsibility as to baggage in the carrier's custody and did not restrict or affect the common-law right of the passenger to carry personal baggage with him. Runyan *v.* Central R. Co., 41 Atl. 367, 61 N. J. L. 537, 43 L. R. A. 284, 68 Am. St. Rep. 711.

10. See post, "Rules as to Carrying Particular Property into Passenger Cars," § 3427.

11. Bullock *v.* Delaware, etc., R. Co., 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417.

12. **Passenger carrying money in leased baggage car.**—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

care of the baggage of its passengers.[13] A rule that baggage shall not be checked until a ticket has been procured is reasonable;[14] and so is a rule that a person intending to become a passenger shall purchase a ticket or pay fare before the carrier becomes responsible for his baggage.[15] But a rule that a baggage master shall not receive, into the baggage room, baggage until a ticket has been procured, is unreasonable and void.[16] It is a reasonable rule that a railroad company will only carry as baggage the passenger's wearing apparel, and upon refusal of the passenger to certify that his trunk contains nothing except wearing apparel, he is not entitled to damage for the company's refusal to carry such trunk.[17]

Notice of Rules.—A rule of a carrier relating to the transportation of baggage is not binding upon a passenger unless he is chargeable with notice of its existence.[18] So where a railroad baggageman has general authority to receive the baggage of persons to go upon his company's trains, and does receive such baggage in violation of the rules and regulations of the company, the latter will be liable for the loss of such baggage to the owner who has delivered it in good faith within a reasonable time before the departure of the train, unless the existence of such rules or regulations was brought to the knowledge of the owner of the baggage.[19] And a railroad company can not escape liability for baggage lost, on the ground that the baggageman had no authority to check the baggage, by setting up a rule of the company prohibiting the baggageman from checking baggage of the class lost without a release of liability therefor, where the traveler had no knowledge of such rule.[20] It has been held, however, that a person

13. **Right to make reasonable rules.**—Norfolk, etc., R. Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

14. **Checking baggage.**—Coffee *v.* Louisville, etc., R. Co., 25 So. 157, 76 Miss. 569, 45 L. R. A. 112, 71 Am. St. Rep. 535.

15. Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

16. **Reception into baggage room.**—Coffee *v.* Louisville, etc., R. Co., 25 So. 157, 76 Miss. 569, 45 L. R. A. 112, 71 Am. St. Rep. 535.

17. **As to what will be carried as baggage.**—Norfolk, etc., R. Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532; S. C., 85 Va. 217, 7 S. E. 233, 1 L. R. A., 110.

Plaintiff was in the habit of carrying merchandise in his trunk as personal baggage, contrary to the regulations of defendant railroad. On presenting baggage to be checked he refused to sign an affidavit as to its contents, and the railroad refused to accept it. It was shown that he was engaged in an unjust effort to make money out of the railroad by unlawful means. The baggage which he presented to the company contained wearing apparel only. Held that, whether or not the regulation requiring the making of an affidavit as to the contents of baggage was a reasonable regulation, plaintiff was not in a position to take advantage of its unreasonableness. Norfolk, etc., R. Co. *v.* Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110.

18. **Necessity for notice of rules.**—Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476; Runyan *v.* Central R. Co., 65 N. J. L. 228, 47 Atl. 422.

Illustrations.—A railroad passenger, without special notice of the company's regulation that "live animals are allowed as baggage men's perquisites," committed a dog to the baggage master, and paid him for its transportation. Held, that the company was liable for the loss of the dog by the baggage man's delivering it up to the wrong person. Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476.

Plaintiff was a passenger for E. in a second-class car, with his dog. The conductor told him, under the company's rules, dogs must go in the baggage car. Plaintiff delivered the dog to the baggage master, and told him to put it off at E., and that he would not pay him any money for the dog. On arriving at E., the baggage master refused to deliver the dog without the payment of 25 cents, which plaintiff refused to give, and the dog was carried further on, and lost by the negligence of the baggage master. Plaintiff afterwards, and before learning of the loss of the dog, offered to pay what was due on it. Held, that plaintiff could recover for the dog from the company, though it had a rule providing only for the payment of a fee to the baggage master, and relieving itself of all liability; plaintiff not being informed of the rule, and having no knowledge of it. Kansas City, etc., R. Co. *v.* Higdon, 94 Ala. 286, 10 So. 282, 11 L. R. A. 515, 33 Am. St. Rep. 119.

19. Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

20. Trimble *v.* New York, etc., R. Co., 56 N. E. 532, 162 N. Y. 84, 48 L. R. A. 115, affirming 57 N. Y. S. 137, 39 App. Div. 103.

who, by the exercise of ordinary care, could have known that the checking of jewelry sample cases by station agents was prohibited by a rule of the company, can not recover the value of such a case if lost.[21]

Waiver of Rule.—Where defendant railroad's baggage man knowingly received a jeweler's sample cases for transportation as ordinary baggage, contrary to a rule of the company, of which the owner had knowledge, there was no waiver of objections to receiving such merchandise as baggage by defendant's refusal to refund a sum paid thereon for excess baggage.[22]

§ 3427. Rules as to Carrying Particular Property into Passenger Cars.—Validity of Rules.—A rule of a railroad company forbidding the carrying of cumbersome and bulky, or dangerous articles, into its passenger coaches by passengers is reasonable as a matter of law.[23] And regulations prohibiting passengers from taking dogs with them in passenger cars, and requiring payment for carrying dogs in baggage cars, are reasonable.[24]

Notice of Rule.—A rule of a railroad company that it would not permit passengers to carry on an express business did not charge plaintiff with notice of the fact that he would not be permitted to carry his own personal effects into a passenger car on which he had purchased transportation.[25]

Effect of Custom or Usage.—If a common carrier of passengers for a long time acquiesces in and makes accommodation for the carriage of small packages of merchandise in its passenger cars as personal baggage, so as to lead passengers to accept and rely upon its attitude in that respect as one of its regulations, it can resume its rights under the law only after reasonable notice of its rescission of the regulation.[26] But when passengers have carried with them small packages of merchandise, in derogation of the common-law contract of carriage, the usage or practice to do so, in order that the passengers may rely upon it as a regulation of the railroad company that such packages can be so carried, must be so general, certain, uniform, and notorious, and it must be so clearly proved, that it can be concluded that the officers and agents of such company possessed knowledge of such usage, and acquiesced therein, in such manner that it became a part of the contract of carriage.[27] Such usage must be distinguished

21. **Duty to investigate.**—Weber Co. *v.* Chicago, etc., R. Co., 92 Iowa 364, 60 N. W. 637.

22. **Waiver of rule—Refusal to refund sum paid for excess baggage.**—Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042, 20 Am. & Eng. R. Cas., N. S., 466.

23. **Validity of rules as to carrying particular property into passenger cars.**—Dowd *v.* Albany Railway, 62 N. Y. S. 179, 47 App. Div. 202; Ray *v.* United Tract. Co., 89 N. Y. S. 49, 96 App. Div. 48; Daniel *v.* North Jersey St. R. Co., 64 N. J. L. 603, 46 Atl. 625; Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

A rule of a street railway forbidding passengers to take into the cars barrels, boxes, trunks, gas pipe, lumber, and panes of glass, is reasonable as matter of law. Dowd *v.* Albany Railway, 62 N. Y. S. 179, 47 App. Div. 202.

24. **Carriage of dogs.**—Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532. See O'Gorman *v.* New York, etc., R. Co., 89 N. Y. S. 589, 96 App. Div. 594, holding that a rule of an electric railway company providing that "no dogs, lumber, large packages, bicycles, * * * or other articles of a bulky nature, that may interfere with the accommodation of passengers," will be allowed on cars, excludes all dogs; and the qualifications forbidding things interfering with the accommodation of passengers relates only to articles carried by them, and not to dogs.

Under the Massachusetts statute.—(St. 1906, c. 463, p. 2, § 181), such regulation is reasonable. Hull *v.* Boston, etc., Railroad, 210 Mass. 159, 96 N. E. 58, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147.

Whether dogs may constitute baggage.—See post, "Dogs," § 3434.

25. **What is not notice of rule.**—Runyan *v.* Central R. Co., 47 Atl. 422, 65 N. J. L. 228.

26. **Effect of custom or usage.**—Runyan *v.* Central R. Co., 41 Atl. 367, 61 N. J. L. 537, 43 L. R. A. 284, 68 Am. St. Rep. 711.

27. **Usage must be general, uniform, etc.**—Runyan *v.* Central R. Co., 44 Atl. 985, 64 N. J. L. 67, 48 L. R. A. 744.

A habit of one particular passenger to carry packages of merchandise into the passenger cars, and with him on his journey, will not constitute a usage or

from mere acts of accommodation; and the mere fact that such acts of accommodation have been constantly done, not in obedience to duty or contract, but as a matter of form and indulgence, cannot compel their continuance.[28]

Enforcement of Rule.—Where a passenger, having a ticket entitling him only to "personal passage," has entered the car with packages of groceries for family use, the officers of the railroad company cannot lawfully take such packages from him by force; the remedy of the company upon his refusal to remove the packages being to remove both the passenger and the packages, using no unnecessary force.[29]

§ 3428. Rule as to Place for Delivery of Baggage.—A rule made by a railway company to sell tickets and deliver baggage at only one of its five stations in a city, which is less convenient for such passengers as desire to transfer baggage to another road, and to carry all baggage on to the main station, though the trains regularly stop at the other stations to allow passengers to alight from or get on them, is, as a matter of law, unreasonable and void.[30]

§§ 3429-3445. What Constitutes Baggage—§ 3429. In General.—As to the general definition of the term "baggage," or "luggage,"[31] the authorities differ but little, though in the application of the definition to the facts of particular cases the results reached are varied and discordant.[32] It may be stated as a general rule that a passenger's baggage may only include such articles as are reasonably necessary for the use, comfort and convenience of the passenger, and such as are usually carried by passengers of his class under similar circumstances.[33] It embraces articles for the protection,[34] instruction or amuse-

practice which can be relied on by passengers as a general regulation of the railroad company. Runyan *v.* Central R. Co., 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744.

28. **Usage must be distinguished from mere acts of accommodation.**—Runyan *v.* Central R. Co., 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744.

29. **Enforcement of rule.**—Delaware, etc., R. Co. *v.* Bullock, 36 Atl. 773, 60 N. J. L. 24, 37 L. R. A. 417.

30. **Rule as to place for delivery of baggage.**—Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

31. **The terms "baggage" and "luggage"** signify one and the same thing. The former is the term in general use in the United States, while in England the latter prevails. The term "luggage" obtains in legal expression in California rather than the term "baggage." Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

"**Ordinarily baggage is made up of two elements.** First, certain things which may become such. Second, the bags, trunks, valises, satchels, packages or other receptacles in which these things are to be put before they can be deemed baggage. In other words, the bag or other receptacle and their contents are both necessary components of the legal idea conveyed by the term baggage. See Century Dictionary." State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66.

32. Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

"As to the things which may become baggage when properly contained, or as to what may be called the subjects of baggage, the definitions given in the decisions and by the text writers, though necessarily wanting in explicitness, from the difficulty of enumerating all the articles which may become baggage, are yet full, comprehensive and in perfect accord in their statements of the rules of law." State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66.

33. **Necessary and usually carried by passengers.** — *United States.* — Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Alabama.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Arkansas.—Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850; Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726.

California.—Metz *v.* California, etc., R.

34. **Articles for protection.**—Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627. See post, "Weapons," § 3444.

ment of the passenger on the way,[35] and articles usually carried as baggage, such as writing materials, books, etc.[36] The obligation of the carrier, as to baggage, is not limited absolutely to wearing apparel and other appliances of necessity, comfort and convenience, suited to the condition of each traveler, but may embrace other articles of limited value and ordinary bulk, which he may think proper to take with him.[37] Thus, it has been held that a passenger's baggage will include such articles, if of trifling value and reasonable in amount, which may be purchased while abroad for the use of the traveler's family at home, such as, ordinarily, men are in the habit of bringing to their family in that way.[38]

For Personal Use of Passenger.—To constitute a part of his baggage, as

Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228.

Georgia.—Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156.

Illinois.—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268; Parmlee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321; Werner *v.* Evans, 94 Ill. App. 328; Atwood *v.* Mohler, 108 Ill. App. 416.

Kentucky.—American Contract Co. *v.* Cross, 8 Bush 472, 8 Am. Rep. 471; Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 10 Am. St. Rep. 316, construing Ky. St., § 783.

Maryland.—Pettigrew *v.* Barnum, 11 Md. 434, 49 Am. Dec. 212.

New Hampshire.—Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

New Jersey.—Bullock *v.* Delaware, etc., R. Co., 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417.

New York.—Grant *v.* Newton, 1 E. D. Smith 95; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Nordemeyer *v.* Loescher, 1 Hilt. 499; Pardee *v.* Drew, 25 Wend. 459; Weeks *v.* New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104, affirming 9 Hun 669.

Ohio.—Smith *v.* C. H. & D. R. Co., 3 O. Dec. 192, 2 N. P. 29; Jones *v.* Voorhees, 10 O. 145.

Oklahoma.—Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 73 Pac. 941, 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Pennsylvania.—Bullard *v.* Delaware, etc., R. Co., 21 Pa. Super. Ct. 583.

Tennessee.—Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Texas.—Galveston, etc., R. Co. *v.* Fales, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; Mexican Nat. R. Co. *v.* Ware (Tex. Civ. App.), 60 S. W. 343; Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118; Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

Comfort and convenience of passenger and family.—In Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, it is held that a railroad's obligation to carry a passenger's baggage is limited to such articles as are reasonably required for the comfort and convenience of the passenger and his family.

Toilet articles constitute baggage.—Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767.

35. Articles for instruction or amusement.—Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Seawell *v.* Greenway Bro. & Co., 22 Tex. 691, 75 Am. Dec. 794. See post, "Property to Be Used for Recreation," § 3440.

36. Writing materials, books, etc.—Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767.

37. Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

38. Articles purchased for use of family.—Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

In Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527, it is held that common carriers are liable for the loss of such property of a passenger received by them as baggage, as is designed for the personal use of himself and members of his family and is of a kind customarily carried by travelers as baggage, although such property is not intended to be used, and is not necessary for the use, comfort or convenience of the passenger on the journey. See also, Duffy *v.* Thompson (N. Y.), 4 E. D. Smith 178.

Dress pattern for member of family.—In Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850, it was held that a suit case purchased en route by a passenger for his own use, and a dress pattern containing 12 yards of goods valued at $8.85, also purchased en route, to take home to a member of his family, were baggage when placed in his trunk, so that he could recover therefor if the trunk was destroyed.

a general rule, an article must be intended for the personal use of the passenger only.[39]

Length, Nature and Purposes of Journey.—The length of the journey, its nature and objects, must be considered in determining what the passenger is entitled to carry with him as baggage.[40] So the mode of conveyance and the character of the country through which the journey is made may be considered in determining what is or is not baggage.[41] The character of the baggage carried by a passenger is not to be limited to the requirements of any particular part of

39. For personal use of passenger.—*United States.*—Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

California.—Metz *v.* California, etc., R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228.

Illinois.—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268; Atwood *v.* Mohler, 108 Ill. App. 416; Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138.

Massachusetts.—Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300.

Mississippi.—Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

Missouri.—State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66.

New Jersey.—Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711.

New York.—Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767.

Ohio.—Smith *v.* C. H. & D. R. Co., 2 N. P. 29, 3 O. Dec. 192; Jones *v.* Voorhees, 10 O. 145.

Oklahoma.—Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 73 Pac. 941, 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914.

Tennessee.—Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

Texas.—Mexican Nat. R. Co. *v.* Ware (Tex. Civ. App.), 60 S. W. 343; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118; Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613; Mexican Cent. R. Co. *v.* De Roscar (Tex. Civ. App.), 109 S. W. 949.

England.—Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

40. Length, nature and purposes of journey.—*United States.*—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Hopkins *v.* Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692.

Arkansas.—Kansas City, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111; Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 35 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726; Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; Werner *v.* Evans, 94 Ill. App. 328; Atwood *v.* Mohler, 108 Ill. App. 416.

Indiana.—Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

Mississippi.—Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

Missouri.—Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

New Jersey.—Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711.

New York.—Davis *v.* Cayuga, etc., R. Co., 10 How. Prac. 330; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Van Horn *v.* Kermit, 4 E. D. Smith 453; Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150; Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119.

Oklahoma.—Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 73 Pac. 941, 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914.

South Carolina.—Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227; Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Texas.—International, etc., R. Co. *v.* McCown, 2 Texas App. Civ. Cas., § 712; Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Texas, etc., R. Co. *v.* Morrison's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103; Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Bonner *v.* Blum (Tex. Civ. App.), 25 S. W. 60.

Wisconsin.—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

England.—Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

41. Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638.

the journey, nor of any particular line of connecting carriers, and the passenger is entitled to carry sufficient personal effects as baggage, as will reasonably supply his wants during the entire journey.[42]

Class and Habits of Traveler.—The class to which the passenger belongs, his habits and needs, and his financial resources have an important bearing on the question, for what articles he may hold the carrier responsible for as his personal baggage.[43]

During Continuance of Journey.—The term baggage includes such articles of necessity or convenience as are usually carried by passengers for personal use, comfort, or protection during the continuance of a journey.[44]

For the Use after Termination of Journey.—In order that articles may constitute baggage, however, it is not essential that they shall be necessary and intended only for the use, comfort or convenience of the traveler on the journey. And the fact that such articles will last and satisfy his requirements for a reasonable length of time after the termination of his transportation by the carrier will not destroy their character as baggage; nor will the fact that they are not intended to be used until after the relation of carrier and passenger has ceased to exist.[45] Thus, baggage includes whatever the passenger takes with him for his own personal use and convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate ne-

42. Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

43. Class and habits of traveler.—*United States.*—Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286.

Arkansas.—Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726; St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 561, 46 Am. St. Rep. 212; Little Rock, etc., R. Co. *v.* Record, 74 Ark. 125, 85 S. W. 421, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664, 109 Am. St. Rep. 67; Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850.

California.—Metz *v.* California, etc., R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268; Chicago, etc., R. Co. *v.* Collins, 56 Ill. 212, 4 Am. R. Rep. 453.

Maryland.—Giles *v.* Fauntleroy, 13 Md. 126.

Mississippi.—Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52; Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

New York.—Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Hasbrouck *v.* New York, etc., R. Co., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150.

Tennessee.—Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 62, 51 Am. Dec. 682; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Texas.—International, etc., R. Co. *v.* McCown, 2 Texas App. Civ. Cas., § 712; Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638.

Wisconsin.—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

England.—Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612, 622, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix; Cadwallder *v.* Grand Trunk R. Co., 9 L. C. Rep. 169.

44. During continuance of journey.—Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627.

45. For use after termination of journey.—*United States.*—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Indiana.—Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

New Jersey.—Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711.

New York.—Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150.

Pennsylvania.—Porter *v.* Hildebrand, 14 Pa. 129.

South Carolina.—Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

Tennessee.—Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 295, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Texas.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317, citing Hutch. on Carr., §§ 686, 687.

cessities or to the ultimate purpose of the journey.[46] This would include not only all articles of apparel, whether for the use or ornament,[47] but also the gun case or the fishing apparatus of the sportsman,[48] the easel of an artist on a sketching tour,[49] or the books of the student,[50] and other articles of an analogous character, the use of which is personal to the traveler and the taking of which has arisen from the fact of journeying.[51] Articles for use as baggage at the end of the journey or during a temporary stay at a particular place, may be as properly baggage as those actually used in the transit, and may include an opera glass, though the entire journey be made at night.[52]

Presents for Others.—It has been held that a passenger can not include in his personal baggage articles intended to be presented as gifts to others.[53]

Articles Usually Transported as Freight—Effect of Usage.—If it is apparent from all the circumstances—from the amount, nature, bulk and value of the articles in question—that they are such as, according to the usual course of business, are transported as freight; or if it is manifest that they are intended for sale, then they are not to be viewed in the light of baggage. It is certainly right too, that usage, however indeterminate should be considered in ascertaining what is baggage. This must be the usage of the time, and of the carrier and his patrons. Nothing, subject to the limitations before stated, should be excluded, which have been usually considered in practice as baggage.[54]

46. *Arkansas.*—Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 22 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726; Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850.

Missouri.—State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66.

Texas.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

New York.—Hasbrouck *v.* New York, etc., R. Co., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150.

England.—Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

47. **Articles of apparel.**—Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix. See post, "Jewelry for Personal Use," § 3436; "Wearing Apparel," § 3443.

48. **Equipment of sportsman.**—Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix. See Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317. See post, "Property to Be Used for Recreation," § 3440.

49. **Easel of artist.**—Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix; Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

50. **Books of student.**—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

51. Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

52. **During temporary stay at intermediate point.**—Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

53. **Presents for others.**—*United States.*—The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219.

Massachusetts.—Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140.

New York.—Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225.

Ohio.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620.

England.—Cahill *v.* London, etc., R. Co., 13 C. B. N. S., 818, 8 Jur. N. S. 1063, 31 L. J. C. P. 271, 10 W. R. 321.

Gold ornaments for presents.—In The Ionic, 5 Blatchf. 538, Fed. Cas., No. 7,059, it is held that a gold watch and chain, gold ornaments for presents and American coin, are not baggage, as between a passenger and a carrier of such passenger.

Toy horse for children with father's baggage.—In Hudson *v.* Midland R. Co. (Eng.), L. R. S. B. 366, it is held that a child's spring horse which a father was taking home for his children was not a part of his baggage.

54. **Articles usually transported as freight.**—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Particular Articles Not Constituting Baggage.—It has been held that locks or handcuffs in a trunk,[55] a manuscript intended for publication,[56] engravings,[57] masonic regalia,[58] and masquerade costumes in a trunk for use at a ball,[59] are not baggage. And it is held that a sacque and muff, and silver napkin rings, do not constitute any part of gentleman's traveling baggage, and no recovery can be had for their value in case of loss.[60]

§ 3430. Effects of Immigrants.—In some cases the rules for determining what is baggage have been applied very liberally in favor of immigrants, that is, those changing their place of residence, either in the same state or by emigrating to a foreign country, as will be seen from the appended note.[61] But in other

55. **Locks or handcuffs.**—Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

56. **Manuscript intended for publication.**—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

57. **Engravings.**—Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225.

58. **Masonic regalia.**—Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225.

59. **Masquerade costumes in trunk for use at ball.**—In Michigan, etc., R. Co. *v.* Oehm, 56 Ill. 293, 4 Am. R. Rep. 451, it appeared that the trunks of a passenger contained masquerade costumes, which she had undertaken to furnish for use at a ball, on the evening of the following day. But one of the trunks failed to arrive in time. It was held that, in order to recover, it was necessary for the passenger to show she informed defendant's servants of the contents of the trunks.

60. **Sack and muff, etc., in trunk of man.**—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

61. **Effects of immigrants.—Clothing and household goods.**—In Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138, the jury found that a passenger, traveling with his family, was entitled to have transported as baggage two feather beds and pillows, two blankets, six towels, a table cover, considerable clothing, one looking glass, one set of dishes, two dozen German-silver spoons, one sewing box, and a double-barrelled gun, worth, altogether, about one hundred and fifty dollars, and the judgment was sustained on appeal.

In Glovinsky *v.* Cunard Steamship Co., 4 Misc. Rep. 266, 24 N. Y. S. 136, it is held a woman and her two children, traveling as emigrants from Europe to the United States, were entitled to carry with them as baggage clothing and bedding, valued at two hundred and eighty-five dollars; and a provision in their ticket purporting to limit the carrier's liability for loss of baggage to fifty dollars was held invalid.

And in House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809, it is held that where passengers making a permanent change of abode, take with them, in their trunks household articles such as dishes, cutlery, etc., such articles are "baggage," if it is customary to take them under such circumstances.

Carpenter's tools.—In Porter *v.* Hildebrand, 14 Pa. 129, it appeared that the plaintiff was a carpenter, and that his trunk contained $45 worth of clothing and $55 worth of carpanter's tools. He was moving from Pennsylvania to the state of Ohio, and he delivered his trunk to the owners of a stage to carry it from Pittsburg to Wooster, Ohio; and it is said in the opinion: "The right to carry tools as baggage is unquestionably open to abuse, but in the language of the court in McGill *v.* Rowland, 3 Pa. 451, 45 Am. Dec. 654, the correction is to be found in the intelligence and integrity of the jury called to determine under the circumstances of each case. It is, it is said, a common thing for journeyman mechanics to carry in their trunks with clothing a small and select portion of their tools. To this practice I see no such objection as ought to put this kind of property out of the protection afforded to the necessaries a traveler is compelled by legitimate considerations to transport with his person. Upon this score, the judgment rendered below is, I think, unobjectionable."

Rifle carried in trunk.—In Davis *v.* Cayuga, etc., R. Co. (N. Y.), 10 How. Prac. 330, it is held that a rifle, valued at $35, in the trunk of a harness maker, who was moving to another town, was included in the term baggage and its value recoverable against the railroad company, the trunk and its contents being lost while being transported on the railroad as his personal baggage.

Emigrant from Germany to New York—Two swords—$800 in gold.—In Merrill *v.* Grinnell, 30 N. Y. 594, the owner of the trunk, for whose loss, with its contents, the action was brought, was allowed to recover for many articles of clothing, besides money, that the passenger did not need to use by the way. He was an emigrant from Germany to New York, and purchased his ticket at Hamburg for the transportation of himself and baggage to New York via Hull and Liverpool, such baggage being a leather trunk, and its contents, consisting of a large amount of wearing apparel, among

cases more stringent rules have been applied.[62] Where a steerage passenger on a vessel is bound to provide her own bedding for the voyage, such bedding constitutes a part of her ordinary baggage.[63] In the case of an immigrant, who carries with him trunks and ordinary baggage, and who also turns over to the carrier a number of boxes of goods for transportation, and pays freight for the weight in excess of his allowance as baggage, and the general character of the shipment is known to the carrier, the courts will not conclusively presume that the entire shipment is of baggage and hold there can be no recovery except for such articles contained in the boxes as may properly be designated as necessary baggage.[64]

§§ 3431-3432. Property of Others—§ 3431. In General.—A common carrier is liable as such only for what the passenger takes with him for his own personal use and convenience, and not for the property of others which the passenger has placed in his trunk or otherwise included with his personal baggage.[65]

which were six dozen shirts, two swords, valued at sixty-eight dollars, $800 in gold, and other articles, valued in all at $1,991.27. The court allowed plaintiff to recover for all these articles. The chief controversy related to the money. It is quite apparent that of these materials of wearing apparel, very few, and of the money very little, if any, were requisite for the use of the passenger while on the journey. His ticket was paid for before he started, and it did not appear that he sought or had occasion to open or to take anything from his trunk before his arrival in New York, where, upon demand for it, it was found to have been stolen or lost.

62. **Household goods.**—A married woman passenger is not entitled to recover for the loss of articles constituting household goods which she was carrying in her trunk, though she and her husband were changing their residence by removal from one state to another, where the carrier had no notice of the fact that such goods were being transported as baggage. Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Bedding.—Proprietors of an ocean steamship are not liable, under their ordinary contract as common carriers to transport a passenger and her baggage, for the loss of a feather bed, carried by the passenger, but not intended for use on the voyage. Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300.

And it has been held that six pair of sheets and an equal number of blankets and quilts were not to be deemed the personal baggage of a passenger traveling from Canada to London, where he expected to provide himself a home. Macrow *v.* Great Western R. Co. (Eng.), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

Artist's and tailor's utensils.—In Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286, it is held that a carrier can not be held liable, as an insurer, for the loss of artist's and tailor's utensils packed with the baggage of an emigrant.

63. **Steerage passenger required to furnish own bedding.**—Hirschsohn *v.* Hamburgh American Packet Co., 37 N. Y. Super. Ct. 521.

64. **Payment for excess weight.**—Hamburgh-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662.

65. **Property of others.** — *Arkansas.* — Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726; Kansas, etc., R. Co. *v.* Skinner, 88 Ark. 189, 113 S. W. 1019, 31 R. R. R. 423, 54 Am. & Eng. R. Cas., N. S., 423, 21 L. R. A., N. S., 850.

California.—Metz *v.* California, etc., R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219; Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

Kentucky. — Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 102 Am. St. Rep. 316.

Maryland.—Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Massachusetts.—Dunlap *v.* International Steamboat Co., 98 Mass. 371.

Mississippi. — Yazoo, etc., R. Co. *v.* Georgia Home Ins. Co., 85 Miss. 7, 37 So. 500, 15 R. R. R. 766, 38 Am. & Eng. R. Cas., N. S., 766, 67 L. R. A. 646, 107 Am. St. Rep. 265; Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671.

New Jersey.—Pennsylvania R. Co. *v.* Knight, 58 N. J. L. 287, 33 Atl. 845.

New York.—Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Hurwitz *v.* Hamburgh-American Packet Co., 56 N. Y. S. 379, 27 Misc. Rep. 814; Gurney *v.* Grand Trunk R. Co., 59 Hun 625, 14 N. Y. S. 321, 37 N. Y. Super. Ct. 155; Weed *v.* Saratoga, etc., R. Co., 19

Thus, it has been held that a railroad passenger's baggage does not include articles which he has purchased for a person not a member of his family and has packed with his own baggage.[66] A man traveling alone, carrying a lady's jewelry in his trunk, can not recover from the carrier for its loss during the passage, if there was no special contract with the carrier relating thereto.[67]

Property of Passenger's Firm.—It has been held that a carrier is not liable to a firm for injuries done to an article belonging to the firm, but carried by the carrier as the personal baggage of a passenger, although the passenger was a member of the firm.[68]

Money of Others.—A common carrier can not be held responsible as a carrier of baggage for the loss of money of another passenger, or of a stranger to the carrier, carried in a passenger's trunk, or on his person, without the carrier's knowledge and consent.[69]

§ 3432. Property of Members of Family.—Property of Members of Family Traveling Together.—It seems to be generally held that when the members of the same family are traveling together, the baggage of one member may be placed in the trunk or other receptacle for baggage of another, without affecting the right to recover against the carrier for its loss or injury.[70] So a

Wend. 534; Cattaraugus Cutlery Co. *v.* Buffalo, etc., R. Co., 24 App. Div. 267, 48 N. Y. S. 451; Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

Pennsylvania. — Bullard *v.* Delaware, etc., R. Co., 21 Pa. Super. Ct. 583; Jacobs *v.* Central R. Co., 19 Pa. Super. Ct. 13.

Texas.—Andrews *v.* Fort Worth, etc., R. Co. (Tex. Civ. App.), 25 S. W. 1040.

England.—Becker *v.* Great Eastern R. Co., L. R., 5 Q. B. 24.

66. **Articles purchased for another.**—Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

67. **Man carrying lady's jewelry.**—Metz *v.* California, etc., R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228.

68. **Property of passenger's firm.**—Pennsylvania R. Co. *v.* Knight, 58 N. J. L. 287, 33 Atl. 845.

69. **Money of others.**—*United States.*—Hallman *v.* Holladay, 1 Woolw. 365.

Massachusetts.—Dunlap *v.* International Steamboat Co., 98 Mass. 371.

New York.—Gurney *v.* Grand Trunk R. Co., 59 Hun 625, 14 N. Y. S. 321, 37 N. Y. Super. Ct. 155.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

Texas.—Andrews *v.* Fort Worth, etc., R. Co. (Tex. Civ. App.), 25 S. W. 1040.

Money of one passenger in valise of another—Fraud on carrier.—In Dunlap *v.* International Steamboat Co., 98 Mass. 371, holding that a carrier is not liable for the loss of money of one passenger contained in a valise which another passenger, with the knowledge of the first, delivered as his own luggage, and the carrier received as such, it is said in the opinion: "It was in effect a concealment of its real value to put into the valise a larger amount of money than was sufficient for the expenses of a single passenger. This enhanced the risk assumed by the defendants, without their knowledge. It exposed them to the hazard of incurring, by the loss of the luggage of one passenger, a heavier liability than they had ever agreed to assume. It is obvious that this was a practical fraud on the defendants."

70. **Property of members of family traveling together.** — *Maryland.* — Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575.

Michigan.—Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740, 1 L. R. A., N. S., 352, 113 Am. St. Rep. 533.

New York.—Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

North Carolina.—Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328.

Tennessee.—Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Checked as baggage of one member.—Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328, it is held that though the carriage of the personal baggage of a passenger is incident to the ticket purchased, and is personal to the user of the ticket, where several members of a family are traveling together, articles belonging to them may be checked as the baggage of one.

Husband's underwear in wife's trunk.—In Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856, it is held that a married woman is entitled to

father paying full fare for himself, traveling with a child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract of carriage for loss or injury of any articles bought and used for the child, which articles are part of the father's baggage.[71] And it has been held that the fact that a lost trunk contained clothing prepared for plaintiff's daughter, nineteen years of age did not divest him of the right to recover its value in an action against the carrier for the loss of his personal baggage while he and his daughter were being transported by defendant as passengers.[72]

Property of Members of Family Not Traveling with Passenger.—It has been held that the carrier is not liable, as for baggage, for articles which a passenger has placed in his trunk for the purpose of carrying home for members of his family who are not traveling with him.[73]

§§ 3433-3444. Particular Kinds of Property—§ 3433. Commercial Travelers' Samples.—Drummers, under ordinary circumstances, are not entitled to have the samples used by them in making sales carried as baggage.[74]

recover for the loss of a small amount of her husband's underwear, which was being carried in her trunk as a part of her baggage, it appearing that her husband was traveling with her and they were changing their place of residence by removal from one state to another.

71. **Articles used for child as father's baggage.**—Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740, 1 L. R. A., N. S., 352, 113 Am. St. Rep. 533.

72. **Daughter's clothing in father's trunk.**—Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575.

73. **Property of members of family not traveling with passenger.**—Hurwitz *v.* Hamburg-American Packet Co., 27 Misc. Rep. 814, 56 N. Y. S. 379; Bullard *v.* Delaware, etc., R. Co., 21 Pa. Super. Ct. 583.

Mother's dress.—In Bullard *v.* Delaware, etc., R. Co., 21 Pa. Super. Ct. 583, it is held that where a passenger carries with her own personal clothing, an embroidered table centerpiece of her own, and a dress belonging to her mother, and the baggage is lost, she can not recover from the carrier for the loss of the centerpiece, or such dress.

Books bought for husband with his money.—In Hurwitz *v.* Hamburg-American Packet Co., 27 Misc. Rep. 814, 56 N. Y. S. 379, it is held, in an action for loss of a passenger's baggage, that no recovery can be had for books, as constituting a part thereof, which she bought for her husband with money which he remitted to her for that purpose.

74. **Commercial travelers' samples.**—*United States.*—Jacobs *v.* Tutt, 33 Fed. 412; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Arkansas.—Kansas, etc., R. Co. *v.* State, 46 S. W. 421, 65 Ark. 363, 41 L. R. A. 333, 67 Am. St. Rep. 933.

Georgia.—Dibble *v.* Brown, 17 Ga. 217, 56 Am. Dec. 460.

Illinois.—Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

Iowa.—McElroy *v.* Iowa Cent. R. Co., 133 Iowa 544, 110 N. W. 915, 23 R. R. R. 466, 46 Am. & Eng. R. Cas., N. S., 466.

Kansas.—Southern Kansas R. Co. *v.* Clark, 52 Kan. 398, 34 Pac. 1054.

Kentucky. — Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 102 Am. St. Rep. 316.

Massachusetts.—Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667; Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140.

Minnesota.—McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

Mississippi.—New Orleans, etc., R. Co. *v.* Shackleford, 87 Miss. 610, 40 So. 427, 24 R. R. R. 15, 47 Am. & Eng. R. Cas., N. S., 15, 4 L. R. A., N. S., 1035, 112 Am. St. Rep. 461, construing Miss. Rev. Code 1892, § 2569.

New York. — Gurney *v.* Grand Trunk R. Co., 59 Hun 625, 14 N. Y. S. 321, 37 N. Y. Super. Ct. 155; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Simpson *v.* New York, etc., R. Co., 16 Misc. Rep. 613, 38 N. Y. S. 341, 73 N. Y. St. Rep. 812; Talcott *v.* Wabash R. Co., 50 N. Y. St. Rep. 423, 66 Hun 456, 21 N. Y. S. 318; Cattaraugus Cutlery Co. *v.* Buffalo, etc., R. Co., 24 App. Div. 267, 48 N. Y. S. 451.

Ohio.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405.

Texas.—Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118.

Photographs of articles passenger was engaged in selling.—In McElroy *v.* Iowa Cent. R. Co., 133 Iowa 544, 110 N. W. 915, 23 R. R. R. 466, 46 Am. & Eng. R. Cas., N. S., 466, it is held that under Iowa Code, § 2077, requiring the carrier to accept and carry the ordinary baggage of a passenger, a carrier was not liable for delay in the delivery of a sample case checked by a passenger as baggage and containing photographs of articles of furniture which the passenger engaged in selling as a commercial traveler.

Custom to Carry Sample Cases as Baggage.—It has been held that the fact that commercial travelers are accustomed to have their sample cases carried on passenger trains of the carrier without paying any more than the usual price of a ticket for a passenger, even if known to the carrier, will not render it liable as an insurer for the loss of a particular sample case so carried, unless it is shown that it accepted such sample case as baggage with knowledge of its contents.[75]

Salesman's Catalogue or Price Book.—It is held that a traveling salesman's catalogue,[76] or his manuscript price book,[77] carried with him for his personal use and convenience, used by him in his business and necessary to be carried in the discharge of his duties, is a part of his personal baggage.

Under Storage Rule.—It has been held that a traveling salesman's sample case, containing patterns and designs used in the business of soliciting orders, carried by him in the passenger coach, is ordinary baggage, within a notice of the carrier for the storage of baggage, and fixing charges for storage on each piece of baggage after remaining at the station for a specified time.[78]

Employer Entitled to Benefit of Drummer's Contract.—It has been held that the employer of a commercial traveler is entitled to the benefit of the latter's contract with a carrier, under which his samples were knowingly accepted as baggage.[79]

§ 3434. Dogs.—Under some circumstances, dogs may be considered a part of the baggage of passengers.[80] But where a passenger applied to the ticket agent for transportation for himself and dogs, but was refused tickets for the dogs and referred to the baggage master, who consented, as a mere accommodation, to take the dogs in his car, and promised to look after them, for which the passenger paid him two dollars, he could not hold the carrier responsible for the loss of the animals in the absence of proof of negligence.[81]

§ 3435. Household Goods.—Under exceptional circumstances the baggage of a passenger may include household goods; but it may be stated, as a general rule, that the carrier can not be held responsible for such articles, as the personal

75. Custom to carry sample cases as baggage.—Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667; McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052; Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

76. Salesman's catalogue.—Staub *v.* Kendrick, 121 Ind. 226, 23 N. E. 779, 6 L. R. A. 619.

77. Manuscript "price book."—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

78. Milwaukee Mirror, etc., Works *v.* Chicago, etc., R. Co. (Wis.), 134 N. W. 379.

79. Employer entitled to benefit of drummer's contract.—Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, 8 Am. & Eng. R. Cas., N. S., 533; Ft. Worth, etc., R. Co. *v.* Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196.

80. Dogs.—In Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476, it appeared that the owner having a dog on a railroad train, being informed by the brakeman and the baggage master that the animal was not allowed in the passenger car, placed him in charge of the baggage master, and paid the latter for his transportation. By the carrier's regulations which were printed and posted at its stations "live animals" were "allowed as baggagemen's perquisites." But no special notice of this rule was brought home to such owner. It was held that the railroad was liable for the loss of the dog by the baggage master.

Dog taken on hunting trip—Refusal to pay fee to baggage master.—In Kansas, etc., R. Co. *v.* Higdon, 94 Ala. 286, 10 So. 282, 14 L. R. A. 515, 33 Am. St. Rep. 119, it is held that a passenger on a railroad train, taking his dog with him on a hunt, and being required by the conductor to put him on the baggage car, may maintain an action against the railroad company for the loss of the dog, which the baggage master refused to deliver at his destination without the payment of a small fee, and which was then carried on and lost; and a rule of the railroad with reference to carrying dogs, requiring that they be placed in the baggage car, and allowing the baggage master a small charge for his care, is no defense to the action, when it is not shown that the passenger had knowledge or notice of it.

81. Dogs taken charge of for accommodation.—Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20.

baggage of an ordinary passenger, when they are carried in his trunk, or otherwise concealed in his legitimate baggage.[82] It has been held, however, that where passengers contemplate a short sojourn at their destination where they, for the time being, will keep house, and take with them, in their trunk, bedding, dishes, and cutlery, these articles are "baggage," if it is customary for people going upon such a journey to take such articles.[83]

Household Goods of Immigrants.—See ante, "Effects of Immigrants," § 3430.

§ 3436. Jewelry for Personal Use.—Baggage may include a reasonable amount of jewelry carried by a passenger for personal use, according to the condition and circumstances in the life of the passenger.[84] However, it has been

82. **Household goods.**—*Maryland.*—Giles *v.* Fauntleroy, 13 Md. 126.

Massachusetts. — Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300.

New York.—Bell *v.* Drew, 4 E. D. Smith 59; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Orange County Bank *v.* Brown (N. Y.), 9 Wend. 85, 24 Am. Dec. 129.

Tennessee. — Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Texas.—Mexican Cent. R. Co. *v.* De Rosear (Tex. Civ. App.), 109 S. W. 949.

England.—Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

A silk quilt in the trunk of an ordinary passenger is not baggage. So held in St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321.

Silver knives, forks, and spoons are not baggage.—Bell *v.* Drew (N. Y.), 4 E. D. Smith 59; Giles *v.* Fauntleroy, 13 Md. 126; Orange County Bank *v.* Brown (N. Y.), 9 Wend. 85, 24 Am. Dec. 129; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767.

A drawnwork centerpiece, a tablecloth, doilies, a bed spread, and pillow shams do not constitute baggage. Mexican Cent. R. Co. *v.* De Rosear (Tex. Civ. App.), 109 S. W. 949.

83. House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

84. **Jewelry for personal use.**—*United States.*—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Alabama.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Georgia.—Pullman Co. *v.* Green, 128 Ga. 142, 57 S. E. 233, 10 Am. & Eng. Ann. Cas. 893; Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407.

Illinois.—Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Kentucky. — Contract Co. *v.* Cross, 8 Bush 472.

Maryland. — Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Michigan.—Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740, 1 L. R. A., N. S., 352, 113 Am. St. Rep. 533.

New Jersey.—Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711.

New York.—Carlson *v.* Oceanic Steam Nav. Co., 109 N. Y. 359, 16 N. E. 546; McCormick *v.* Hudson River R. Co., 4 E. D. Smith 181; Torpey *v.* Williams, 3 Daly 162; Weeks *v.* New York, etc., R. Co., 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104; Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming judgment 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478.

North Carolina.—Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328.

Ohio.—Jones *v.* Voorhees, 10 O. 145; Keith *v.* New York Cent. R. Co., 1 West L. M. 451, 2 O. Dec. 125.

Pennsylvania. — McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

South Carolina.—Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849; Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Texas.—Galveston, etc., R. Co. *v.* Fales, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; Mexican Nat. R. Co. *v.* Ware (Tex. Civ. App.), 60 S. W. 343; Pullman Co. *v.* Vanderhoeven, 107 S. W. 147, 48 Tex. Civ. App. 414.

England.—Brooke *v.* Pickwick, 4 Bing. 218.

Canada.—McDongal *v.* Allen, 12 J. C. 321.

Three rings.—Plaintiff, a passenger on defendant's railroad, carried in her card case in the bottom of a suit case, which was not checked, three rings, worth

held that if a railroad traveler brings a trunk to the depot, which contains costly jewelry, of the value of thirty thousand dollars, and gives no notice of its contents, and has the same checked as ordinary baggage, and there is nothing about the trunk indicating its contents, and the same is consumed by fire while being carried, the company not being guilty of gross negligence, it can not be held liable for the contents of the trunk.[85]

§ 3437. Merchandise.—Merchandise, or other property carried by a traveler for sale, is not baggage, and, if carried without the carrier's knowledge and consent, it can not be held responsible as a common carrier for its loss or damage.[86]

$1,500, for her personal wear at a reception she intended to attend at her destination, and which were adapted to her tastes, habits, and social standing, and the rings were missing from the suit case when it was returned by the trainman who had taken it to assist plaintiff off the train. Held, that the suit case and contents were baggage. Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming judgment 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478.

Diamond ring.—The term "baggage" in so far as a female passenger is concerned is sufficiently broad to cover a diamond ring worn as part of her wardrobe. Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

Diamond pin in trunk held to be.—Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

85. Thirty thousand dollars worth of jewelry in trunks.—Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

86. Merchandise.—*United States.*—Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Saunders *v.* Southern R. Co., 62 C. C. A. 523, 1 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, 128 Fed. 15; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059.

California.—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

Georgia.—Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois. — Hamburg-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662; Illinois, etc., R. Co. *v.* Antoon, 122 Ill. App. 359; Michigan, etc., R. Co. *v.* Oehm, 56 Ill. 293, 4 Am. R. Rep. 451; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

Iowa.—Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042, 20 Am. & Eng. R. Cas., N. S., 466.

Maine.—Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

Maryland.—Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Massachusetts.—Collins *v.* Boston, etc., Railroad, 10 Cush. 506; Dunlap *v.* International Steamboat Co., 98 Mass. 371; Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140; Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667.

Michigan.—Amory *v.* Wabash R. Co., 130 Mich. 404, 90 N. W. 22, 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

Minnesota.—Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

Mississippi. — Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671.

Missouri. — Ross *v.* Missouri, etc., R. Co., 4 Mo. App. 583; Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

New Hampshire.—Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

New Jersey.—Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711.

New York. — Bell *v.* Drew, 4 E. D. Smith 59; Millard *v.* Missouri, etc., R. Co., 6 Am. & Eng. R. Cas. 311, 86 N. Y. 441, affirming 20 Hun 191; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Pardee *v.* Drew, 25 Wend. 459; Simpson *v.* New York, etc., R. Co., 16 Misc. Rep. 613, 38 N. Y. S. 341, 73 N. Y. St. Rep. 812.

Ohio.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Smith *v.* C. H. & D. R. Co., 2 N. P. 29, 3 O. Dec. 192; Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405.

Oklahoma.—Choctaw, etc., R. Co. *v.* Zwirtz, 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914, 73 Pac. 941, 13 Okla. 411, construing Wilson's Rev. & Ann. St. 1903 §§ 708, 709.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Pennsylvania. — Bullard *v.* Delaware, etc., R. Co., 21 Pa. Super. Ct. 583.

Tennessee. — Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

Texas.—Texas, etc., R. Co. *v.* Capps, 2

§ 3438. Money.—A passenger is entitled to carry as baggage an amount of money reasonably sufficient for the expenses of the journey.[87] And the amount of money to be allowed for traveling expenses may be measured by the requirements of the whole of the contemplated journey and return, and includes such an allowance for accidents or sickness, and sojourning by the way, as a reasonably prudent man would consider it necessary to make.[88] A savings bank and its contents have been held to be baggage where the contents might have been useful on the journey.[89]

Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118; Mexican Cent. R. Co. *v.* De Rosear (Tex. Civ. App.), 109 S. W. 949.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

England.—Belfast, etc., R. Co. *v.* Keys, 9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. 841, 8 Jur. N. S., 367; Cahill *v.* London, etc., R. Co., 10 C. B., N. S., 154, 7 Jur. N. S., 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T. N. S. 246; Great Northern R. Co. *v.* Shepherd, 9 Eng. L. & Eq. Rep. 477; Richards *v.* London, etc., R. Co., 7 C. B. 839, 6 Railw. Cas. 49, 13 Jur. 986, 18 J. C. P. 251.

Canada.—Shaw *v.* Grand Trunk R. Co., 7 U. C. C. P. 493; Lee *v.* Grand Trunk R. Co., 36 U. C. Q. B. 350.

Jewelry for sale.—Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587; Wunsch *v.* Northern Pac. R. Co., 62 Fed. 878; Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219; Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328; Bowler, etc., Co. *v.* Toledo, etc., R. Co., 1 O. Dec. 55, 3 N. P. 322.

Merchandise taken into car by passenger and removed to luggage van.—In Belfast, etc., R. Co. *v.* Keys, 9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. 841, 8 Jur. N. S. 367, it appeared that a passenger, contrary to the rules of the carrier, and, in order to avoid the payment of extra toll, took merchandise with him into the car, which was afterwards removed by the guard to the luggage van. It was held that in case of its loss, there could be no recovery against the carrier.

87. Money.—*Alabama.*—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Arkansas.—St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212.

Connecticut.—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Georgia.—Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156.

Illinois.—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242; Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

Kentucky.—Chesapeake, etc., R. Co. *v.* Hall (Ky.), 124 S. W. 372, 34 R. R. R. 468, 57 Am. & Eng. R. Cas., N. S., 468.

Massachusetts. — Dunlap *v.* International Steamboat Co., 98 Mass. 371; Jordan *v.* Fall River R. Co., 5 Cush. 69, 51 Am. Dec. 44.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Whitmore *v.* Caroline, 20 Mo. 513.

New York. — Adams *v.* New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Duffy *v.* Thompson, 4 E. D. Smith 178; Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Knieriem *v.* New York, etc., R. Co., 96 N. Y. S. 602, 109 App. Div. 709, 17 N. Y. Ann. Cas. 415; Merrill *v.* Grinnell, 30 N. Y. 594; Orange County Bank *v.* Brown, 9 Wend. 85, 24 Am. Dec. 129; Taylor *v.* Mounot, 11 N. Y. Super. Ct. 116; Torpey *v.* Williams, 3 Daly 162; Weed *v.* Saratoga, etc., R. Co., 19 Wend. 534; Weeks *v.* New York, etc., R. Co., 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104; Williams *v.* Webb, 22 Misc. Rep. 513, 49 N. Y. S. 1111.

Ohio. — First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655; Jones *v.* Voorhees, 10 O. 145; Mad River, etc., R. Co. *v.* Fulton, 20 O. 318; McFadden *v.* Steamboat Niagara, 10 West. L. J. 169, 1 O. Dec. Reprint 491.

South Carolina.—Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849; Godfrey *v.* Pullman Co., 69 S. E. 666, 87 S. C. 361.

Tennessee. — Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

Texas.—International, etc., R. Co. *v.* McCown, 2 Texas App. Civ. Cas., § 712; Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Texas, etc., R. Co. *v.* Lawrence, 42 Tex. Civ. App. 318, 95 S. W. 663.

England.—Cadwalldern *v.* Grand Trunk R. Co., 9 L. C. Rep. 169.

88. Merrill *v.* Grinnell, 30 N. Y. 594; Hasbrouck *v.* New York, etc., R. Co., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 135, 64 Misc. Rep. 478; Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

89. Savings bank and contents.—Yazoo,

Money in Excess of Traveling Expenses.—The carrier is not liable, as for baggage, for the loss of any money in excess of the reasonable expenses of the journey.[90] So money not intended for the use of the passenger while traveling can not be considered baggage.[91] It has been held that a county treasurer who purchases a railroad ticket entitling him to first class passenger transportation has no right to carry with him in a passenger train certain money which he is required by law to pay over to the state treasurer at the place of destination, although the railroad had for many years previously acquiesced in such a practice, and accepted him as a passenger with knowledge that he had the money with him.[92]

Money of Another Passenger.—See ante, "In General," § 3431.

§ 3439. Perishable Property.—A common carrier is not liable, as for the ordinary baggage of a passenger, for articles which are perishable in their nature,

etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

90. **Money in excess of traveling expenses.** — *Arkansas.*—St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212.

California.—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

Connecticut. — Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156.

Illinois. — Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151; Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Kentucky.—Chesapeake, etc., R. Co. *v.* Hall (Ky.), 124 S. W. 372, 34 R. R. R. 468, 57 Am. & Eng. R. Cas., N. S., 468.

Massachusetts. — Dunlap *v.* International Steamboat Co., 98 Mass. 371; Jordan *v.* Fall River R. Co., 5 Cush. 69, 51 Am. Dec. 44; Levins *v.* New York, etc., R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Whitmore *v.* Caroline, 20 Mo. 513.

New York.—Grant *v.* Newton, 1 E. D. Smith 95; Merrill *v.* Grinnell, 30 N. Y. 594; Orange County Bank *v.* Brown, 9 Wend. 85, 24 Am. Dec. 129; Torpey *v.* Williams, 3 Daly 162; Weed *v.* Saratoga, etc., R. Co., 19 Wend. 534; Weeks *v.* New York, etc., R. Co., 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104; Williams *v.* Webb, 22 Misc. Rep. 513, 49 N. Y. S. 1111.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655; McFadden *v.* Steamboat Niagara, 10 West L. J. 169, 1 O. Dec. Reprint 491.

Tennessee. — Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

Texas.—Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

England.—Butcher *v.* London, etc., R. Co., 16 C. B. 13, 3 C. L. R. 805, 1 Jur. N. S. 427, 24 L. J. C. P. 137, 3 W. R. 409; Phelps *v.* London, etc., R. Co., 19 C. B. N. S. 321, 11 Jur. N. S. 652, 34 L. J. C. P. 259, 13 W. R. 782, 12 L. T. 496.

Unless the loss is occasioned by gross negligence on the part of its servants, the carrier is not responsible for money included in the baggage of a passenger beyond the amount necessary for traveling expenses and personal use. Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44.

91. **Money not intended for expenses.** —Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44.

Money intended for trade or investment.—In Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404, it is held that under § 2181 of the Civil Code of California, money belonging to a passenger on a railroad, and intended for trade, or investment, and not for the use of the passenger while traveling, is not luggage.

Money in trunk for purchasing clothing.—In Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143 it is held that a passenger can not recover for money carried in the trunk for the purpose of purchasing clothing at the place to which he was traveling.

Bank notes for contingencies of suit.—In Phelps *v.* London, etc., Ry. Co., 19 C. B., N. S., 321, 11 Jur., N. S., 652, 34 L. J. C. P. 259, 13 W. R. 782, 12 L. T. 496, it is held that "ordinary luggage," for which a railroad is responsible, does not include bank notes (to a considerable amount) carried by an attorney for the purpose of meeting the contingencies of a suit.

92. **Money carried by county treasurer.** —Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Dec. 404.

such as fruit, when placed in the trunk of a passenger, to be transported by the carrier as baggage.[93]

§ 3440. Property to Be Used for Recreation.—According to the weight of authority, articles intended to be used as instruments of pastime and recreation, either during the journey or after its completion, may constitute part of a passenger's ordinary personal baggage.[94] So it is held that the guns of a hunter,[95] the fishing tackle of a fisherman, while on a hunting expedition, or the cooking utensels of a party bent upon a camping expedition,[96] are baggage. It has been held that an unboxed and unguarded bicycle, though intended for recreation, is not baggage and a railroad is not bound to carry it free as such.[97]

§ 3441. Tools, and Professional Instruments and Documents.—It is generally held that a mechanic, workman, or member of a profession is entitled to include in his baggage a reasonable quantity of tools, professional instruments, or business documents and memoranda, or books, for use in his occupation.[98] Thus, it has been held that manuscript music which is used by a traveling

93. Perishable property.—Georgia R. Co. *v.* Johnson, 113 Ga. 589, 38 S. E. 954, 21 Am. & Eng. R. Cas., N. S., 840.

94. Property to be used for recreation.—*Arkansas.*—Little Rock, etc., R. Co. *v.* Record, 74 Ark. 125, 85 S. W. 421, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664, 109 Am. St. Rep. 67.

Illinois.—Atwood *v.* Mohler, 108 Ill. App. 416; Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; Werner *v.* Evans, 94 Ill. App. 328.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242; Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

Missouri.—Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

New York.—Davis *v.* Cayuga, etc., R. Co., 10 How. Prac. 330; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Van Horn *v.* Kermit, 4 E. D. Smith 453.

South Dakota.—House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

Texas.—Pullman Co. *v.* Vanderhoeven, 107 S. W. 147, 48 Tex. Civ. App. 414.

England.—Cadwallder *v.* Grand Trunk R. Co., 9 L. C. 169; Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. H. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

Camera held to be baggage.—Atwood *v.* Mohler, 108 Ill. App. 416.

Graphophone horn held to be.—Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

Opera glass—Entire journey made at night.—In Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221, it is held that baggage may include an opera glass, though the entire journey be made at night.

Telescopes on ocean voyage.—In Cadwallder *v.* Grand Trunk R. Co., 9 L. C. (Eng.), 169, it is held that night glasses or telescopes carried by one intending to cross the ocean are baggage.

Zither key held to be baggage.—Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

95. Guns of hunter.—House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Davis *v.* Cayuga, etc., R. Co. (N. Y.), 10 How. Prac. 330; Van Horn *v.* Kermit (N. Y.), 4 E. D. Smith 453. See Little Rock, etc., R. Co. *v.* Record, 74 Ark. 125, 85 S. W. 421, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664, 109 Am. St. Rep. 67.

96. Fishing tackle and camp utensils.—House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

97. Unboxed and unguarded bicycle.—State *v.* Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66.

98. Tools, and professional instruments and documents.—*United States.*—Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Hopkins *v.* Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692.

Florida.—Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Illinois.—Werner *v.* Evans, 94 Ill. App. 328.

Indiana.—Staub *v.* Kendrick, 121 Ind. 226, 23 N. E. 779, 6 L. R. A. 619.

Kansas.—Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, 23 Am. & Eng. R. Cas. 481.

New York.—Davis *v.* Cayauga, etc., R. Co., 10 How. Prac. 330; Grzywacz *v.* New York, etc., R. Co., 134 N. Y. S. 209, 74 Misc. Rep. 343, judgment affirmed in 134 N. Y. S. 1133, 149 App. Div. 936.

Oregon.—Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Pennsylvania. — Porter *v.* Hildebrand, 14 Pa. 129; McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

South Dakota.—House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

Texas.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Texas, etc., R. Co. *v.* Russell (Tex. Civ. App.), 97 S. W. 1090; Texas, etc., R. Co. *v.* Morris-

company in its business is entitled to be regarded and carried as baggage when the company travel as passengers by railroad.[99] And it is held that the manuscript of an author, professional man or student is baggage.[1] The surgical instruments, in the case of a surgeon in the army traveling with troops, constitute part of his baggage.[2]

Articles Held Not Baggage.—Trunks containing stage properties, costumes, paraphernalia, advertising matter, etc., carried with a theatrical company on its journey, are not "baggage."[3] It has been held that painter's and tailor's utensils packed with the belongings of an emigrant can not be included as baggage unless it appears that the carrier had knowledge of such articles and accepted them as baggage.[4] And it is held that "ordinary luggage" for which a railroad company is responsible does not include title deeds belonging to a client, which an attorney is carrying in his valise for the purpose of producing on a trial.[5] Memoranda and papers in the possession of an agent, but relating exclusively to the business of his principal, and carried by the agent solely for business purposes, are not baggage, when put by the agent in his trunk, and, in the absence of a consent or

on's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

England.—Cadwallder *v.* Grand Trunk R. Co., 9 L. C. (Eng.), 169.

Barber's tools.—Razors and other tools of a barber in his suit case constitute baggage. Grzywacz *v.* New York, etc., R. Co., 134 N. Y. S. 209, 74 Misc. Rep. 343, judgment affirmed in 134 N. Y. S. 1133, 149 App. Div. 936.

Carpenter's tools.—In Porter *v.* Hildebrand, 14 Pa. 129, a carpenter emigrating from one state to another was allowed to recover for the loss of his trunk containing carpenter tools worth fifty-five dollars. But in Bruty *v.* Grand Trunk R. Co., 32 U. C. Q. B. 66, it is held that a carpenter's baggage may not include the tools of his trade.

Jeweler's tools.—A watchmaker and jewler may carry as a part of his personal baggage a reasonable quantity of watchmaker's and jewler's tools, when placed in his trunk for transportation as baggage. Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818; Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, 23 Am. & Eng. R. Cas. 481.

Mechanics tools.—The tools of a mechanic, taken by him in his trunk when going on a journey to perform the work of his trade, are "baggage." House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

Tools of mechanical engineer—Tests for determining question.—In Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317, it appeared that plaintiff, a mechanical engineer, was going to a certain town to do work upon engines there, testing and regulating them, and he shipped his tools necessary for that purpose as baggage. In action for their loss, the court charged that if the jury found that the tools were of a character absolutely essential and necessary for plaintiff to carry with him on that particular trip for performing the work in which he was engaged in his vocation at the time, they should determine the issue of whether they were baggage or not in his favor. This was held error, as making the personal use and necessities of plaintiff for that trip the sole test of whether the articles were such as are carried by passengers of that class upon such a journey according to the habits and customs of such passengers.

Easel of artist may be baggage.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

99. Manuscript music used by traveling company.—Texas, etc., R. Co. *v.* Morrison's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103.

1. Manuscript of author, etc.—Hopkins *v.* Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692.

2. Surgical instruments.—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

3. Stage properties of theatrical company.—Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Unless a general custom to do so is shown the carrier does not impliedly contract to carry the paraphernalia of a theatrical company without extra compensation on the tickets of the company as passengers. Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

4. Painter's and tailor's utensils.—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286.

5. Documents to be used on trial.—Phelps *v.* London & N. W. Ry. Co., 19 C. B., N. S., 321, 11 Jur., N. S., 652, 34 L. J. C. P. 259, 13 W. R. 782, 12 L. T. 492.

custom from the railroad to accept such papers as baggage, no damages can be recovered against the railroad, either for the loss of the papers, or for delay in their shipment and delivery.[6] It has been held that an artist's baggage may not include his pencil sketches.[7]

Salesman's Catalogue or Price Book.—See ante, "Commercial Travellers' Samples," § 3433.

§ 3442. Watches.—It has been held that a passenger's watch, when carried in his trunk, may be properly classed as baggage.[8]

§ 3443. Wearing Apparel.—A passenger has a right to take with him a reasonable amount of clothing, for use on the journey and a reasonable time thereafter, according to circumstances.[9] It has been held that it is not necessary that the clothes shall be ready for use, and a quantity of cloth cut into patterns for garments may constitute baggage.[10] Where the journey was in summer, it was held error for the court to assume as a matter of law that heavy

6. **Business memoranda and papers in agent's trunk.**—Yazoo, etc., R. Co. *v.* Georgia Home Ins. Co., 85 Miss. 7, 37 So. 500, 15 R. R. R. 766, 38 Am. & Eng. R. Cas., N. S., 766, 67 L. R. A. 646, 107 Am. St. Rep. 265.

7. **Artist's sketches.**—Mutton *v.* Midland R. Co. (Eng.), 4 H. & N. 615.

8. **Watches in trunks.**—*United States.*—Walsh *v.* Wright, Newb. 494, Fed. Cas. No. 17,115.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Kentucky.—American Contract Co. *v.* Cross, 8 Bush 472, 8 Am. Rep. 471.

New York.—Torpey *v.* Williams, 3 Daly 162; McCormick *v.* Hudson River R. Co., 4 E. D. Smith 181.

Ohio.—Jones *v.* Voorhees, 10 O. 145.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227; compare Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

9. **Wearing apparel.**—*United States.*—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; Baldraff *v.* Camden, etc., Railroad, Fed. Cas. No. 794, 25 Hunt, Mer. Mag. 77.

Alabama.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Maryland. — Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

New Hampshire.—Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

New York.—Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Duffy *v.* Thompson, 4 E. D. Smith 178; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Torpey *v.* Williams, 3 Daly 162; Glovinsky *v.* Cunard Steamship Co., 4 Misc. Rep. 266, 24 N. Y. S. 136; Merrill *v.* Grinnell, 30 N. Y. 594; Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

Pennsylvania. — McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

Tennessee.—Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Texas.—Pullman Co. *v.* Vanderhoeven, 107 S. W. 147, 48 Tex. Civ. App. 414; Mexican Cent. R. Co. *v.* De Rosear (Tex. Civ. App.), 109 S. W. 949.

England.—Munster *v.* Southeastern R. Co., 4 Jur. N. S. 738, 27 L. J. C. P. 308, 4 C. B. N. S. 676; Brooke *v.* Pickwick, 4 Bing. 218; Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

A traveler's own clothing and that of her children, including fancy work and miscellaneous ornaments, all of which were being carried in her trunk, constituted baggage, for the loss of which she was entitled to recover. Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Costly dresses and laces.—In Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531, it appeared that the defendant in error had brought with her to the United States six trunks, containing a large quantity of wearing apparel, including many costly dresses, and rare and valuable laces, which she had been accustomed to wear when on visits, and to theaters, dinners, balls, and receptions. On her railroad passage from Albany to Niagara Falls one of the trunks was broken and more than two hundred yards of dress lace abstracted. She sued the railroad and obtained judgment for $10,000.

10. **Cloth cut into patterns.**—Duffy *v.* Thompson (N. Y.), 4 E. D. Smith 178.

winter clothing included among the lost articles would come within the definition of baggage.[11]

§ 3444. Weapons.—Weapons, such as pistols and guns, whether for use as weapons or for sporting purposes, may constitute a part of the ordinary baggage of a passenger.[12] So it is held that a common carrier of passengers is liable for the loss of a pocket pistol and a pair of dueling pistols, contained in a carpet bag of a passenger, which is stolen out of the possession of the carrier.[13] And a passenger who was formerly an army officer may recover of a carrier the value of two swords carried by him in his trunk and lost during the passage.[14] Where, however, a grocer, who went into the country in quest of butter, sought to recover of a railroad company the value of two revolvers, among other things, which he claimed were in his trunk as part of his baggage, which was lost by the carrier, it was held that with due regard to the habits and condition of life of the passenger, more than one revolver was not reasonably necessary for his personal protection and use so that could only recover for one.[15]

§ 3445. Questions for Court or Jury.—The question what articles baggage may consist of is a mixed question of law and fact, to be determined by the jury under proper instructions from the court.[16] The court, however, may

11. Winter clothing carried in summer.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

12. Weapons.—*Arkansas.*—Little Rock, etc., R. Co. *v.* Records, 74 Ark. 125, 85 S. W. 421, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664, 109 Am. St. Rep. 67.

Illinois.—Atwood *v.* Mohler, 108 Ill. App. 416; Chicago, etc., R. Co. *v.* Collins, 56 Ill. 212, 4 Am. R. Rep. 453; Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151; Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483; Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138.

New York.—Davis *v.* Cayuga, etc., R. Co., 10 How. Prac. 330; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Merrill *v.* Grinnell, 30 N. Y. 594; Van Horn *v.* Kermit, 4 E. D. Smith 453.

Texas.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

England.—Munster *v.* Southeastern R. Co., 4 Jur., N. S., 738, 27 L. J. C. P. 308, 4 C. B. N. S. 676.

Canada.—Brunty *v.* Grand Trunk R. Co., 32 U. C. Q. B. 66.

Pistol held not to be baggage.—See Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690; Giles *v.* Fauntleroy, 13 Md. 126.

13. Pocket pistol and pair of dueling pistols in carpet bag.—Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483.

14. Two swords in trunk.—Merrill *v.* Grinnell, 30 N. Y. 594.

15. Chicago, etc., R. Co. *v.* Collins, 56 Ill. 212, 4 Am. R. Rep. 453.

16. Questions for court or jury.—*United States.*—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; Railroad Co. *v.* Fraloff, 100 U. S. 24, 35 L. Ed. 531.

Arkansas.—Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726.

Kansas.—Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, 23 Am. & Eng. R. Cas. 481.

Missouri.—Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

South Carolina.—Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

Texas.—Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613; Texas, etc., R. Co. *v.* Ferguson, 1 Texas App. Civ. Cas., § 1253, 9 Am. & Eng. R. Cas. 395. See, also, Texas, etc., R. Co. *v.* Lawrence, 42 Tex. Civ. App. 318, 95 S. W. 663.

It has been held that it is improper for the judge to designate by name what articles may be included in the term "baggage" of a traveler. Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Bedding. — Whether a bed, pillows, bolster and bed quilts, belonging to a poor man, who is moving with his family, carried along with him in a railroad train, and packed in his trunk or box containing his clothing, are baggage or not, is a question to be decided by the jury, under proper instructions from the court, taking into consideration the particular circumstances of the case, and the use, quality, value and kind of the articles in question. Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646. See Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638.

Money.—Plaintiff and his family were emigrants to Texas from Tennessee. He had a trunk containing $400 in money. Held, that the question of whether the money was legal "baggage" was one of

determine such question where the facts are susceptible of one inference only,[17] or the facts are admitted.[18] And in some instances the court may say that particular articles are not baggage.[19] But the question must be submitted to the jury when the facts and circumstances of the particular case are such as to raise a reasonable doubt in the minds of men of ordinary intelligence, whether the article falls within the definition of baggage given by the court.[20] What articles are usually carried by passengers is a question to be left to the jury, under the direction of the court, upon a consideration of the condition in life of the traveler, his habits, vocation and tastes, the length of his journey, and whether he travels alone, or with his family, and of the usage of the time, and place, and all the circumstances of each case.[21] Where it appeared that plaintiff had taken the journey in the summer time, and for a short distance only, it was error for the court to assume as matter of law that heavy winter clothing included among the lost articles would come within the definition of baggage.[22] And in an action against a carrier for the contents of a trunk, carried as baggage, it was proper to submit to the jury whether the contents came under the head of merchandise and were carried for purposes of trade, or whether they were carried merely for the comfort and convenience of the traveler either on the journey or after arriving at his destination.[23]

Questions as to Quantity and Value.—In the absence of a valid regulation on the subject, the proper quantity and value of property which a passenger is entitled to have transported as his personal baggage is a question for the jury.[24] The question whether jewelry comprising part of plaintiff's baggage

fact to be determined by the court, passing upon the case as a jury. Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638.

Tools.—In an action against a carrier for negligent delay in delivering a passenger's trunk, it appearing that the passenger was a carpenter on his way to a place where he expected to use tools contained in his trunk, the question whether the tools constituted baggage was one for the jury. Texas, etc., R. Co. *v.* Russell (Tex. Civ. App.), 97 S. W. 1090.

17. Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

18. Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300; Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403; Grant *v.* Newton (N. Y.), 1 E. D. Smith 95.

It is a question of law for the court, whether a feather bed not intended for use on the voyage, is personal baggage for an emigrant from Ireland to America. Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300.

19. Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

20. *Florida.*—Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Kansas.—Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, 23 Am. & Eng. R. Cas. 481.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52.

New York.—Grant *v.* Newton, 1 E. D. Smith 95.

South Carolina. — Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

Texas.—Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

21. Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460. See Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726; Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356; Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

In Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52, an action against a railroad for loss of a passenger's baggage, it was held that whether the articles lost, consisting of opera glasses, jewelry, watches, diamonds, etc., were baggage or not, that is articles of personal comfort, convenience and ornament usually taken on journeys, was properly left to the jury.

22. Winter clothing in summer.—Missouri, etc., R. Co. *v.* Meek, 75 S. W. 317, 33 Tex. Civ. App. 47.

23. Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

24. Questions as to quantity and value.—*Florida.*—Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Illinois.—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Kansas.—Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225, 23 Am. & Eng. R. Cas. 481.

New York.—Merrill *v.* Grinnell, 30 N.

exceeded in value that usually taken by passengers of like station is for the jury.[25] The amount of money which a passenger may carry as baggage depends upon the length of the journey, the circumstances and condition of the passenger, and other questions which are to be determined by the jury.[26] So the question of the reasonableness of the amount of money carried by a passenger in his trunk for traveling expenses is one of fact.[27] In an action by a mechanic against a carrier for lost tools checked as baggage, it was for the jury to determine whether the tools were reasonable in quantity, and of a character usually carried by mechanics like plaintiff for their personal use at their destinations, and hence such as could be regarded as baggage.[28]

§§ 3446-3447. Extra Baggage and Special Contracts—§ 3446. In General.—A carrier may, by express or implied agreement, waive the right to refuse to transport as baggage anything but the usual personal effects of a passenger.[29] And if proprietors of railroads, steamboats, stage coaches and omnibuses, etc., who are engaged in the business of transporting passengers, holding themselves out to the world as persons exercising a public employment, and as being ready to carry goods for hire, receive extra baggage, to be carried for compensation, they are, as to such extra baggage, liable as common carriers.[30]

Knowledge of Agent.—It is held that a carrier whose agent sells a ticket to a passenger, and checks his valise, is not bound by the knowledge of the agent that the valise contains only merchandise, where such knowledge did not come to the agent in the transaction of the carrier's business, but in the purchase of personal wearing apparel.[31]

§ 3447. Authority of Carrier's Agents.—It may be stated, as a general rule, that a baggage master, or other agent of the carrier clothed with a baggage master's authority, has implied authority to accept a particular article as baggage, and the carrier can not question his decision, except on the ground of fraud and collusion.[32] Where a railroad company places a baggage master in

Y. 594; Rawson *v.* Pennsylvania R. Co., 2 Abb. Prac., N. S., 220, affirmed in 48 N. Y. 212, 3 Am. R. Rep. 528, 8 Am. Rep. 543; Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119.

United States.—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531, affirming Fed. Cas. No. 5,026, 12 Blatchf. 484.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Texas.—Galveston, etc., R. Co. *v.* Fales, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; International, etc., R. Co. *v.* McCown, 2 Texas App. Civ. Cas., § 712; Missouri, etc., R. Co. *v.* Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613; 614; Bonner *v.* Blum (Tex. Civ. App.), 25 S. W. 60.

25. Jewelry.—Bonner *v.* Blum (Tex. Civ. App.), 25 S. W. 60.

26. Money.—International, etc., R. Co. *v.* McCown, 2 Texas App. Civ. Cas., § 712.

Where a traveler sought to recover for $100 in coin, and $200 in currency, lost with his baggage, it was for the jury, under all the circumstances, whether the sum was greater than necessary. Jones *v.* Priester, 1 Texas App. Civ. Cas., § 613.

27. Merrill *v.* Grinnell, 30 N. Y. 594.

28. Tools.—Missouri, etc., R. Co. *v.* Meek, 75 S. W. 317, 33 Tex. Civ. App. 47.

Tools of jeweler.— Kansas, etc., R. Co. *v.* Morrison, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252, 23 Am. & Eng. R. Cas. 481.

29. Special contracts.—Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

30. Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460. See Stoneman *v.* Erie R. Co. (N. Y.), 1 Sheld. 286, affirmed in 52 N. Y. 429. And see post, "Property Other than Personal Baggage," §§ 3475-3481.

31. Knowledge of agent acquired outside of line of duty.—Central, etc., R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35.

32. Authority of carrier's agents.—*United States.*—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Arkansas.—St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.—Bergstrom *v.* Chicago, etc., R. Co., 134 Iowa 223, 111 N. W. 818, 25 R. R. R. 140, 48 Am. & Eng. R. Cas., N. S., 140, 10 L. R. A., N. S., 1119, 13 Am. & Eng. Ann. Cas. 239.

Kansas.—Chicago, etc., R. Co. *v.* Con-

its baggage room it holds out to the public that he has authority to make arrangement as to what sort of baggage shall be carried by the company, and a contract to carry extra baggage upon the payment of an extra charge made by him will be binding on the railroad.[33] If property is offered by the passenger to the carrier's agent, but not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received to be forwarded, the carrier is responsible for its safe delivery.[34] So where a passenger, ignorant of the rules of the railroad company forbidding its agents to receive money for transportation as baggage, delivers to the baggage agent more money that the carrier is required to transport, and informs the agent of the amount, the carrier's common law liability will attach, if the agent undertakes to ship it as baggage, and a loss occurs.[35] And a carrier is bound by the act of its baggage master who receives and checks a trunk as personal baggage of a passenger with knowledge that it contains goods not baggage, without advising the passenger, ignorant of the extent of his authority, that he exceeds his authority in so doing.[36]

Contrary View.—It has been held that a railroad corporation is not liable for the value of merchandise checked as baggage, although the baggage master knew it was merchandise, in the absence of an agreement to carry it as freight, or in the absence of evidence that the baggage master had authority to receive freight to be carried on a passenger train, or to bind the corporation to carry merchandise as personal baggage.[37]

Agent of Connecting Line.—Where the only authority given by a railroad company to the baggage agent of a connecting road is to check baggage to all stations on the line of the former road, no presumption follows that such agent has authority to check merchandise over the line of said road under the guise of baggage; and knowledge on the part of such agent that a passenger's trunks contain merchandise, and not baggage, is not sufficient to charge such company with knowledge.[37a]

Contract to Furnish Baggage Car.—A local station agent has no power as a matter of law to contract to furnish the proprietor of a theatrical troupe a baggage car at each week end for an indefinite period and at other stations, and to make such a contract binding, special authority to make it must be shown, or ratification.[37b]

klin, 32 Kan. 55, 3 Pac. 762, 16 Am. & Eng. R. Cas. 116.

Missouri.—Sherlock *v.* Chicago, etc., R. Co., 85 Mo. App. 46; Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288; Whitmore *v.* Caroline, 20 Mo. 513.

Ohio.—Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, 8 Am. & Eng. R. Cas., N. S., 533.

England. — Great Northern R. Co. *v.* Sheperd, 8 Exch. 30, 30 Railw. Cas. 310, 21 L. J. Exch. 286.

Trunk and piece of carpeting accepted by baggage master.—In Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288, it is held that where a passenger delivered his trunk and a piece of carpeting to the baggage master of a passenger railroad train and received a check for his trunk, but was told that no check was necessary for the carpet as it would go safely, the railroad was liable for the loss of the carpet, although by the printed rules of the company the baggage master was forbidden to receive merchandise as passenger's baggage.

33. Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

34. Property not so packed as to have appearance of baggage.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

35. St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 591, 46 Am. St. Rep. 212.

36. Bergstrom *v.* Chicago, etc., R. Co., 134 Iowa 223, 111 N. W. 818, 25 R. R. R. 140, 48 Am. & Eng. R. Cas., N. S., 140, 10 L. R. A., N. S., 1119, 13 Am. & Eng. Ann. Cas. 239.

37. Contrary view.—Blumantle *v.* Fitchburg R. Co., 127 Mass. 322, 34 Am. Rep. 376.

37a. Agent of connecting line.—Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813.

37b. Contract to furnish baggage car.—Newbury *v.* Seaboard Air Line R. Co., 160 N. C. 156, 76 S. E. 238.

§§ 3448-3457. Delivery to Carrier and Commencement of Liability —§ 3448. In General.—The liability of a railroad company as insurers of luggage commences from the moment when it is placed under the control of one of their authorized employees for the purpose of putting it in transit.[38] The acceptance of baggage for transportation by the employee of the carrier at the station of another company where the carrier receives passengers for carriage, imposes upon the carrier the obligation of a common carrier.[39] And a steamship engaged in carrying passengers and their baggage from one port to another is responsible to a passenger for the injury to the contents of a trunk by its falling into the water while being carried from a wharf on board the vessel by persons in the employment of the managers of the vessel.[40] Where plaintiff left his trunks with defendant's freight agent for storage over night, intending the next day to take them to the passenger depot and have them checked for transportation, in an action to recover for their loss before the owner returned to take them from the possession of the freight agent, it was held that the railroad company had never received them into its possession as a common carrier.[41]

§ 3449. Necessity of Delivery.—A railway company is not responsible for a passenger's baggage, which is shown never to have been delivered to it.[42] It is not always necessary, however, to show actual delivery and express acceptance, since there may be an implied or constructive delivery and acceptance of baggage.[43] If there has been no delivery to the carrier, but his agent, without authority, agrees to take care of the baggage as a matter of accommodation, the agent is pro hac the agent of the owner of the baggage, and not of the carrier, and no responsibility against the latter attaches to the transaction.[44]

§ 3450. Time of Delivery.—To make a carrier liable for baggage delivered to it, it must be delivered and accepted for transportation within a reasonable time before departure of the train.[45] The passenger has the right to deliver his baggage to the carrier such time before the starting of the train upon which he intends to take passage as may be reasonably necessary for obtaining a ticket and checking the baggage. From the time delivery is thus made, the carrier will be responsible for its safety, as a common carrier.[46] But a passenger delivering his baggage at the station before it is necessary to do so in order to have reasonable time for obtaining his ticket, checking his baggage, etc., can not thereby render the carrier liable as an insurer of the baggage without its consent.[47] A railroad,

38. **When liability commences.**—Lovell *v.* London, etc., R. Co., 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 R. & C. T. Cas. lxix, 3 R. & C. T. Cas. xx.

39. Wilson *v.* Grand Trunk Railway, 57 Me. 138, 2 Am. Rep. 26.

40. Moore *v.* Evening Star, 20 La. Ann 402.

41. Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548.

42. **Necessity of delivery.**—Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573; Southern R. Co. *v.* Bickley, etc., Co., 119 Tenn. 528, 107 S. W. 680, 14 L. R. A., N. S., 859, 14 Am. & Eng. Ann. Cas. 910.

43. **Constructive delivery.**—Cone *v.* Southern Railway, 85 S. C. 524, 67 S. E. 779, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 21 Am. & Eng. Ann. Cas. 158.

44. **Carrier's agent as owner's agent.**—Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E 81.

45. **Time of delivery.**—Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328.

46. Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

47. Goldberg *v.* Ahnapee, etc., R. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899, 17 Am. & Eng. R. Cas., N. S., 65.

A., intending to take a trip on a steamer which was to sail on Monday, sent his valise to the office of the steamship company on Saturday, where it was received by the company's agents, who declined to sign a receipt for it. On Monday A. went to the office in time to have the valise checked and inquired for it, but it could not be found. The rules of the

however, may be liable as an insurer, for a passenger's baggage as soon as it is properly accepted at night for transportation by a train scheduled for departure next morning.[48] And it has been held that where a passenger, intending to leave on an afternoon train, carried his trunk to the station in the forenoon, and was there told by the agent that it could not be checked until fifteen minutes before the starting of the train, whereupon the passenger left his trunk in the care of the agent, it was held that the delivery was complete from that time.[49]

§ 3451. Liability before Purchase of Ticket or Demand for Check.—The liability of a carrier for baggage may arise before the purchase of a ticket by one intending to become a passenger, who has his baggage placed at the proper place on the station premises within a reasonable time before the departure of the train upon which the prospective passenger intends to ride,[50] and before demand for a check.[51] A railroad company's rule that a person intending to become a passenger shall purchase a ticket or pay fare, before the company becomes responsible for his baggage, is a reasonable regulation, and may be enforced.[52] But if the company adopts no such rule, or if, having adopted, it adopts a practice or custom to the contrary, or if, notwithstanding such a rule, it receives a person's trunk or baggage, trusting to his honesty to purchase the ticket upon the train upon which the trunk is to go, it will be liable for its loss, whether that loss occurs before or after the arrival or departure of the train, or before or after the purchase of a ticket.[53]

company required a ticket to be presented in order to have baggage checked, and A. presented such a ticket. It was held that the liability of defendant was that of a warehouseman, and not that of a carrier. Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290.

48. Delivered at night for next morning train.—*Alabama.*—Anniston Transfer Co. *v.* Gurley, 107 Ala. 600, 18 So. 209, 34 L. R. A. 137.

Connecticut.—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Iowa.—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410.

North Carolina.—Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328.

Vermont.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

G. advised defendant's agent that she intended to take the train the following morning. She sent her baggage, properly marked, to the station the evening before her departure, as was the custom with passengers intending to take the morning train, and it was locked up in defendant's baggage room. Held, that the facts constituted an acceptance of the baggage by the carrier, and rendered it liable for the loss of the trunk and baggage by the burning of the depot during the night. Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410.

In Illinois Cent. R. Co. *v.* Trowstine, 64 Miss. 834, 2 So. 255, 31 Am. & Eng. R. Cas. 99, it appeared that the owner left baggage with the defendant's baggage master, with instructions to ship to a certain place the next day. This was on Friday, and the baggage, not having been shipped as directed, was consumed by fire on Sunday. It was held that the defendant was liable as a carrier.

49. Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

50. Liability before purchase of ticket.—*Connecticut.*—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410.

Mississippi.—Coffee *v.* Louisville, etc., R. Co., 76 Miss. 569, 25 So. 157, 45 L. R. A. 112, 71 Am. St. Rep. 535.

South Carolina. — Cone *v.* Southern Railway, 85 S. C. 524, 67 S. E. 779, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 21 Am. & Eng. Ann. Cas. 158.

England.—Lovell *v.* London, etc., R. Co., 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 R. & C. T. Cas. lxix, 3 R. & C. T. Cas. xx.

When a porter receives luggage at the entrance of a station for the purpose of labelling it and putting it in the train, the company is liable for its safety, although the passenger has not yet taken a ticket. Lovell *v.* London, etc., R. Co., 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 R. & C. T. Cas. lxix, 3 R. & C. T. Cas. xx.

51. Liability before demand for check. — Cone *v.* Southern Railway, 85 S. C. 524, 67 S. E. 779, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 21 Am. & Eng. Ann. Cas. 158.

52. Validity of rule.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

53. Lake Shore, etc., R. Co. *v.* Foster, 4 N. E. 20, 104 Ind. 293, 54 Am. Rep. 319.

§ 3452. Place of Delivery.—As a general rule, where a carrier has provided a regular and suitable place at its depot for receiving baggage, delivery of baggage to it can only be accomplished by depositing it there.[54] It has been held that leaving baggage at the yard of an inn whence the vehicle of the carrier departs, will, in the absence of special agreement or custom, not suffice.[55] And where a trunk containing a large sum of money was left by the owner in the care of the baggage keeper of a boat, contrary to the advice and instruction of the captain of the boat, who said that the office was the proper place of deposit, the owner replying that he would take care of the trunk himself, it was held that there was no delivery.[56] The place of delivery, however, may be varied by special agreement or by usage.[57] And a delivery, if accepted by the carrier, may be made at a place other than where such deliveries are usually made.[58]

§ 3453. Notice to Carrier.—As a rule, notice must be given to an authorized agent of the carrier when baggage is taken to a railroad station or other place where baggage is usually received, in order to make the carrier liable.[59] Thus, the placing of baggage in the carrier's conveyance without his knowledge does not, as a general rule, constitute delivery.[60] And where a passenger entered a railway car just before the train started, left his valise on a vacant seat, and went out, it not appearing that any one was in charge of the train at that time, and on coming back soon afterward found that it was gone, it was held that there was no delivery.[61] By course of business, however, the carrier may be held bound for the delivery of baggage, where it is deposited in the usual place for the reception of baggage, though no notice thereof is given to the carrier or his agent.[62] And where there is a custom that baggage for transportation shall be deposited at a particular place, and it appears that baggage was thus deposited, an acceptance by the carrier may be inferred.[63]

54. **Place of delivery.**—Where a railroad provided a regular and safe place at its depot for receiving baggage, and there was a safe road leading thereto, delivery of baggage to the railroad in such sense as to make it responsible for injury thereto could not be accomplished by unloading the baggage from a dray, in the absence of the station officials, onto a wheeled truck close to the edge of the platform near the track. Lennon *v.* Illinois Cent. R. Co., 103 N. W. 343, 127 Iowa 431.

55. Buckman *v.* Levi, 3 Camp. 414; Selway *v.* Holloway (Eng.), 1 Ld. Raym. 46.

56. Senecal *v.* Richelieu (Eng.), 15 L. C. Jur. 1.

57. **Special agreement or usage.**—Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100.

58. Phillips *v.* Earle (Mass.), 8 Pick. 182.

If a message be left at the booking office of a common carrier from N. to L., for his van to call for plaintiff's luggage at another inn, for the purpose of its being carried to L., and the carrier's employee and van go to the other inn, and the plaintiff's luggage be there put into such van, and afterwards lost therefrom, the carrier is liable for loss, just as he would be if the luggage had been accepted for carriage at the carrier's booking office. Davey *v.* Mason, 41 Eng. C. L. 30.

59. **Notice to carrier.**—Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328; Gregory *v.* Webb, 40 Tex. Civ. App. 360, 89 S. W. 1109.

60. Leigh *v.* Smith, 1 C. & P. 638.

Trunk deposited on steamboat in usual place.—Plaintiff intending to take passage on the steamboat of defendants, deposited his trunk on board in the usual place for baggage, but without putting it in charge of any person, or notifying any one employed on the boat of such deposit or of his intention to take passage, and, while temporarily absent from the boat, she started on her trip and he was left. The trunk could not afterwards be found. It was held that it appeared from these facts that there was no constructive delivery and acceptance of the trunk as baggage by the carrier. Wright *v.* Caldwell, 3 Mich. 51.

61. Kerr *v.* Grand Trunk R. Co., 24 U. C. C. P. 209.

62. **Effect of custom.**—Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100; Najac *v.* Boston, etc., R. Co. (Mass.), 7 Allen 329, 83 Am. Dec. 686; Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288; Camden, etc., Transp. Co. *v.* Belknap (N. Y.), 21 Wend. 354; Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328.

63. Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

§ 3454. What Constitutes Delivery in General.—To render a carrier liable for baggage the owner need not have placed himself in such situation that he cannot withdraw the baggage. The question of liability is determined by the intention of the owner at the time he places his baggage in the hands of the carrier's servants.[64] The delivery of a trunk to a common carrier for carriage, however, is not complete while the trunk remains in the traveler's private dwelling, though a check or receipt therefor may have been issued by the carrier.[65] And when a passenger gives baggage to the carrier with a request to retain it until he is ready to go, this will not be such a delivery as will bind the carrier as such.[66] Where, by a regulation of the carrier, known to plaintiff, no baggage could be received except for immediate shipment, and the baggage agent took charge of plaintiff's trunks as an accommodation to plaintiff, and they were burned before plaintiff gave directions to ship, the carrier can not be held for the loss.[67]

Violation of Instructions by Agent.—Where a transfer agent with authority to check baggage checked the baggage of one who subsequently purchased a ticket, the fact that the agent violated his instructions not to check baggage for a person unless he produced a ticket was immaterial on the issue of the liability of the carrier for loss of the baggage.[68]

Mere Acceptance of Check of Another Company.—Where a station agent accepted a check issued by another railroad for a trunk then at another station common to both railroads, and at which they had a common agent, and agreed to have the trunk forwarded to the destination of the person delivering the check, but the trunk was not forwarded, and was subsequently burned while at the station at which it was when the check was accepted, it was held that there was no constructive delivery of the trunk to the railroad whose agent accepted the check, so as to render it liable for the loss of the trunk.[69]

§ 3455. To Whom Delivery May Be Made.—It is held that delivery if made to a servant or agent of the carrier, must be to such an one as is instructed to receive baggage, and not one engaged in other duties.[70] But as a general rule, a passenger may deliver his baggage to any person at a station of the carrier, who has apparent authority to accept it on the part of the carrier.[71] When one took

64. **What constitutes delivery in general.**—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410.

65. Hoskins *v.* Southern Pac. Co., 148 Ill. App. 11, affirmed in 90 N. E. 669.

66. Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

67. Illinois Cent. R. Co. *v.* Troustine, 64 Miss. 834, 2 So. 255, 31 Am. & Eng. R. Cas. 99.

68. **Violation of instructions.**—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732.

69. **Mere acceptance of check of another company.**—Southern R. Co. *v.* Bickley, etc., Co., 119 Tenn. 528, 107 S. W. 680, 14 L. R. A., N. S., 859, 14 Am. & Eng. Ann. Cas. 910.

70. **To whom delivery may be made.**—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

A passenger on a steamboat asked for the key to the stateroom assigned him by the clerk, and, being told that no keys were given out, replied that he wanted to place his baggage where it would be safe while he went to get his trunk checked. He deposited his valise in an unlocked room, calling the attention of two or three cabin boys to the fact, asking whether it would be safe, and receiving an affirmative answer. When he returned to his room, the valise was gone. There was a porter on the boat, whose duty it was to receive and check baggage, which plaintiff knew. There was no evidence of any usage of defendant to accept delivery in that way; nor of any specific direction or assent on the part of the carrier; nor was there any finding by the jury that the carrier was guilty of negligence in not providing the stateroom door with a suitable lock and key, according to the custom of such carriers, and that such negligence caused the loss. Held, that there was no delivery of the valise to the carrier, and he was not liable for its loss. Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

71. Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732; Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849; International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

a trunk to the baggage room of a railway company and found it locked, and left it outside the door, went in the ticket office, and informed the ticket agent of the fact, who said "all right," it was held that as the ticket agent was apparently in charge of the depot, there was evidence showing a delivery, even if another agent had charge of the business of receiving freight.[72] Where the trunk of a passenger is delivered to the only person in charge of the station, who is at the time engaged at a telegraph instrument, by depositing it at the place indicated by him, and giving him at the time directions as to checking, and notice that the owner would soon appear, and that he would attend to it, it is a delivery to the carrier.[73] And a railway passenger is justified in regarding the man whom he sees handling the baggage at its station as the proper agent of the railway company for receiving baggage.[74]

To Other than Carrier's Employee.—When a passenger notifies the employees of a railroad company of his wish that his baggage go with him, it is the duty of the company to take charge of it, and the company is liable as a common carrier, as for a breach of that duty, if the passenger, having been directed by an employee of the company where to deposit his baggage, delivered it at the place designated, but, by mistake, to another than an employee of the company.[75] Where, when a passenger arrived at the station the baggage master of the road over which she was to travel was absent and she delivered her baggage to the baggage master of another road which used the same station, as was customary under such circumstances, it was held that this constituted delivery to the former road.[76]

§ 3456. Carrier's Duty to Take Charge of Baggage.—When a passenger notifies the servants of a railway company of his wish that his baggage go with him, it is the duty of the company to take charge of it.[77] And while it is a reasonable regulation that baggage shall not be checked until a ticket is procured, a carrier can not refuse to take charge of baggage until the procurement of a ticket.[78] The proprietors of a railroad, who receive passengers and commence their carriage at the station of another road, are bound to have an employee there to take charge of baggage.[79]

§ 3457. Goods Awaiting Transportation.—After baggage has been delivered to and accepted by the carrier for carriage, its responsibility of its safety while it is awaiting transportation is that of a common carrier, and not of a warehouseman.[80] And a carrier is liable for the personal baggage of a passenger delivered to and received by it solely for transportation, and not for storage, although for the convenience of the carrier the passenger consents to delay in the transportation, and it is put in the baggage room and destroyed by fire the day after the delivery.[81]

§§ 3458-3461. Checks and Receipts, and Checking Baggage—§ 3458. Nature and Functions of Checks and Receipts.—The ordinary baggage check is not regarded as embodying the contract of carriage, but only as

72. Rogers *v.* Long Island R. Co. (N. Y.), 2 Lans. 269.

73 Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849.

74. Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

75. **To other than carrier's employee.**—International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

76. Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44.

77. **Duty to take charge of baggage.**—Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44; International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

78. Houston, etc., R. Co. *v.* Anderson (Tex. Civ. App.), 147 S. W. 353.

79. **Employee at station of another company.**—Wilson *v.* Grand Trunk Railway, 57 Me. 138, 2 Am. Rep. 26.

80. **Goods awaiting transportation.**—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410; Shaw *v.* Northern Pac. R. Co., 40 Minn. 144, 41 N. W. 548; Fleischman, etc., Co. *v.* Southern Railway, 76 S. C. 237, 56 S. E. 974, 9 L. R. A., N. S., 519.

81. Shaw *v.* Northern Pac. R. Co., 40 Minn. 144, 41 N. W. 548.

a voucher or token to enable the passenger to reclaim his baggage at the end of his journey.[82] It is intended as evidence of the identity of the baggage.[83] A check, however, may be admissible in evidence to show the nature of the carrier's contract.[84] And it is held that a baggage check is evidence that the party holding it has purchased the rights of a passenger.[85] The delivery of a check to a passenger is intended to relieve him of any care or superintendence of his baggage, while on its journey, and devolves such care upon the agents of the several roads over which it passes.[86]

As Evidence of Ownership.—Possession of a baggage check is prima facie evidence of ownership or authority to receive the baggage.[87]

As Evidence of Delivery to Carrier.—The possession of a baggage check by a railroad passenger is prima facie evidence that the carrier has received and is in possession of his personal baggage.[88] But the presumption of the receipt of the baggage by the carrier arising from the possession of its check is prima facie only, and may be rebutted.[89] The carrier may show that the check or receipt was obtained by the passenger without the article in question actually passing into the hands of the carrier.[90] Where a railway company received a passenger's check for baggage not yet received from another carrier, giving its own check in lieu thereof, and it appeared that it had surrendered the check so received to the other carrier, this was held to show that the baggage had been re-

82. **Nature and function of baggage checks.**—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Hoskins *v.* Southern Pac. Co., 148 Ill. App. 11, affirmed in 90 N. E. 669; Isaacson *v.* New York, etc., R. Co., 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188, 46 Am. Rep. 142; Soviero *v.* Westcott Exp. Co., 94 N. Y. S. 375, 47 Misc. Rep. 596; Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573.

83. Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

84. Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

85. Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

86. **Relief from care of baggage.** — Check *v.* Little Miami R. Co., 2 Disn. 237, 13 O. Dec. Reprint 146; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

Relieves passenger of duty of seeing that baggage properly placed aboard train.—Savannah, etc., R. Co. *v.* McIntosh, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269.

87. **As evidence of ownership.**—St. Louis, etc., R. Co. *v.* Stone, 78 Ark. 318, 95 S. W. 470; Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

A check for baggage is prima facie evidence that the baggage it represents has been delivered to the issuing company by the person to whom the check was issued. Chicago, etc., R. Co. *v.* Steear, 53 Neb. 95, 73 N. W. 466.

88. **Check as evidence of delivery to carrier.**—*Colorado.*—Denver, etc., R. Co. *v.* Roberts, 6 Colo. 333.

Georgia.—Atlanta Baggage, etc., Co. *v.* Mizo, 4 Ga. App. 407, 61 S. E. 844.

Illinois.—Chicago, etc., R. Co. *v.* Clayton, 78 Ill. 616; St. Louis, etc., R. Co. *v.* Hawkins, 39 Ill. App. 406; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Kansas. — Atchison, etc., R. Co. *v.* Brewer, 20 Kan. 669.

Minnesota.—Ahlbeck *v.* St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661.

Nebraska.—Chicago, etc., R. Co. *v.* Steear, 53 Neb. 95, 73 N. W. 466.

New York.—Davis *v.* Cayuga, etc., R. Co., 10 How. Prac. 330.

South Carolina. — Cone *v.* Southern Railway, 85 S. C. 524, 67 S. E. 779, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 21 Am. & Eng. Ann. Cas. 158; Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573; Dill *v.* South Carolina R. Co., 7 Rich. L. 158, 62 Am. Dec. 407.

Tennessee.—Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218.

Virginia.—Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

The possession of a check by the passenger, and evidence that carriers only give checks when fares have been paid and their baggage has been received, sufficiently proves receipt of baggage. Davis *v.* Cayuga, etc., R. Co. (N. Y.), 10 How. Prac. 330.

89. **Presumption may be rebutted.**—Chicago, etc., R. Co. *v.* Clayton, 78 Ill. 616.

90. Hoskins *v.* Southern Pac. Co., 148 Ill. App. 11, judgment affirmed in 90 N. E. 669.

ceived by the railway company.[91] Where a railway company issued to a passenger its check for baggage, without having received the same from another company, for the purpose of accommodating the passenger, the check was prima facie evidence of a delivery to it of the baggage, rebuttable only by direct proof that the baggage was never received.[92]

§ 3459. Duties and Liabilities of Carrier.—Upon receiving the baggage of a passenger, it is the duty of the carrier to check or otherwise receipt for the same with due care.[93] And where a passenger buys a ticket from a point on the carrier's line to a station on another line with which a connection is made at a junctional point, the carrier must check the baggage to the point of destination and can not require the passenger to recheck at the junctional point.[94]

Failure to Buy Ticket.—The carrier is responsible where it gives a check for baggage received, though the passenger has bought no ticket.[95]

Failure to Furnish Check.—Where a passenger has delivered his baggage to a carrier, but has failed to receive a check through the fault of the latter, he may recover for the loss of the baggage, though a regulation of the carrier requires all baggage to be checked or booked.[96]

Depot Company as Agent of Railroad.—Where a railroad company's trains, by an arrangement with a depot company, regularly enter and depart from the depot of the latter, which is also intrusted with the business of handling and checking the baggage of the railroad's passengers, and furnished by it with checks, such company must be deemed the agent of the railroad company in respect to such business.[97]

Baggage Checked at Place Other than Station.—Where a carrier allows a person to check baggage of the intending passengers at other places than the station, the person delivering such checks is, in law and in fact, the agent of the carrier and the checks delivered by him become tokens of a contract between the carrier and prospective passengers for the transportation of the latter's baggage.[98]

§ 3460. Baggage Company Receiving Railroad Check.—Where a baggage company, engaged in the business of hauling for hire trunks and other baggage of the traveling public, received from a passenger a railroad check for a trunk, for which check it issued a receipt containing the number of the check, the baggage company agreeing to get the trunk that was called for by the check and deliver it to him as directed, the baggage company was under a legal obliga-

91. **Connecting carriers.**—Chicago, etc., R. Co. *v.* Clayton, 78 Ill. 616.

92. Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573; Ahlbeck *v.* St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661. See Atlanta Baggage, etc., Co. *v.* Mizo, 4 Ga. App. 407, 61 S. E. 844.

93. **Duty to check.**—Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457.

94. **Checking baggage over connecting line.**—Sullivan *v.* Southern Railway, 74 S. C. 377, 54 S. E. 586.

95. **Failure to buy ticket.**—Matteson *v.* New York, etc., R. Co., 76 N. Y. 381.

96. **Failure to furnish check.**—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456; Freeman *v.* Newton (N. Y.), 3 E. D. Smith 246; Texas, etc., R. Co. *v.* Weatherby, 41 Tex. Civ. App. 409, 92 S. W. 58; Great Western R. Co. *v.* Goodman (Eng.), 12 C. B. 313.

Where plaintiff's wife was a passenger on defendant's railroad and placed her two trunks and a package in the custody of the railroad company, with request that they be checked to her destination, and defendant's agent said he would not have time to check the package, but would send it by express the next day, and the trunks were checked by defendant's agents, and the package, though not checked, was put on the car before the train left and was lost, the railroad company was liable. Ft. Worth, etc., R. Co. *v.* McCarty, 94 S. W. 178, 42 Tex. Civ. App. 514.

97. **Depot company as agent of railroad.**—Ahlbeck *v.* St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661.

98. **Baggage checked at place other than station.**—Kates *v.* Atlanta, etc., Cab Co., 107 Ga. 636, 34 S. E. 372.

tion to deliver the trunk as directed, or return the railroad check to the passenger.[99]

§ 3461. Surrender of Check.—A stipulation in an excess baggage check requiring it to be surrendered with ordinary baggage checks given by the railroad in order to get baggage is valid.[1]

§§ 3462-3482. Loss or Injury—§§ 3462-3473. Personal Baggage in General—§ 3462. What Law Governs.—It is a general rule, in an action against a carrier for the loss of or injury to baggage, that the law of the state or country in which the contract of transportation was made governs the rights and liabilities of the parties under it.[2] Thus, a contract upon the face of a steamship ticket issued in England limiting the liability for loss of baggage, being valid in England, where made, will be enforced in Massachusetts, although, if made in the latter place, it would be void as against public policy.[3] It has been held, however, that if a passenger delivers his baggage to a railroad company in Pennsylvania, to be carried to New York, and there delivered, the company is liable, in case of failure to deliver, under New York laws, and can not take advantage of a Pennsylvania statute defining the liability of railroad corporations for baggage.[4]

§§ 3463-3469. Liability as Insurer—§ 3463. In General.—A common carrier of passengers, such as a railroad company, stage proprietor, steamboat owner, and omnibus proprietor, who carries passengers for hire, as regards the passengers' baggage, is liable for its loss or injury to the same extent as a common carrier of freight. Hence, it is an insurer of passengers' baggage against any loss or damage not caused by an act of God, the public enemy, vis major, the nature of the property, the fault of the passenger or his agent,[5] or the

99. **Baggage company receiving railroad check.**—Atlanta Baggage, etc., Co. *v.* Mizo, 4 Ga. App. 407, 61 S. E. 844.

Where a passenger on a railroad, upon arriving at his destination, contracted with a transfer company to procure his baggage from the depot and deliver it at his residence, and he surrendered his checks to the company and it then refused to deliver the baggage to him until it was paid certain extra charges for transportation claimed by the railroad company, though the owner tendered the price agreed to be paid for its own service, and, on his refusal to pay these extra charges, it retained his checks for a time, and then gave them up to the railroad company, under the contract, the transfer company was responsible for the delivery of the baggage, and the owner might enforce his rights against it by suit and sequestration. Da Ponte *v.* New Orleans Transfer Co., 42 La. Ann. 696, 7 So. 608.

1. **Surrender of check.**—Texas Mex. R. Co. *v.* Willis, 3 Texas App. Civ. Cas., § 71.

2. **What law governs.**—Wald *v.* Pittsburg, etc., R. Co., 60 Ill. App. 460; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660.

3. Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660.

4. Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271.

5. **Liability as insurer.**—*United States.*—Walsh *v.* Wright, Newb. 494, Fed. Cas. No. 17,115; Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

Georgia.—Ford *v.* Atlantic, etc., R. Co., 8 Ga. App. 295, 68 S. E. 1072; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; City Transfer Co. *v.* Draper, 115 Ga. 954, 42 S. E. 221; Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

Indiana.—Indiana, etc., R. Co. *v.* Zilly, 20 Ind. App. 569, 51 N. E. 141.

Michigan.—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52.

New York.—Butler *v.* Hudson River R. Co., 3 E. D. Smith 571; Merrill *v.* Grinnell, 30 N. Y. 594; Estes *v.* St. Paul, etc., R. Co., 55 Hun 605, 7 N. Y. S. 863, 27 N. Y. St. Rep. 594; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Robinson *v.* New York, etc., R. Co., 203 N. Y. 627, 97 N. E. 1115, affirming order 129 N. Y. S. 1030, 145 App. Div. 391.

North Carolina.—Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328.

Ohio.—Bowler, etc., Co. *v.* Toledo, etc., R. Co., 3 N. P. 322, 1 O. Dec. 55; Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, 8 Am. & Eng. R. Cas., N.

act of the civil authorities.[6] So the carrier may be liable for the loss of or injury to the baggage of a passenger although it was entirely without fault, and no negligence nor lack of skill for which it was responsible contributed in any degree to cause the loss or injury.[7] Thus, it is liable for damage that happens to baggage from a defect in the vehicles or machinery, though it may not be negligent or unskillful in securing its safety.[8]

§§ 3464-3469. Exceptions and Excuses—§ 3464. Act of God.—As the liability of a common carrier of passengers for the loss of or injury to the baggage of a passenger is the same as that of a common carrier of freight, it is not liable where such loss or injury is proximately caused by the act of God.[9] It is the duty of a railroad company, however, to protect the baggage of its passengers, while in its custody, from exposure to rain, or other act of God, by the exercise of due care.[10] And where an injury to baggage is the result of an act

S., 533; Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Keith *v.* New York Cent. R. Co., 1 West. L. M. 451, 2 O. Dec. 125.

Pennsylvania. — Springer *v.* Pullman Co., 234 Pa. 172, 83 Atl. 98.

South Carolina.—Peixotti *v.* McLaughlin, 1 Strob. 468, 47 Am. Dec. 563; Dill *v.* South Carolina R. Co., 7 Rich. L. 158, 62 Am. Dec. 407.

Tennessee. — Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419; Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947.

Texas.—Mexican Cent. R. Co. *v.* De Rosear (Tex. Civ. App.), 109 S. W. 949; White *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 86 S. W. 962.

Virginia.—Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654. See ante, "Liability as Insurer," §§ 989-1010.

"**In the early history of railroads,** it was held that, as a carrier was only liable for the negligence causing injury to a passenger, it was only liable to that extent for loss of his baggage. The courts have repudiated this doctrine, and a railroad is now held to the strict liability of a carrier of goods." Adger *v.* Blue Ridge Ry. Co., 71 S. C. 213, 59 S. E. 783, 110 Am. St. Rep. 568.

Special circumstances excusing duty of carrying passenger.—A railroad company can not, in an action against it by a passenger for loss of his baggage, defend upon the ground that special circumstances existed when the plaintiff took passage, excusing the company from the duty of carrying him. If a carrier has reasonable ground for refusing to receive and carry persons or property applying, he is bound to make the objection at the time the application is made. If the carrier, without making objection, receives the persons or property for transportation, his liability is the same as though no ground for refusal existed. Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

6. **Act of civil authorities.**—See post, "Act of Civil Authorities," § 3466.

7. **Absence of negligence.**—Camden, etc., Transp. Co. *v.* Burke (N. Y.), 13 Wend. 611, 28 Am. Dec. 488; Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Knieriem *v.* New York, etc., R. Co., 96 N. Y. S. 602, 109 App. Div. 709, 17 N. Y. Ann. Cas. 415; Hasbrouck *v.* New York, etc., R. Co., 122 N. Y. S. 123, 137 App. Div. 532.

8. **Defects in vehicles or machinery.**—Camden, etc., Transp. Co. *v.* Burke (N. Y.), 13 Wend. 611, 28 Am. Dec. 488.

9. **Act of God.**—*Georgia.*—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Ford *v.* Atlantic, etc., R. Co., 8 Ga. App. 295, 68 S. E. 1072; Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

Michigan.—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52.

New York.—Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455.

Pennsylvania.—Springer *v.* Pullman Co., 234 Pa. 172, 83 Atl. 98.

Tennessee.—Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947. See ante, "In General," § 3463.

What constitutes act of God.—See ante, "What Constitutes Act of God," § 991.

10. **Duty to protect from act of God.**—Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77; Harzburg & Co. *v.* Southern R. Co., 44 S. E. 75, 65 S. C. 539.

A sudden and extraordinary flood in a river is to be regarded as the act of God; and, in an action by the owner of baggage for damage caused thereby, the jury are to determine, from all the circumstances of the case, whether, after the baggage master of the railroad company received and checked such baggage, the flood came so suddenly that, under the circumstances, the injury could not have reasonably been prevented by the company or its agents by the use of all possible means; and if they find that it could have been done with the exercise of rea-

of God, such as a flood or lightning, and a fault of the carrier combined, and each is necessary in the combination to produce it, the carrier is liable therefor.[11] Thus, if there be any negligence on the part of a carrier in the care of baggage in leaving it exposed to the rain, the carrier can not escape responsibility by showing that the act of God was the cause of the injury.[12] And where a carrier, through its negligence, fails to send a passenger's baggage by the same train with the passenger, it is liable for the loss of the baggage if destroyed, due to such delay, by an act of God.[13]

§ 3465. Act of Public Enemy.—The carrier is not liable where the proximate cause of the loss of or damage to baggage is the act of a public enemy.[14] Where, however, in an action for loss of baggage, it appeared that the enemy limited its capture to the vessel, and expressly permitted passengers to take their baggage; that the captain of the captured ship took charge of the baggage, and attempted to transfer it in a schooner provided by the enemy, but omitted to bring plaintiff's baggage on board the schooner, there was not such a capture of the baggage as relieved the carrier of liability therefor.[15]

§ 3466. Act of Civil Authorities.—The carrier is not liable for the loss of or injury to baggage as the result of its being taken from its possession and control by the civil authorities.[16]

§ 3467. Spontaneous Combustion of Other Baggage.—In an action against a common carrier of persons, for the loss of baggage, it is no defense that it was destroyed by the spontaneous combustion of some article contained in the baggage of another person, carried at the same time, such combustion not being an act of God.[17]

§ 3468. Contributory Negligence of Passenger.—See post, "Contributory Negligence of Passenger," § 3482.

§ 3469. Loss by Theft.—The act of a thief in stealing baggage, while it is in the possession and under the control of the carrier, is not, in contempla-

sonable and proper and all possible means that could be exercised and used by its agents, the carrier was bound to place such baggage in a place of safety and prevent damage to the goods, and the owner is entitled to recover. Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

11. **Negligence of carrier concurring with act of God.**—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; Harzburg & Co. *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75; Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

12. Sonneborn & Co. *v.* Southern R. Co., 44 S. E. 77, 65 S. C. 502.

13. **Negligent delay.**—Wald *v.* Pittsburgh, etc., R. Co., 44 N. E. 888, 162 Ill. 545, 35 L. R. A. 365, 53 Am. St. Rep. 332.

14. **Act of public enemy.**—*Georgia.* — Ford *v.* Atlantic, etc., R. Co., 8 Ga. App. 295, 68 S. E. 1072; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

Michigan.—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52.

New York.—Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455.

Pennsylvania.—Springer *v.* Pullman Co., 234 Pa. 172, 83 Atl. 98.

Tennessee.—Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947.

Who are public enemies.—See ante, "Act of Public Enemy," §§ 995-997.

15. Spaids *v.* New York Mail, etc., Co. (N. Y.), 3 Daly 139.

16. **Act of civil authorities.**—Plaintiff purchased a ticket from defendant railway company, and obtained leave to stop over until next day at an intermediate station. He also requested that his baggage be unloaded there, but this was not assented to, and it was carried through to the point of destination named in the ticket, where it was taken charge of, pursuant to law, by the customs officers of the United States, and while in their custody was destroyed by fire. Held, that defendant was not liable for its loss. Howell *v.* Grand Trunk R. Co., 92 Hun 423, 36 N. Y. S. 514, 71 N. Y. St. Rep. 640.

17. **Spontaneous combustion of other baggage.**—Keith *v.* New York Cent. R. Co., 1 West. L. M. 451, 2 O. Dec. 125.

tion of the law, an act of a public enemy, nor vis major, such as to relieve the carrier from responsibility.[18]

§ 3470. Liability for Negligence.—Of course the carrier is liable in damages for any loss or injury caused by its negligence, as where baggage has been negligently exposed to the weather.[19] But to render a carrier liable for injury to a passenger's baggage on account of its negligence, such negligence must be the proximate cause of the injury.[20] As to the effect of the act of God where the carrier's negligence concurs therewith, see ante, "Act of God," § 3464.

§ 3471. Effect of Nonpayment of Compensation.—The law does not exact from a railway company carrying baggage free any greater diligence than from any other gratuitous bailee.[21] Thus, a vessel is not liable for failure to deliver at its destination personal baggage gratuitously carried, and unaccompanied by the owner, where there is no proof of actual negligence or misconduct, or of improper delivery, on the part of the carrier.[22] And it has been held that where a carrier received baggage for transportation, mistakenly supposing that the owners thereof had purchased tickets over its road, when in fact they had purchased tickets over another road, it owed to the owners the duty only of abstaining from anything amounting to willful or wanton injury to their property while in its possession, and was hence not liable for its destruction, in common with its own property, caused by attempting to run the train in which it was placed upon an unguarded bridge, which was, and long had been, so defective that it could not sustain such a burden.[23] Where, however, a person procures goods to be checked as baggage and takes passage on a train, intending to pay cash fare, and does so pay when demanded by the conductor, he is a passenger from the time he boarded the train and the company is charged with the same responsibility concerning his baggage as if he had purchased a ticket at the station.[24] And it has been held that even if fare is not paid by a passenger in a stage coach, the fact that he is liable to the stage owner therefor renders the latter liable to the passenger for failing to exercise ordinary diligence in the care of his baggage.[25]

§ 3472. Where Passenger Does Not Accompany Baggage.—As a general rule, it makes no difference, so far as a common carrier's responsibility for the safety of a passenger's baggage is concerned, whether the passenger travels with his baggage or whether it is carried without him.[26] And it has been held

18. Loss by theft.—Chicago, etc., R. Co. *v.* Conklin, 32 Kan. 55, 3 Pac. 762, 16 Am. & Eng. R. Cas. 116; Hasbrouck *v.* New York, etc., R. Co., 122 N. Y. S. 123, 137 App. Div. 532.

19. Liability for negligence.—Southern R. Co. *v.* Wood, 114 Ga. 159, 39 S. E. 922.

20. Proximate cause.—*United States.*—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Illinois.—Wald *v.* Pittsburgh, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 365, 53 Am. St. Rep. 332.

New York.—McCormick *v.* Pennsylvania Cent. R. Co., 80 N. Y. 353; Schalscha *v.* Third Ave. R. Co., 43 N. Y. S. 251, 19 Misc. Rep. 141.

South Carolina.—Harzburg & Co. *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75; Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

Texas.—Tarvin *v.* Texas, etc., R. Co. (Tex. Civ. App.), 151 S. W. 640.

21. Baggage carried gratuitously.—Rice *v.* Illinois Cent. R. Co., 22 Ill. App. 643; Flint, etc., R. Co. *v.* Wier, 37 Mich. 111, 26 Am. Rep. 499; White *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 86 S. W. 962.

22. Brown *v.* Elvira Harbeck, Fed. Cas. No. 2,005, reversed in Fed. Cas. No. 4,424, 2 Blatchf. 336, on the ground that the baggage was not carried gratuitously.

23. Beers *v.* Boston, etc., R. Co., 67 Conn. 417, 34 Atl. 541, 32 L. R. R. 535, 52 Am. St. Rep. 293.

24. Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, 8 Am. & Eng. R. Cas., N. S., 533; affirmed in 57 O. St. 38, 47 N. E. 1039.

25. McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

26. Where passenger and baggage are transported by different trains.—Larned *v.* Central R. Co., 81 N. J. L. 571, 79 Atl. 289; Adger *v.* Blue Ridge Ry. Co., 71 S. C. 213, 50 S. E. 783, 110 Am. St. Rep. 568.

A railway company's liability as a carrier of baggage is not affected by the passenger going on a later train than that carrying the baggage. Wilson *v.* Chesa-

that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked, merely because the passenger does not go on the same train with it.[27]

§ 3473. Baggage Not Carried as Incident to Transportation of Passenger.—A carrier of passengers is not liable for baggage unless the baggage is checked and transported as incident to the transportation of a passenger, even though it may have been checked and carried in a baggage car.[28] So where one purchased a passenger ticket over the defendant's railroad for the purpose of obtaining a check upon which his trunk was forwarded as baggage, without any intention of accompanying the baggage in its transportation, and made the journey to his destination by his own private conveyance, it was held that defendant was not liable as a common carrier, and that the owner could not recover where the baggage was stolen from the baggage room in the absence of gross negligence.[29] But it has been held that where plaintiff applied in good faith for a ticket and transportation of baggage over the line of the initial carrier and its connecting lines, with notice to the agent of no intent to become a passenger on its line, but to take the train at a more distant point, and the agent declined to sell a through ticket, but sold a ticket over its lines, and received and checked the baggage to its destination, it was liable for the loss thereof.[30]

§ 3474. Property under Control of Passenger.—It may be stated, as a general rule, that in the absence of a special agreement, the carrier, whether its transportation be by water or by land, is not liable as a common carrier or insurer for the loss of money, valuables or other property carried upon the persons of passengers, or in their exclusive custody,[31] but becomes responsible only

peake, etc., R. Co., 62 Va. (21 Gratt.) 654.

A passenger was promised by an agent that his trunk, which was locked up in the baggage room of another railroad at the time he wished to start, should be sent by the next train. Held that, as the passenger had paid his fare, it made no difference, as far as his right to recover for the loss thereof was concerned, that the trunk was not forwarded by the same train that he took. Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389.

27. McKibbin *v.* Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964, 8 L. R. A., N. S., 489.

28. **Baggage not carried as incident to transportation of passenger.**—Hicks *v.* Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A., N. S., 235.

29. Marshall *v.* Pontiac, etc., R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650.

30. Adger *v.* Blue Ridge R. Co., 71 S. C. 213, 50 S. E. 783, 110 Am. St. Rep. 568.

31. **Property under control of passenger.**—*United States.* — Defrier *v.* Nicaragua, 81 Fed. 745; Henderson *v.* Louisville, etc., R. Co., 16 Am. & Eng. R. Cas. 397, 20 Fed. 430; The Humbolt, 97 Fed. 656; The R. E. Lee, Fed. Cas. No. 11,690, 2 Abb. U. S. 49.

Connecticut. — Sperry *v.* Consolidated R. Co., 65 Atl. 962, 79 Conn. 565, 10 L. R. A., N. S., 907.

Kentucky.—Crystal Palace *v.* Vanderpool, 16 B. Mon. 302, holding that steamboat owners are not liable as common carriers, for the loss of the wearing apparel of a passenger, or his money, which is not delivered to the officers of the boat for safe-keeping, but kept under his own immediate care and control.

Louisiana.—Del Valle *v.* Richmond, 27 La. Ann. 90.

Maine.—Abbott *v.* Bradstreet, 55 Me. 530.

Massachusetts. — Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024; Levins *v.* New York, etc., R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434; Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200; Clark *v.* Burns, 118 Mass. 275, 19 Am. Rep. 456; Bursteen *v.* Boston Elev. R. Co., 98 N. E. 27, 211 Mass. 459, 39 L. R. A., N. S., 313, Ann. Cas. 1913B, 558.

Michigan.—McKee *v.* Owen, 15 Mich. 115.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Williams *v.* Keokuk Northern Line Packet Co., 3 Cent. L. Jur. 400.

New York.—Cohen *v.* Frost, 9 N. Y. Super. Ct. 335; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Sewall *v.* Allen, 6 Wend. 335; Weeks *v.* New York, etc., R. Co., 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104; Tolano *v.* National Steam Nav. Co., 5 Robt. 318; Knieriem *v.* New York, etc., R. Co., 96 N. Y. S. 602, 109 App. Div. 709, 17 N. Y. Ann. Cas. 415; Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202

for failing to exercise reasonable care to protect the same from loss or injury.[32] The reason for the rule is that such possession on the part of the passenger is not regarded as the possession of the carrier.[33] So the carrier has been held liable for the loss of property where the possession of the passenger was not exclusive.[34] And it has been held that where a passenger carried a valise into a

N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming judgment 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478; Tower *v.* Utica, etc., R. Co. (N. Y.), 7 Hill 47, 42 Am. Dec. 36.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

Pennsylvania.—American Steamship Co. *v.* Bryan, 83 Pa. 446, holding that an ocean steamship company is not responsible, as a common carrier or an innkeeper, for the baggage of a passenger which he keeps in his own possession in his stateroom.

Tennessee.—Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947, holding that a railroad company is not an insurer of baggage and hand luggage taken by passengers into a day coach.

Texas.—Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

England.—Bunch *v.* Great Western R. Co., 17 Q. B. D. 215, 55 L. J. Q. B. 525, 5 Ry. & C. T. Cas. viii; Talley *v.* Great Western R. Co., L. R., 6 C. P. 44, 40 L. J. C. P. 9, 19 W. R. 154, 23 L. T., N. S., 413, 3 Ry. & C. T. Cas. xx.

In Williams *v.* Webb, 22 Misc. Rep. 513, 49 N. Y. S. 1111, it is held that a common carrier is not liable to a sleeping-car passenger, from Detroit to New York, for the loss of $1,250, of which he had retained custody, and which he intended, upon subsequently reaching the city of Boston, to deposit in a bank, as such a large sum can not be regarded as necessary or reasonable for the expenses of the trip.

Contrary holding as to carriers by water.—A few cases hold that the liability of a carrier by water is analogous to that of an innkeeper. Adams *v.* New Jersey Steamboat Co., 9 Misc. Rep. 25, 29 N. Y. S. 56, 59 N. Y. St. Rep. 720, affirmed in 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Macklin *v.* New Jersey Steamboat Co. (N. Y.), 7 Abb. Prac., N. S., 229. Thus, it is held that where money for traveling expenses carried by a passenger on a steamboat is taken from his stateroom at night, the owner of the boat is liable therefor, without proof of negligence on his part. Adams *v.* New Jersey Steamboat Co., 9 Misc. Rep. 25, 29 N. Y. S. 56, 59 N. Y. St. Rep. 720, affirmed in 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616. And see Van Horn *v.* Kermit (N. Y.), 4 E. D. Smith 453, holding that a passenger, in order to make the shipowner responsible for the safety of his baggage, is not bound to place it beyond his own reach, in the special charge of the officers of the ship.

In Mudgett *v.* Bay State Steamboat Co. (N. Y.), 1 Daly 151, and Gore *v.* Norwich, etc., Transp. Co. (N. Y.), 2 Daly 254, the stateroom door was provided with a lock, of which the key was delivered to the passenger, who had it in his possession, leaving the door of the room locked when the same was broken and entered, and the articles stolen for which the carrier was held responsible. See, also, Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716, holding the carrier not liable because the passenger was not provided with a key to the stateroom door.

"In Crozier *v.* Boston, etc., Steamboat Co. (N. Y.), 43 How. Prac. 466, the plaintiff, the occupant of a stateroom on the defendant's steamboat, retired at night and in the morning found that his room had been entered, and his watch and chain and pocketbook stolen, and the action brought to recover the damages sustained thereby. It was said: 'In such a case, the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake, and to intrust his person, and whatever men usually carry about their persons, to the care and vigilance which it must be presumed they who extend the invitation and receive the reward for the comfort thus afforded, will themselves exercise.'" Woodruff, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102.

32. Sperry *v.* Consolidated R. Co., 65 Atl. 962, 79 Conn. 565, 10 L. R. A., N. S., 907; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

33. Reason of rule.—McKee *v.* Owen, 15 Mich. 115.

Street railways.—In the absence of a special agreement, a street railroad company does not assume control of such baggage as its passengers may bring with them into its cars. Sperry *v.* Consolidated R. Co., 65 Atl. 962, 79 Conn. 565, 10 L. R. A., N. S., 907.

34. Possession of passenger not exclusive.—It appeared that a passenger went to a railroad carriage, and there gave a chronometer to the railway porter, who placed it on a seat in the carriage. They both then went away; the passenger to look after his own luggage, and the porter to attend to his other duties, and that

sleeping car, and deposited it on his seat, and afterwards, on retiring, placed it under his berth, the valise was, in effect, placed in charge of the railroad company, and hence it was an insurer thereof.[35]

Liability for Negligence.—Though a carrier of passengers is not liable as a common carrier for baggage retained in the possession and control of the passenger, it may become responsible for its loss or injury through its failure to exercise ordinary and reasonable care under the circumstances.[36] So a carrier is responsible for baggage, kept by a passenger exclusively within his own control, which is lost through the negligence of the carrier or its servants, and without fault of the passenger.[37] And the liability of a carrier may exist without proof of gross negligence.[38] But it is held that a common carrier of passengers is not liable for the loss of money kept in the sole custody of a passenger, and which he carries, without notice to the carrier, for a purpose unconnected with the expenses of the journey, notwithstanding such loss was occasioned by the negligence of the carrier's servants.[39]

Losses by Theft.—In the absence of any fault on its part, a carrier of passengers is not liable for the loss of property by theft when it was within the exclusive custody of the passenger.[40] So a carrier by water is not liable for the property of a passenger kept in his exclusive possession, which is stolen,[41] in the

the former returned in a few minutes, and found that the chronometer had been stolen. It was held that the company was liable for the loss, the possession of the passenger not having been exclusive. Le Coteur *v.* London & S. W. R. Co., 6 B. & S. 961, 118 E. C. L. 961.

In Richards *v.* London, B. & S. C. R. Co., 7 C. B. 839, 62 E. C. L. 839, a lady was traveling on a railway train, having with her a dressing case, which the railway porters placed under her seat. On arriving at her destination the same porters took the dressing case for the purpose of placing it in a coach which was to take the lady to her residence; but it was not placed in the coach. The court held that the railway company was liable for the loss.

35. Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947.

36. Liability for negligence.—Sperry *v.* Consolidated R. Co., 65 Atl. 962, 79 Conn. 565, 10 L. R. A., N. S., 907; Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

37. Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200; American Steamship Co. *v.* Bryan, 83 Pa. 446.

38. Gross negligence unnecessary.—*Connecticut.*—Sperry *v.* Consolidated R. Co., 65 Atl. 962, 79 Conn. 565, 10 L. R. A., N. S., 907.

Iowa.—Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 613, 31 Am. & Eng. R. Cas. 108.

Massachusetts. — Bursteen *v.* Boston Elev. R. Co., 98 N. E. 27, 211 Mass. 459, 39 L. R. A., N. S., 313, Ann. Cas. 1913B, 558; Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

New York.—Weeks *v.* New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104.

Ohio.—First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

Pennsylvania. — American Steamship Co. *v.* Bryan, 83 Pa. 446.

Texas.—Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

39. First Nat. Bank *v.* Marietta, etc., R. Co., 20 O. St. 259, 5 Am. Rep. 655.

40. Losses by theft.—The R. E. Lee, Fed. Cas. No. 11,690, 2 Abb. U. S. 49; Levins *v.* New York, etc., R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434; Weeks *v.* New York, etc., R. Co. (N. Y.), 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104.

Where a passenger on a railroad train keeps her money in her possession and under her control, and it is lost or stolen when left momentarily by her on a window sill of the car, the company can not be held responsible as a bailee. Levins *v.* New York, etc., R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434.

Plaintiff was a passenger in one of defendant's trains. On its arrival at New York, the car in which plaintiff was sitting was detached from the rest of the train, and allowed to remain unguarded, while awaiting the arrival of horses to draw it to the station. Plaintiff got up and went towards the door to ascertain the cause of the stoppage, whereupon he was seized by three men, who had just entered the car, and robbed of over $16,000. Held, that he was not entitled to recover from the company for the loss. Weeks *v.* New York, etc., R. Co. (N. Y.), 9 Hun 669, affirmed in 72 N. Y. 50, 28 Am. Rep. 104.

41. Carrier by water.—In McKee *v.* Owen, 15 Mich. 115, it appeared that a passenger on board a steamboat, a common carrier of passengers, occupied a stateroom with a fellow passenger, a stranger, which was assigned to them by the officers of the boat; that the state-

absence of proof that the robbery was committed by one of its employees.[42] Where a passenger who, having placed his overcoat on the seat of the car in which he sat, forgot to take it with him when he left, and it was afterwards stolen, the carrier was not liable.[43] And it has been held that the carrier is not liable for a large amount of gold coin placed in a carpet bag by a passenger without notice to the carrier, though the money is stolen by one of the carrier's employees.[44]

Duty of Carrier after Loss.—Where a passenger on a subway lost a violin, due to a sudden jerk of the car, but without negligence of the carrier, it was under no duty to stop the car between stations to permit him to regain it.[45] And where a passenger accidentally drops a handbag containing money and jewelry out of the window of the car, while attempting to close it, the company is not liable for the loss, although the passenger notifies those in charge of the train of the accident and requests that the train be stopped in order that she may recover it.[46]

Assisting Departing Passenger Off Train.—It has been held that where a trainman, acting in the scope of his employment, takes a passenger's suit case, which had not been checked as baggage, for the special purpose of assisting the passenger off the train, his possession is that of the carrier, but the carrier's liability is only that of a bailee and not that of an insurer, but for a theft by the employee the carrier is liable.[47]

§§ 3475-3481. Property Other than Personal Baggage—§ 3475. Effect of Acceptance with Knowledge of Nature of Property.—If a carrier knows that an article offered by a passenger for transportation as his personal baggage is not such baggage, but undertakes to carry it as such, it renders itself responsible as a common carrier for its loss or injury, as much so as for the real baggage of a passenger.[48] This rule has been applied to drummers'

room window was broken, and the attention of the stewardess was called to it. When the first passenger retired for the night, she rolled up her dress, in the pocket of which were money and a gold chain, and placed it at the foot of the upper berth. Early in the morning she found the dress unrolled, and the money and chain had disappeared, and a pillow which had been placed in the window was not in it; and she testified that the woman with her could not have taken the property without awakening her, as they occupied the same berth. It was held, that the owners of the boat were not liable for the loss, because the money and chain were not in their custody. But see Crozier *v.* Boston, etc., Steamboat Co. (N. Y.), 43 How. Prac. 466, and Gore *v.* Norwich, etc., Transp. Co. (N. Y.), 2 Daly 254, holding the carrier liable. See, also, Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

42. Abbott *v.* Bradstreet, 55 Me. 530. (Money stolen from pocket of passenger.)

43. Leaving overcoat in car.—Tower *v.* Utica, etc., R. Co. (N. Y.), 7 Hill 47, 42 Am. Dec. 36.

44. Theft by carrier's employees.—Doyle *v.* Kiser, 6 Ind. 242.

45. Duty of carrier after loss.—Bursteen *v.* Boston Elev. R. Co., 98 N. E. 27, 211 Mass. 459, 39 L. R. A., N. S., 313, Ann. Cas. 1913B, 558.

46. Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. Ed. 92.

47. When assisting passenger off train.—Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming judgment 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478. See Richards *v.* London, B. & S. C. R. Co., 7 C. B. 839, 62 E. C. L. 839, holding the carrier liable for the loss of a suit case which its porter took from the train for the purpose of placing it in a coach which was to take the passenger to his residence.

48. Effect of acceptance with knowledge of character and value.—*United States.*—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; Central Trust Co. *v.* Wabash, etc., R. Co., 40 Am. & Eng. R. Cas., 636, 39 Fed. 417; Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Saunders *v.* Southern R. Co., 62 C. C. A. 523, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, 128 Fed. 15; Hellman *v.* Holladay, 1 Woolw. 365, Fed. Cas. No. 6340; Jacobs *v.* Tutt, 33 Fed. 412.

Arkansas.—St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212; Kansas, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111; St. Louis, etc., R. Co. *v.* Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A., N. S., 634.

Dakota.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

Illinois.—Lake Shore, etc., R. Co. *v.* Hochstim, 67 Ill. App. 514; Michigan

samples,[49] merchandise,[50] more money than is usually carried under similar

Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Kansas.—Chicago, etc., R. Co. *v.* Conklin, 16 Am. & Eng. R. Cas. 116, 32 Kan. 55, 3 Pac. 762.

Michigan.—Amory *v.* Wabash R. Co., 130 Mich. 404, 90 N. W. 22, 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

Minnesota.—Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199.

Mississippi.—New Orleans, etc., R. Co. *v.* Shackleford, 87 Miss. 610, 40 So. 427, 24 R. R. R. 15, 47 Am. & Eng. R. Cas., N. S., 15, 4 L. R. A., N. S., 1035, 112 Am. St. Rep. 461.

Missouri.—Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52; Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288; Ross *v.* Missouri, etc., R. Co., 4 Mo. App. 583; Sherlock *v.* Chicago, etc., R. Co., 85 Mo. App. 46; Rossier *v.* Wabash R. Co., 91 S. W. 1018, 115 Mo. App. 515; Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529.

New York.—Millard *v.* Missouri, etc., R. Co., 6 Am. & Eng. R. Cas. 311, 86 N. Y. 441, affirming 20 Hun 191; Butler *v.* Hudson River R. Co., 3 E. D. Smith 571; Glovinsky *v.* Cunard Steamship Co., 6 Misc. Rep. 388, 26 N. Y. S. 751; Perley *v.* New York, etc., R. Co., 65 N. Y. 374; Sloman *v.* Great Western R. Co., 67 N. Y. 208, 5 Am. R. Rep. 113, reversing 6 Hun 546; Stoneman *v.* Erie R. Co., 52 N. Y. 429; Trimble *v.* New York, etc., R. Co., 57 N. Y. S. 437, 39 App. Div. 403, affirmed in 56 N. E. 532, 162 N. Y. 84, 48 L. R. A. 115; Saleeby *v.* Central R. Co., 90 N. Y. S. 1042, 99 App. Div. 163, 15 N. Y. Ann. Cas. 353, affirmed in 184 N. Y. 597, 77 N. E. 1196.

North Carolina. — Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 139 N. C. 382, 51 S. E. 973, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

Ohio.—Bowler, etc., Co. *v.* Toledo, etc., R. Co., 3 N. P. 322, 1 O. Dec. 55; Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am. & Eng. R. Cas., N. S., 533, 63 Am. St. Rep. 702; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813, 19 Am. & Eng. R. Cas., N. S., 574, affirming 10 O. C. C. 272, 6 O. C. D. 401.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

South Carolina.—Fleischman, etc., Co. *v.* Southern Railway, 56 S. E. 974, 76 S. C. 237, 9 L. R. A., N. S., 519.

Texas.—St. Louis, etc., R. Co. *v.* Green, 44 Tex. Civ. App. 13, 97 S. W. 531; Ft. Worth, etc., R. Co. *v.* Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118.

Wisconsin.—Hoeger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 21 Am. & Eng. R. Cas. 308, 53 Am. Rep. 271.

England.—Belfast, etc., R. Co. *v.* Keys, 9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. 841, 8 Jur., N. S., 267; Cahill *v.* London, etc., R. Co., 10 C. B., N. S., 154, 7 Jur., N. S., 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T. N. S. 246; Macrow *v.* Great Western R. Co., L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix; Great Northern R. Co. *v.* Shepherd, 8 Exch. 30, 30 Railw. Cas. 310, 21 L. J. Exch. 286.

Articles exposed to view.—If a passenger takes with him articles, which do not come strictly within the denomination of baggage, and exposes them to view, so that no concealment is practiced, and the carrier chooses to treat them as personal baggage, and carries them accordingly, and a loss occurs, he will be responsible therefor. Great Northern R. Co. *v.* Shepherd (Eng.), 8 Exch. 30, 30 Railw. Cas. 310, 21 L. J. Exch. 286.

49. Drummer's samples.—*United States.*—Jacobs *v.* Tutt, 33 Fed. 412; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Mississippi.—New Orleans, etc., R. Co. *v.* Shackelford, 87 Miss. 610, 40 So. 427, 24 R. R. R. 15, 47 Am. & Eng. R. Cas., N. S., 15, 4 L. R. A., N. S., 1035, 112 Am. St. Rep. 461.

Missouri.—Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529.

New York.—Trimble *v.* New York, etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 17 Am. & Eng. R. Cas., N. S., 176, 48 L. R. A. 115.

South Carolina.—Fleischman, etc., Co. *v.* Southern Railway, 56 S. E. 974, 76 S. C. 237, 9 L. R. A., N. S., 519.

Texas.—Ft. Worth, etc., R. Co. *v.* Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118.

Wisconsin.—Hoeger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 21 Am. & Eng. R. Cas. 308, 53 Am. Rep. 271.

Canada.—Dixon *v.* Richelieu Nav. Co., 15 Ont. App. Rep. 647.

Sample case checked as baggage for two years.—In New Orleans, etc., R. Co. *v.* Shackelford, 87 Miss. 610, 40 So. 427, 24 R. R. R. 15, 47 Am. & Eng. R. Cas., N. S., 15, 4 L. R. A., N. S., 1035, 112 Am. St. Rep. 461, it is held that if the carrier's station agent knew that a parcel checked as baggage was a sample case and the carrier had accepted it as baggage for two years, the carrier is liable for its loss or destruction in transit.

50. Merchandise.—Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am.

circumstances,[51] stage costumes and properties,[52] and tents.[53] It has been held, however, that evidence that a passenger delivered to the baggage master of a railroad a package of merchandise, and received a check for it, on showing his passenger ticket; that the baggage master knew that it was merchandise, and that other passengers had similar packages, will not warrant the jury in finding that the railroad company agreed to transport the merchandise, or became liable for it as a common carrier, in absence of evidence of an agreement that it should be carried as freight, or that the baggage master had authority to receive freight to be carried on a passenger train, or to bind the company to carry merchandise as personal baggage.[54]

Extra Compensation.—If a railroad receives for carriage from a passenger trunks containing articles other than personal baggage, either with or without payment of an extra charge, and with knowledge of the contents of the trunks, the carrier is liable for loss or damage as an insurer or common carrier of freight.[55] Where a carrier has a fixed tariff of charges for transporting gold, and the carrier knows that a certain package which a passenger has introduced into his vehicle contains gold, and charges the passenger, not the usual rates for its transportation, but merely such as are chargeable for ordinary extra baggage, the carrier is liable in case of loss.[56]

§ 3476. Effect of Acceptance without Knowledge of Nature of Property.—In the absence of a special agreement, the carrier's common-law liability for baggage, of the nature of which it is ignorant, embraces only such articles as properly constitute baggage.[57] So it may be stated as a general rule that a carrier

& Eng. R. Cas., N. S., 533, 163 Am. St. Rep. 702; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813, 19 Am. & Eng. R. Cas., N. S., 574, affirming 10 O. C. C. 272, 6 O. C. D. 401; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405.

51. Money.—St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212.

Passenger ignorant of rule.—A railroad company is liable to a passenger who, without knowledge of the rule forbidding its agents to receive money to be so shipped, delivers a trunk containing a large amount of money to its agent, informs him of the fact, and he receives the same for shipment. St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212.

52. Stage properties.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

53. Tents.—Chicago, etc., R. Co. *v.* Conklin, 32 Kan. 55, 3 Pac. 762, 16 Am. & Eng. R. Cas. 116.

54. Authority of baggage master.—Blumantle *v.* Fitchburg R. Co., 127 Mass. 322, 34 Am. Rep. 376.

55. Extra compensation.—Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 51 S. E. 973, 139 N. C. 382, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459; Saleeby *v.* Central R. Co., 77 N. E. 1196, 184 N. Y. 597; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 N. P. 126, 4 O. Dec. 405.

It would not seem practicable in this respect to distinguish between the carriage of freight and the carriage of baggage, nor between knowledge of the value of the articles carried and knowledge of their character. In one case, as clearly as in the other, considerations of public policy justify the conclusion that if the carrier, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives it right to refuse merchandise which it is requested to carry as baggage, or to make an additional charge commensurate with the increased risk, it can not, after a loss has occurred, assert an immunity from liability because of such rights. Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am. & Eng. R. Cas., N. S., 533, 63 Am. St. Rep. 702.

Where carrier exacts extra compensation.—Sloman *v.* Great Western R. Co., 67 N. Y. 208, 5 Am. R. Rep. 113; Perley *v.* New York, etc., R. Co., 65 N. Y. 374; Stoneman *v.* Erie R. Co., 52 N. Y. 429; Trimble *v.* New York, etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 17 Am. & Eng. R. Cas., N. S., 176, 48 L. R. A. 115.

56. Gold.—Hellman *v.* Holladay, Fed. Cas. No. 6,340, 1 Woolw. 365.

57. General rule as to liability for articles other than baggage.—Hubbard *v.* Mobile, etc., R. Co., 87 S. W. 52, 112 Mo. App. 459; Robinson *v.* New York, etc., R. Co., 129 N. Y. S. 1030, 145 App. Div. 391, affirmed in 203 N. Y. 627, 97 N. E. 1115; Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

By the sale of a ticket to a passenger the carrier does not become liable for the

of passengers is not liable as a common carrier for loss or injury to packages of merchandise, or other articles not baggage, accepted as baggage, unless its agent having control of the receipt of the baggage was informed or knew, or was chargeable with notice as to what was contained therein, and no misrepresentation was made by the owner to the agent having charge of the business of checking the baggage.[58] It is held that where goods not the personal baggage of a passenger are checked as his baggage without the fact being brought to the knowledge of the carrier, the carrier is liable only as a gratuitous bailee, and to recover for a loss gross negligence or willful injury must be clearly shown.[59] But though a carrier did not know that the trunks of a passenger contained samples, it had no right, after arrival of the trunks at their destination, to practically abandon them and leave them for three days on a station platform, exposed to the weather.[60] And a passenger is not precluded from recovering for loss of baggage for which the carrier is liable, because he had also in his trunk articles for which the carrier is liable.[61]

safe transportation of merchandise delivered as baggage, without clear proof of an agreement to that effect. Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

Under Ky. St., § 738, providing that every company shall check every parcel of "baggage" taken for transportation, a company is only liable as a carrier for what the passenger takes with him for his own personal use and convenience, unless the company by contract, express or implied, has accepted other articles as baggage. Illinois Cent. R. Co. *v.* Matthews, 72 S. W. 302, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 114 Ky. 973, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

58. Effect of acceptance without notice of character or value of goods.—*United States.*—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587.

Arkansas.—St. Louis, etc., R. Co. *v.* Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A., N. S., 634.

Illinois.—Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578; Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

Indiana.—Doyle *v.* Kiser, 6 Ind. 242.

Kansas.—Southern Kansas R. Co. *v.* Clark, 52 Kan. 398, 34 Pac. 1054.

Kentucky.—Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

Massachusetts.—Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140; Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667.

Minnesota.—Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199.

Mississippi.—New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

New York.—Gurney *v.* Grand Trunk R. Co., 14 N. Y. S. 321, 59 Hun 625, 37 N. Y. Super. Ct. 155.

Ohio.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 58 N. E. 813, 63 O. St. 274, 19 Am. & Eng. R. Cas., N. S., 574.

Pennsylvania.—Merritt *v.* Lehigh Valley R. Co., 40 Pa. Super. Ct. 219.

Tennessee.—Yazoo, etc., R. Co. *v.* Baldwin, 81 S. W. 599, 113 Tenn. 205, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

If a passenger undertake to carry property not baggage in the character of baggage, the carrier is not liable for a loss not occasioned by its wrongful act. Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

A railroad company is not liable, to either owner or agent, on its ordinary contract of transportation of a passenger for losing a trunk delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose traveling agent he was to sell such goods by sample; nor in tort, for the loss, without proof of gross negligence. Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140; Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667.

59. Brick *v.* Atlantic, etc., R. Co., 58 S. E. 1073, 145 N. C. 203, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328. See Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am. & Eng. R. Cas., N. S., 533, 63 Am. St. Rep. 702; Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 24 Ky. L. Rep. 1766, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

60. Must not abandon goods.—Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 51 S. E. 973, 139 N. C. 382, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

61. Where articles are mixed.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Absence of Fraud and Concealment.—It has been held that where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practiced or attempted upon its employees, it assumes with reference to the property the liability of a common carrier of merchandise.[62]

Extra Compensation.—Where merchandise or other property not properly classed as baggage is packed with a passenger's baggage without the carrier's knowledge, the payment of extra charges on account of overweight will not convert such property into freight or baggage and render the carrier responsible for it as an insurer.[63]

§ 3477. Duty to Disclose Nature and Value and Effect of Concealment.—Duty to Disclose Nature and Value.—A passenger, in the absence of a request, is not bound to volunteer information to the carrier's servants as to the nature and value of his baggage, provided it is only such and so much as he is warranted in carrying for the journey contemplated.[64] And it is held that in the absence of legislation, or of special regulations by the carrier, or of conduct by the passenger misleading the carrier as to the value of his baggage, his failure to disclose it, when no inquiry is made of him is not, in itself, a fraud upon the carrier.[65] It is held, however, that a passenger is required to act in good faith, and if he obtains carriage on his ticket as personal baggage of merchandise or articles not properly such baggage, without disclosing the fact, the carrier will not be liable as an insurer, for their loss or damage.[66] And it has been held that a traveler who presents to a carrier of passengers, as his baggage, an ordinary trunk or valise, without describing its contents, impliedly represents that it contains only wearing apparel, and articles such as are necessary for his comfort and convenience on the journey, and if it, in fact, contains costly jewelry, and it is destroyed without gross negligence chargeable to the carrier, he is not liable for such extra value.[67] The carrier has been held not liable for the loss of a box containing only merchandise where the passenger gave no information as to the contents of the box and the servants of the carrier did not inquire, although the word "glass" was written on the box in large letters.[68] The carrier may, by

62. Absence of fraud and concealment.—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

63. Extra compensation. — Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587; Hamburg-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662; Talcott *v.* Wabash R. Co., 50 N. Y. St. Rep. 423, 66 Hun 456, 21 N. Y. S. 318; Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219; Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

64. Passenger's duty to disclose nature and value of goods.—Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681; Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

"However valuable an article of baggage may be, it seems now to be well settled by the authorities that the owner is not bound to disclose such peculiar value to the carrier, unless inquiry be made." Jones *v.* Voorhees, 10 O. 145.

65. Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531 holding that the word "shipper," as used in Rev. St., § 4281, exempting a master or owner, etc., from liability for loss of articles of whose value he is not notified, does not apply to carriers by land of the baggage of passengers.

66. Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; Michigan, etc., R. Co. *v.* Oehm, 56 Ill. 293, 4 Am. R. Rep. 451; Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605; Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627.

"It is the duty of the passenger to give the carrier notice that his trunk contains merchandise, or things which can not be included as baggage, unless the carrier has knowledge that the contents of the trunk are not baggage, but merchandise." Amory *v.* Wabash R. Co., 130 Mich. 404, 90 N. W. 22, 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

67. Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248.

68. Box of merchandise marked "glass."—Cahill *v.* London, etc., Ry. Co., 10 C. B., N. S., 154, 7 Jur., N. S., 1164, 30 L. J. C. P.

notice brought home to the passenger, require the latter to make known to him the nature and value of the property which the carrier is to convey.[69] But it has been held that where the advertisement of a carrier stated that passengers were "prohibited from taking anything as baggage but their wearing apparel, which will be at the risk of the owner," and the trunk of a passenger contained specie, and the extra weight of his baggage was paid for, and the agents of the carriers took charge of it, it was not incumbent on the passenger to inform the carrier of its contents, unless he was inquired of; and that the carrier was liable for its loss through the negligence or fraud of its agents.[70]

Effect of Concealment of Nature and Value.—A carrier may be discharged from liability for the full value of baggage if the passenger, by any device or artifice, evades inquiry as to such value, whereby a responsibility is imposed upon the carrier beyond what they are bound to assume in consideration of the ordinary fare charged for the transportation of the person.[71] Where the passenger informs the carrier that his trunk contains nothing but clothing, whereas it contains a large amount of coin and gold ornaments, the carrier is not liable for any of the contents where it is lost.[72] And it has been held that a person who places in the hands of the agent of a railroad company merchandise, jewelry, and other valuables for transportation, under the semblance of baggage, is guilty of fraud, which releases the company from liability as common carriers, and it is simply liable as common bailees for hire.[73]

§ 3478. Right and Duty of Carrier to Investigate.—As a condition precedent to a contract for the transportation of baggage, the carrier may require information from the passenger as to its value.[74] But the law does not require a common carrier of passengers, under ordinary circumstances, to inquire or investigate in order to find out the nature of property offered for transportation as the ordinary baggage of a passenger, as it is entitled to assume that it is such, and nothing else.[75] Thus, the carrier is not bound to inspect a trunk, presented

289, 9 W. R. 653, 4 L. T., N. S., 246, affirmed in Exchequer Chamber, 13 C. B., N. S., 818.

69. Notice requiring disclosure.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

70. Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681.

71. Effect of concealment of nature and value.—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531. See Jones *v.* Voorhees, 10 O. 145.

72. The Ionic, Fed. Cas. No. 7,059, 5 Blatchf. 538.

73. Cincinnatti, etc., R. Co. *v.* Marcus, 38 Ill. 219.

74. Right of carrier to investigate.—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; Bonner *v.* Blum (Tex. Civ. App.), 25 S. W. 60.

75. Duty of carrier to investigate.—Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248; Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667; Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813, 19 Am. & Eng. R. Cas., N. S., 574; Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am. & Eng. R. Cas., N. S., 533, 63 Am. St. Rep. 702; Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620.

"Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage." Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 24 Ky. L. Rep. 1766, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

Box of merchandise marked "glass."—Where a passenger took with him a box containing only merchandise, but not exceeding in weight the limit prescribed for personal baggage, but gave no information to the railroad's servants as to the contents of the box, nor did they inquire, although the word "glass" was written on the box in large letters, it was held that, as the box contained only merchandise, there was no contract on the part of the railroad to carry it, and it was not liable for its loss. Cahill *v.* London, etc., Ry. Co., 10 C. B., N. S., 154, 7 Jur. N. S., 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T., N. S., 246, affirmed in Exchequer Chamber, 13 C. B., N. S., 818.

Holding that carrier should make inquiry.—In Kuter *v.* Michigan Cent. R. Co., 1 Biss. 35, Fed. Cas. No. 7955, disapproved in Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587, it was

by a passenger as baggage, to see whether it contains articles of merchandise.[76] Nor is the carrier bound to inquire as to the contents of a trunk delivered to it as ordinary baggage, such as travelers usually carry, even if the same is of considerable weight, but may rely upon the representations arising by implication, that it contains nothing more than baggage.[77] And the carrier does not, by accepting it without inquiring as to contents, become an insurer of a traveling salesman's trunk filled with samples.[78]

§ 3479. Sufficiency of Notice to Carrier of Nature of Property.—It has been held that in order to charge a railroad company with liability for articles of merchandise tendered and accepted as baggage, it need not be shown that the agent of the railroad company was expressly notified that the articles were merchandise, but it is sufficient if the agent had notice or knowledge sufficient to put him on inquiry.[79] But the paying of overweight charges on baggage is not of it-

said in the charge to the jury, that, if the railroad company knew that immigrants, like the plaintiff, were in the habit of putting valuable articles and money among their household goods, and from such knowledge might have inferred that the box of the plaintiff might contain money, then it became the duty of the company to make inquiry in order to relieve itself from liability.

And in Walker *v.* Jackson, 10 Mees. & W. (Eng.), 161, it appeared that the plaintiff paid 5s. for the ferriage of his phaeton and horse, which according to the defendant's scale of charges, was the charge for a light four-wheeled phaeton and one horse, and he did not communicate the fact that the carriage contained in the box seat, jewelry and watches to the value of several thousand pounds. Before the phaeton was landed on the opposite side of the ferry, it, and the jewelry contained, were injured. The ferryman was held liable; and Parke, B., said: "I take it now to be perfectly well understood, according to the majority of opinions on the subject, that if any thing is to be delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he asks no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is."

76. Toledo, etc., R. Co. *v.* Dages, 57 O. St. 38, 47 N. E. 1039, 8 Am. & Eng. R. Cas., N. S., 533, 63 Am. St. Rep. 702.

77. Heavy trunk.—Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248. See Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587.

78. Drummer's trunk.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587.

79. Sufficiency of notice to carrier.—Dahrooge *v.* Pere Marquette R. Co., 108 N. W. 283, 144 Mich. 544. See Trimble *v.* New York, etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115, 17 Am. & Eng. R. Cas., N. S., 176; Sloman *v.* Great Western R. Co., 67 N. Y. 208, 5 Am. R. Rep. 113; Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Illinois Cent. R. Co. *v.* Matthews, 114 Ky. 973, 24 Ky. L. Rep. 1766, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

Illustrations.—Where a traveling salesman had his sample trunk, which was different in appearance from ordinary trunks, checked from a station from which he had frequently had it checked before, and an employee of the road, other than the baggageman, in a record kept by him, designated it as a sample trunk, and the baggageman was accustomed to checking sample trunks, but the salesman did not state that his trunk contained samples, such fact were held to warrant a direction of a verdict that defendant had notice that the trunk contained samples. Trimble *v.* New York, etc., R. Co., 56 N. E. 532, 162 N. Y. 84, 48 L. R. A. 115, 17 Am. & Eng. R. Cas., N. S., 176.

Where plaintiff had traveled over defendant's road for six years, carrying samples of merchandise in trunks different in style from the ordinary and a witness testified that on the last of these trips the baggage master stated that plaintiff was a dress man, and that he had ladies dresses, but the trunks were received as passengers' baggage, and some of their contents, stolen, there was evidence from which the jury might infer knowledge on defendant's part as to the character of the contents, and a verdict for plaintiff will not be disturbed. Amory *v.* Wabash etc., R. Co., 130 Mich. 404, 90 N. W. 22, 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

Where three members of a family offered for transportation, as their baggage, two trunks and three boxes, having the appearance of being packed with merchandise, and aggregating over 500 pounds in weight (Sand. & H. Dig., § 6215, allowing each passenger 150 pounds), the carrier was chargeable with notice that the contents exceeded the ordinary luggage of three persons. Kansas, etc., Co. *v.* McGahey, 38 S. W. 659, 63 Ark. 344, 36 L. R. A. 781, 58 Am. St. Rep. 111.

self such notice to the company that the trunk contains merchandise, or other articles than the passenger's ordinary baggage, as will render the company liable as a carrier for such articles.[80] And the packing of articles, not baggage, in a laundry basket does not give notice to the carrier of the character of the articles.[81]

Knowledge of Baggage Agent of Connecting Road.—It has been held that where the only authority given by a railroad company to the baggage agent of a connecting road is to check baggage to all stations on the line of the former road, no presumption follows that such agent has authority to check merchandise over the line of said road under the guise of baggage; and knowledge on the part of such agent that a passenger's trunks contain merchandise, and not baggage, is not sufficient to charge the railroad company with such knowledge.[82]

§ 3480. Money Intrusted for Safe-Keeping to Carrier or Its Servants.—It has been held that the owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown.[83] A steamboat, however, is responsible for money deposited by travelers with the captain, when the deposit is a necessary one.[84]

§ 3481. Effect of Regulations Known to Passenger.—It has been held that where the passenger knew of a regulation of the carrier forbidding baggage men to receive jewelers' sample cases for carriage as ordinary baggage, without the execution of a bond to release the carrier from liability in case of loss, he could not recover for the loss of the samples, though the carrier's own agent induced its baggage man to receive the samples without the bond.[85] And a railroad company which does not assume the transportation of dogs, but permits its baggage masters to take charge of them as a matter of accommodation, and for a fee retained by the baggage master, is not liable as a common carrier to one with notice of its rules, if the dogs come to harm.[86]

§ 3482. Contributory Negligence of Passenger.—Where a passenger's negligence contributes to cause the loss of or injury to his baggage, for which he sues, he can not, as a general rule, recover therefor against the carrier.[87] Thus,

80. **Paying overweight charges.**—Illinois Cent. R. Co. *v.* Matthews, 72 S. W. 302, 24 Ky. L. Rep. 1766, 114 Ky. 973, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

81. **Packing articles in laundry basket.**—St. Louis, etc., R. Co. *v.* Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A., N. S., 634.

82. **Knowledge of baggage agent of connecting road.**—Toledo, etc., R. Co. *v.* Bowler, etc., Co., 19 Am. & Eng. R. Cas., N. S., 574, 63 O. St. 274, 58 N. E. 813.

83. **Money intrusted for safe-keeping to carrier or its servants.**—Whitmore *v.* Caroline, 20 Mo. 513.

It has been held that a sealed letter with bank notes inclosed, delivered by a passenger to the clerk of a steamboat for safe-keeping, is simply a contract of deposit between them, and the steamboat is not liable for loss of the notes. Wilcox *v.* Philadelphia, 9 La. 80, 29 Am. Dec. 436.

84. Dunn *v.* Branner, 13 La. Ann. 452.

Money was intrusted to the owner of a steamboat by a passenger, who paid no more than the regular fare. There was a great crowd. Two boats lying near had just been robbed. The money was stolen from the safe, and the extra watchman employed about the boat was not produced as a witness. Held, that the owner was liable as a mandatory, and that there was evidence of a want of the ordinary care called for under the circumstances to sustain a verdict for the plaintiff. Jenkins *v.* Motlow, 33 Tenn. (1 Sneed) 248, 60 Am. Dec. 154.

85. **Effect of regulation known to passenger.**—Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042, 20 Am. & Eng. R. Cas., N. S., 466.

86. Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20.

87. **Contributory negligence of passenger.**—*United States.*—The John Brooks, Fed. Cas. No. 7,335, 1 Hask. 439.

Colorado.—Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627.

Louisiana.—Gonthier *v.* New Orleans, etc., R. Co., 28 La. Ann. 67, 69.

New Hampshire.—Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

New York.—Burkett *v.* New York, etc., R. Co., 53 N. Y. S. 394, 24 Misc. Rep. 76.

Texas.—Bonner *v.* Grumbach, 2 Tex. Civ. App. 182, 21 S. W. 1010.

Wisconsin. — Gleason *v.* Goodrich

where, a passenger who had placed his coat, containing money, in an unoccupied seat, just before the coach turned over, recovered his coat shortly after he had gotten out of the overturned coach, and immediately missed his money, his failure to notify the carrier of his loss, or to make any effort to find it, will preclude a recovery.[88] And, where a passenger's property is stolen from his stateroom by reason of his neglect to lock and bolt his stateroom door, the carrier is not liable.[89] It has been held that where one delivered articles to a ticket master, with no label on them so as to show their owner or place of consignment, the company is not liable for their loss, though the ticket master promised to put a label on them, such promise not being binding on the company.[90] But the fact that a passenger negligently leaves valuables in a car does not, necessarily, relieve the carrier from responsibility for their safety.[91] And the fact that a passenger on a train takes off his coat and places it on an unoccupied seat is not such contributory negligence as will prevent his recovering for money therein contained, lost by the overturning of the coach into the water.[92] Nor was a passenger whose baggage was stolen from an insecurely fastened baggage room, where the carrier had stored it, negligent, so as to defeat his recovery, because he omitted to claim the baggage for two days.[93] And a woman passenger, who has delivered a suit case to a trainman to assist her from the train on his assurance that the train was about to stop at her station, is not guilty of contributory negligence if, after about fifteen minutes has passed and the train has not stopped, she does not seek out the trainman and retake the suit case, and keep it until the train reaches the station.[94] A passenger, prima facie entitled to recover of a carrier for loss of property contained in a suit case delivered to the carrier's employee, is not precluded by the fact that the suit case was neither locked nor fastened except by the catches when delivered to the employee, since contributory negligence in its ordinary sense has no application where the plaintiff shows delivery to defendant and failure to redeliver, and no explanation or excuse is given by the carrier, since it is only as a part of the explanation required of the bailee that it becomes material.[95]

Transp. Co., 32 Wis. 85, 14 Am. Rep. 716. In Talley *v.* Great Western R. Co., L. R. 6 C. P. 44, a passenger got out of a railway coach for refreshments, leaving his portmanteau in the coach. On returning he failed to find his coach, and so got into another. At the end of his journey he recovered his portmanteau, but found that it had been rifled of a portion of its contents. It was held that the passenger had been guilty of contributory negligence in failing to take reasonable care of his baggage and that the railway company was discharged.

A passenger riding on a pass who bases his right to recover for loss of his gun from his bundle checked as baggage only on the principle that the carrier is liable for such negligence as would charge a gratuitous bailee, can not prevail, notwithstanding evidence of the carrier's negligence, where contributing therewith to the loss was the passenger's own wrongful act in presenting to the baggage agent the bundle without divulging its contents, when the rule of the carrier forbade the checking of a weapon except when inclosed in a proper case. Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627.

88. Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

89. Failure to lock door of stateroom.—The John Brooks, Fed. Cas. No. 7,335, 1 Hask. 439.

In American Steamship Co. *v.* Bryan, 83 Pa. 446, the valise of the plaintiff was stolen from his stateroom while he slept, he having left the door open for ventilation. He had no key to the door, but could have had one on application. The carrier was held not liable.

90. Failure to label baggage.—Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

91. Leaving valuables in car.—Bonner *v.* De Mendoza, 4 Texas App. Civ. Cas., § 234, 16 S. W. 976.

92. Placing coat on seat.—Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

93. Delay in claiming baggage.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

94. Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150, affirming judgment 122 N. Y. S. 123, 137 App. Div. 532, which affirms 118 N. Y. S. 735, 64 Misc. Rep. 478.

95. Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150.

Failure to Comply with Rule.—A carrier of passengers may establish any reasonable regulation for the safety of baggage, and is not liable where a passenger loses his baggage through his own neglect or refusal to comply with it.[96]

Improper Packing.—If the manner in which a passenger's baggage is packed for transportation by the owner is obviously objectionable, the carrier must make the objection a reason for refusing to receive the property. The full liability of the carrier attaches when the property passes, with its assent, into its possession, and is not affected by the manner in which it is loaded.[97]

§ 3483. Baggage of Ejected Passenger.—In ejecting a passenger from a railway train, employees of the company have no right to place the baggage of the passenger in a place where it will be injured.[98] And a passenger being ejected from a railway train has the right to use such force as is necessary to prevent his baggage from being injured.[99]

§§ 3484-3492. Transportation and Delivery to Passenger and Termination of Liability—§ 3484. When Baggage Must Be Carried.—The obligation of a carrier as to baggage is to transport the same to its destination within a reasonable time after it has received and checked such baggage.[1] It is held that railroad companies, in the absence of an express or implied contract provision on the subject, are under obligation to transport a passenger's baggage in a car annexed to the passenger train in which the passenger himself goes,[2] if the passenger has allowed the carrier's agent a reasonable time for checking and getting the same on board the train after the purchase of his ticket.[3] But it is also held that if the carrier sees proper to carry the baggage of a passenger in another train than that by which he is carried to his destination, no objection can be made, provided the baggage is delivered at the time the passenger reaches his destination.[4] And a carrier's practice of giving checks in exchange for transfer company checks amounts to an agreement to receive the baggage when it arrives and check it to its destination seasonably, and contemplates that it may not go by the train the passenger takes.[5]

Contributory Negligence of Passenger.—The passenger may be guilty of such contributory negligence as will defeat a recover for delay in the delivery of baggage.[6]

96. **Failure to comply with rule.**—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

97. **Improper packing.**—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

98. **Baggage of ejected passenger.**—Gulf, etc., R. Co. *v.* Moody (Tex. Civ. App.), 30 S. W. 574.

99. **Right of passenger to prevent injury to baggage.**—Gulf, etc., R. Co. *v.* Moody (Tex. Civ. App.), 30 S. W. 574.

1. **Duty to transport promptly.**—Logan *v.* Pontchartrain R. Co. (La.), 11 Rob. 24, 43 Am. Dec. 199; Brooks *v.* Northern Pac. R. Co., 58 Ore. 387, 114 Pac. 949; St. Louis, etc., R. Co. *v.* Ray, 13 Tex. Civ. App. 628, 35 S. W. 951.

2. **Upon same train.**—Glasco *v.* New York Cent. R. Co. (N. Y.), 36 Barb. 557.

3. **Reasonable time for checking baggage.**—Conheim *v.* Chicago, etc., R. Co., 101 Minn. 312, 116 N. W. 581, 17 L. R. A., N. S., 1091, 15 Am. & Eng. Ann. Cas. 389.

Where a passenger purchased a ticket for a certain train, and had his trunk checked twenty minutes before train time, it was the duty of the railroad company to carry the trunk on the same train with its owner, and a failure to do so was negligence. Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462.

4. Sullivan *v.* Southern Railway, 74 S. C. 377, 54 S. E. 586.

In the early development of railroads it was regarded as necessary for the passenger to accompany his baggage for the purpose of identifying it and receiving it when it reached its destination. This is still necessary in England and other countries, where the system of checking does not prevail. But now carriers in this country frequently refuse to take baggage on trains which carry passengers, and give notice of this fact in their time-tables. Adger *v.* Blue Ridge Ry. Co., 71 S. C. 213, 50 S. E. 783, 110 Am. St. Rep. 568.

5. **Giving checks in exchange for transfer checks.**—Moffatt *v.* Long Island R. Co., 107 N. Y. S. 1113, 123 App. Div. 719.

6. **Contributory negligence.—Failure to examine check.**—Plaintiff, a merchant tailor in O., preparatory to sending one of his clerks to J. on business, packed a

§ 3485. Packing and Conveyance.—The duty to see that the packing of baggage and its conveyance are such as to secure its safety rests upon the carrier.[7]

§ 3486. Notice of Arrival at Destination.—Where a passenger is informed of the time of the arrival of his baggage, no notice of its arrival is necessary to relieve the carrier from a common carrier's liability.[8]

§ 3487. Time, Place and Manner of Delivery.—The carrier is bound as such to carry the baggage to the place of destination, and to deliver it there in a reasonable time, and in a reasonable manner.[9] And it owes to a passenger alighting at a station reasonable facilities for the reception of his baggage by whoever is to transport it further.[10] Where baggage has reached its final destination, the railroad company must, upon its arrival, have it ready for delivery upon the platform, at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it.[11] And where baggage is accompanied by the owner, as the carrier has a right to suppose will be the case, when the journey has been safely made, the carrier may at once deliver to him his baggage.[12] A railroad company, however, is entitled to a reasonable time within which to deliver the baggage. What will constitute a reasonable time in this respect must necessarily vary according to circumstances.[13] It has been held that the fact that a passenger calls for his baggage on Sunday, during which secular labor is forbidden by law, will not excuse the carrier for failing to deliver it on that day.[14] And the custom of a carrier to keep open an office for the delivery of baggage only during certain hours of the day will not bind a passenger unless he is informed of it.[15]

Failure of Passenger to Inquire for Baggage.—The proprietors of a stage-coach are responsible for the loss of a trunk carried beyond its destination although the owner, after his arrival at the end of his journey, permitted the coach to proceed without any inquiry for his trunk.[16]

Custom as to Place of Delivery.—Where it is the custom of a common carrier to allow the baggage of passengers to be taken in charge by its employees, to be delivered by them at a certain place, they will be liable for the loss of the baggage arising from the neglect of their employees to make the delivery according to custom.[17]

trunk with samples, etc., for him and sent it to the depot by another clerk, who received a check for it, which he gave to the clerk who was going to J. Neither of the two clerks looked at the check. By some mistake, the trunk went to P., whereby its delivery was greatly delayed. Held, that the failure of the clerks to examine the check was negligence, defeating plaintiff's recovery. Gonthier *v.* New Orleans, etc., R. Co., 28 La. Ann. 67, 69.

7. **Packing and conveyance.**—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

8. **Notice of arrival at destination.**—Indiana, etc., R. Co. *v.* Zilly, 26 Ind. App. 569, 51 N. E. 141.

9. **Time, place and manner of delivery.**—Logan *v.* Pontchartrain R. Co. (La.), 11 Rob. 24, 43 Am. Dec. 199; Cary *v.* Cleveland, etc., R. Co. (N. Y.), 29 Barb. 35.

10. **Reasonable facilities for reception of baggage.**—Hedding *v.* Gallagher, 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204.

11. Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

12. Wood *v.* Maine Cent. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339.

13. **Carrier entitled to reasonable time.**—Georgia R., etc., Co. *v.* Phillips, 93 Ga. 801, 20 S. E. 646.

"In some instances a few minutes will be all the time to which the company is entitled. In other instances the lapse of a much longer period before delivering the baggage would not be unreasonable. A passenger alighting from a train at a small country station should be able to get his trunk at once; while a visitor to Chicago during the World's Fair would have had no just cause of complaint against the railroad which landed him in that city if he failed to receive his trunk until after the lapse of several hours." Georgia, R., etc., Co. *v.* Phillips, 93 Ga. 801, 20 S. E. 646.

14. **Demand for baggage on Sunday.**—Stallard *v.* Great Western R. Co., 2 B. & S. 420, 110 E. C. L. 419.

15. **Custom to keep office open during certain hours.**—Stallard *v.* Great Western R. Co., 2 B. & S. 420, 110 E. C. L. 419.

16. **Failure of passenger to inquire.**—Cole *v.* Goodwin (N. Y.), 19 Wend. 251, 32 Am. Dec. 470.

17. **Custom to allow baggage to be delivered at certain place.**—Fisher *v.* Geddes, 15 La. Ann. 14.

Waiver as to Place of Delivery.—A passenger may waive his rights under a contract stipulation requiring the carrier to deliver his baggage at a certain place.[18]

§ 3488. Delivery to Wrong Person.—The carrier is liable where it delivers baggage to one not entitled to receive it.[19] And the carrier is not discharged from liability by a delivery of the baggage upon a forged order after arrival at the passenger's destination.[20]

§ 3489. Time for Removal of Baggage by Passenger.—A passenger is allowed a reasonable time in which to call for and take his baggage upon reaching his destination;[21] and it is his duty to call for his baggage within a reasonable time.[22] What constitutes such reasonable time depends on the particular facts and circumstances of each case.[23] If a passenger is informed that his baggage has not arrived on the train he came on and he gives no directions concerning it and no information to identify himself so notice of its arrival can be given, it is his duty to make inquiry for it the first convenient opportunity after the arrival of the next train and within a reasonable time.[24] It is not negligence for a passenger to go to his hotel near by and then to send back within a reasonable time for his baggage.[25] It has been held that the fact that a passenger arrives at his destination on Sunday, during which secular labor is forbidden by law, will not excuse him for not calling for his baggage until Monday.[26] Where a passenger knew

18. Waiver as to place of delivery.—Patten *v.* Johnson, 131 Mass. 297.

A. hired of a common carrier a hack and driver to take himself and two trunks to a house on a certain street, at each end of which were posts so placed that the hack could not enter. A. told the carrier that he would help the driver with the trunks, although the carrier proposed to send another man for that purpose. On arriving at the entrance to the street, A. went into the house with a valise, leaving the driver to unload the trunks, and then returned and suggested that they take in the heavier trunk first, to which the driver assented, saying, "I will set the other in here," putting the smaller trunk inside of the posts. On their return from carrying the larger trunk into the house, the other was gone, and had never been found. Held, that a finding that A. had waived a delivery of the trunks at the house was warranted by these facts. Patten *v.* Johnson, 131 Mass. 297.

19. Delivery to wrong person.—A street railway company which, according to its regulations, took charge of a passenger's hand bag, which she had left in the car, and delivered it to the wrong person, was liable for its conversion. Morris *v.* Third Ave. R. Co. (N. Y.), 1 Daly 202, 23 How. Prac. 345.

Plaintiff, having bought tickets of defendant railroad company for himself and family, pointed out to the baggage master their baggage, consisting of three trunks and two boxes, and they were all checked except one box, a small, rough, pine box, such as is used for merchandise. This box was not checked, for the sole reason that it had no handle or place to which a check could be fastened, but the agent received it, saying that he would place it in the baggage car, and that it would go just as safe. Plaintiff made no misrepresentations, and was not asked as to the contents or value. For some reason it was not placed in the baggage car, but was left behind on the platform, and afterwards put in the baggage room. That evening the night baggage master, who knew that plaintiff intended to have the box go on the train with him, delivered it to one who falsely claimed to have authority to receive it, and at his request it was checked as baggage for him to a place other than that plaintiff had gone to. Held, that the railroad company was liable to plaintiff for the contents of the box. Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

20. Delivery upon forged order.—Powell *v.* Myers (N. Y.), 26 Wend. 591.

21. Time for removal.—Georgia R., etc., Co. *v.* Phillips, 93 Ga. 801, 20 S. E. 646; Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

22. Hurwitz *v.* Hamburg-American Packet Co., 56 N. Y. S. 379, 27 Misc. Rep. 814; Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Chicago, etc., R. Co. *v.* Addizoat, 17 Ill. App. 632; Holdridge *v.* Utica, etc., R. Co. (N. Y.), 56 Barb. 191.

23. What constitutes reasonable time.—See post, "What Constitutes Reasonable Time for Removal of Baggage," § 3501.

24. Chicago, etc., R. Co. *v.* Addizoat, 17 Ill. App. 632.

25. Contributory negligence.—Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225.

26. Arrival on Sunday.—Jones *v.* Norwich, etc., Transp. Co. (N. Y.), 50 Barb. 193.

that the carrier's depot was usually closed soon after the time of his arrival, and he made no effort to remove his baggage therefrom, and did not ask that the station be kept open until he had had an opportunity to take it away, he can not complain that, because of the closing of the depot, he had no opportunity to obtain it.[27]

§ 3490. Duty to Care for Baggage until Reasonable Time for Removal.—If the passenger does not call for his baggage at once after its arrival at its destination, the carrier must place it in a suitable and secure baggage room or warehouse, and is responsible for it as a common carrier while it is there, until the passenger has had a reasonable time and opportunity to remove it.[28]

§ 3491. Termination of Liability.—Effect of Delivery to Owner or Agent.—A delivery of baggage by a carrier at the end of its route to the owner or to his agent terminates the liability of the company.[29] A through passenger over connecting lines of transportation, however, who avails himself of the privilege, accorded to all passengers over such lines, of stopping overnight at certain specified points, is entitled to have his baggage carried to his lodgings, and, if he redelivers it the next morning to the carrier, the continuity of bailment is not broken.[30]

Expiration of Reasonable Time for Delivery.—The liability of a common carrier as such for the baggage of a passenger is terminated upon the expiration of a reasonable time for its delivery after arrival at destination; it then becomes liable as a warehouseman only.[31] As to what constitutes such reasonable time, see post, "What Constitutes Reasonable Time for Removal of Baggage," § 3501.

27. **Right to complain of lack of opportunity.**—Graves *v.* Fitchburg R. Co., 51 N. Y. S. 636, 29 App. Div. 591.

28. **Duty to care for baggage until reasonable time for removal.**—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468; Bartholomew *v.* St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45; Chicago, etc., R. Co. *v.* Fairclough, 52 Ill. 106; Matteson *v.* New York, etc., R. Co., 76 N. Y. 381; Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133.

29. **Termination of liability.—Effect of delivery.**—Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

As a general rule, a carrier of passengers, in order to terminate his responsibility for the baggage of a passenger, must deliver it to him. Matteson *v.* New York Cent. & H. R. R. Co., 76 N. Y. 381; Oumit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

30. Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

31. **Expiration of reasonable time for delivery—Liability as warehouseman.**—*United States.*—Wiegand *v.* Central R. Co., 75 Fed. 370.

Alabama.—Central, etc., R. Co. *v.* Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240.

Arkansas.—Kansas, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111.

Georgia.—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

Illinois.—St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321; Chicago, etc., R. Co. *v.* Fairclough, 52 Ill. 106.

Iowa.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Kentucky.—Louisville, etc., R. Co. *v.* Mahan, 8 Bush 184; Wald *v.* Louisville, etc., R. Co., 92 Ky. 645, 18 S. W. 850, 13 Ky. L. Rep. 853, 58 Am. & Eng. R. Cas. 125.

Massachusetts. — Nealand *v.* Boston, etc., Railroad, 161 Mass. 67, 36 N. E. 592; Norway Plains Co. *v.* Boston, etc., Railway, 1 Gray 263, 61 Am. Dec. 423.

Missouri. — Lin *v.* Terre Haute, etc., Railroad, 10 Mo. App. 125; Cohen *v.* St. Louis, etc., R. Co., 59 Mo. App. 66; Ross *v.* Missouri, etc., R. Co., 4 Mo. App. 583.

New York.—Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Powell *v.* Myers, 26 Wend. 591; Cary *v.* Cleveland, etc., R. Co., 29 Barb. 35; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Burgevin *v.* New York, etc., R. Co., 69 Hun 479, 23 N. Y. S. 415, 52 N. Y. St. Rep. 617; Hart *v.* Rensslaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Mattison *v.* New York Cent. R. Co., 57 N. Y. 552; Fairfax *v.* New York, etc., R. Co., 67 N. Y. 11.

North Carolina.—Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 51 S. E. 973, 139 N. C. 382, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

Pennsylvania. — National Line Steamship Co. *v.* Smart, 107 Pa. 492.

Texas.—Gulf, etc., R. Co. *v.* Jackson, 4 Texas App. Civ. Cas., § 47, 15 S. W. 128; Galveston, etc., R. Co. *v.* Smith

§ 3492. Carriers' Agents.—Who Are Agents.—The person provided by a carrier to care for baggage is the agent of the carrier, although he may not be one of the crew, or paid by the carrier, but a porter who receives his compensation from the passenger.[32] A passenger in a railroad train has a right to regard the man who handles and takes charge of the baggage on the arrival of the train at a station as the authorized agent of the company on whose road he is traveling, and notice to such person as to the destination of the baggage is notice to the company.[33] Where a railroad company delivers all of its baggage to a union depot company, to be cared for and delivered to passengers on presentation of checks, it makes such depot company its agent for such purpose.[34] Where a railway company had been in the habit for years of stopping all its trains to discharge passengers and baggage at the station of another company, whose agent cared for the baggage on its trains, and checks for such baggage were required to be surrendered on the train, it was held that the agent at such station was the agent of the railway company so delivering the baggage, and not of the owner.[35]

Authority of Agents.—A baggage master, as such, has no authority to contract for carriage beyond his company's route.[36] And directions given by a baggage master concerning the delivery of baggage will not bind the railroad company, if given off the company's premises, and by the baggage master while engaged in the transaction of his private business.[37] As to the authority of agents to make special contracts for the transportation of baggage, see ante, "Authority of Carriers' Agents," § 3447.

§§ 3493-3496. Limitation of Liability—§ 3493. A Power to Limit Liability.—A common carrier of passengers may contract for a reasonable limitation of its common-law liability for loss of or damage to baggage not resulting from its own negligence or that of its servants.[38] Thus, is is held that by a

(Tex. Civ. App.), 24 S. W. 668; S. C., 81 Tex. 479, 17 S. W. 133.

Virginia.—Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A., N. S., 183.

Wisconsin. — Hoeger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271, 21 Am. & Eng. R. Cas. 308; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

Canada.—Vineburg *v.* Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

32. Person provided by carrier—Paid by passenger.—Perkins *v.* Wright, 37 Ind. 27.

33. One who takes charge of baggage.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646, cited in Campbell *v.* Missouri Pac. R. Co., 78 Neb. 479, 111 N. W. 126.

34. Union depot company.—Jacobs *v.* Tutt, 33 Fed. 412.

35. Agent of other company.—Campbell *v.* Missouri Pac. R. Co., 78 Neb. 479, 111 N. W. 126.

36. Authority of agents.—Marmonstein *v.* Pennsylvania R. Co., 34 N. Y. S. 97, 68 N. Y. St. Rep. 172, 13 Misc. Rep. 32.

37. Chillicothe *v.* Raynard, 80 Mo. 185.

38. May contract for reasonable limitation.—*United States.* — The Majestic, 56 Fed. 244; Ayers *v.* Western R. Corp., 14 Blatchf. 9, Fed. Cas. No. 689; Saunders *v.* Southern R. Co., 128 Fed. 15, 62 C. C. A. 523, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Massachusetts.—Malone *v.* Boston, etc., R. Corp., 12 Gray 388, 74 Am. Dec. 598.

Michigan. — American Transp. Co. *v.* Moore, 5 Mich. 368.

Montana. — Rose *v.* Northern Pac. R. Co., 35 Mont. 70, 88 Pac. 767, holding that under Civ. Code, § 2892, providing that the liability of a carrier for baggage received with a passenger is the same as that of a carrier of property, a carrier may lawfully contract to limit its liability for loss of a passenger's baggage, provided the limitation is reasonable. Rose *v.* Northern Pac. R. Co., 88 Pac. 767, 35 Mont. 70.

New York.—Bissell *v.* New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Moore *v.* Evans (N. Y.), 14 Barb. 524.

Ohio.—Davidson *v.* Graham, 2 O. St. 131.

Pennsylvania.—Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533; Bingham *v.* Rogers (Pa.), 6 Watts & S. 495, 40 Am. Dec. 581; Atwood *v.* Reliance Transp. Co. (Pa.), 9 Watts 87, 34 Am. Dec. 503; Farnham *v.* Camden, etc., R. Co., 55 Pa. 53.

Tennessee.—Dillard Bros. *v.* Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Wisconsin.—Morrison *v.* Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599.

England.—Rumsey *v.* Northeastern R. Co., 14 C. B. N. S. 641.

special notice brought to the knowledge of the owner the carrier may qualify his liability for loss of brittle, perishable, or unusually valuable articles; and that by special contract the carrier may relieve himself from loss by fire.[39] It is held that a statute declaring that no railroad shall exempt itself from liability as a carrier by any contract, does not apply to rule that a company's baggage men should not receive jewelers' sample cases for transportation as ordinary baggage unless the owner had secured a permit from the company.[40]

Amount of Recovery.—The carrier may, by an express or implied contract, limit its liability on account of a passenger's baggage to a reasonable amount.[41] Where a ticket limits the liability for loss or injury to baggage to a certain amount unless the passenger declares and pays additional compensation, such a limitation is void where the right to declare and pay for a greater amount of baggage is burdened with conditions void because against public policy.[42] Where a passenger pays extra compensation for the transportation of his trunk, a limitation in his ticket of the damages recoverable for loss of baggage will not preclude a recovery in excess of such limitation, since his right to recover depends on the agreement.[43]

Losses Caused by Negligence.—According to the weight of authority in the United States, a common carrier can not, even by express contract, exempt itself from liability for the loss of or injury to a passenger's baggage caused by its negligence or that of its servants.[44] Thus, exemptions in a ticket seeking unequivocally to relieve a carrier from the initial duty of furnishing a seaworthy vessel, for all negligence in loading or stowing and for any and every fault of

39. Smith *v.* North Carolina R. Co., 64 N. C. 235.

40. Code, § 2074; Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042, 20 Am. & Eng. R. Cas., N. S., 466.

41. **Limitation of amount of recovery.**—The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. Ed. 1039; Kansas, etc., R. Co. *v.* Rodebaugh, 38 Kan. 45, 15 Pac. 899, 34 Am. & Eng. R. Cas. 219, 5 Am. St. Rep. 715; Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246; Jacobs *v.* Central R. Co., 208 Pa. 535, 57 Atl. 982, 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562.

Where the passenger does not disclose and pay for a greater value the amount of recovery that may be had for the loss of his baggage may be limited by the carrier. Jacobs *v.* Central R. Co., 208 Pa. 535, 57 Atl. 982, 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562.

The carrier, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with a statute or its duties to the public, may protect itself against liability as an insurer of his baggage which exceeds a fixed amount in value, except upon additional compensation proportioned to the risk. Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. Ed. 1039.

42. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190.

43. **Extra compensation.**—Trimble *v.* New York, etc., R. Co., 57 N. Y. S. 437, 39 App. Div. 403, order affirmed in 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115, 17 Am. & Eng. R. Cas., N. S., 176.

44. **Limitation of liability for losses caused by negligence.—United States.**—The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190; Saunders *v.* Southern R. Co., 128 Fed. 15, 62 C. C. A. 523, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

Indiana.—Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640.

Massachusetts. — French *v.* Merchants', etc., Transp. Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A., N. S., 1006.

Oregon.—Homer *v.* Oregon, etc., R. Co. (Utah), 128 Pac. 522; Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Pennsylvania.—Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 532.

Tennessee.—Dillard Bros. *v.* Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Texas.—International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

A ticket issued to a person at a reduced rate and limiting liability for baggage to wearing apparel not exceeding one hundred dollars in value does not relieve the carrier from accountability for the value of the baggage lost through the negligence of its agents. Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818; International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

commission or omission on the part of a carrier or its servants, are void.[45] And a railroad company can not limit its responsibility for a passenger's baggage to a specified sum, and thus exempt itself from all liability for the willful default or tort of its servants, although such stipulation be made by special contract.[46] But in New York the carrier may, by special contract, exempt itself from liability for loss of or injury to baggage resulting from the negligence of itself or its employees.[47]

Free Passes.—It is held that the issuance of a "free ticket" by a railroad company to a passenger containing the following writing: "The person accepting this free ticket, in consideration thereof, assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of the negligence of their agents, or otherwise, for any injury to the person or property," does not exempt the company from liability for the loss of baggage of the passenger occasioned by the negligence, or willful default or tort of its servants.[48] It has been held, however, that where plaintiff was traveling on a pass under an agreement thereon that the railroad company should not be liable for damage to property of such person by negligence of its agents or otherwise, such person could not recover for loss of baggage, except for willful misconduct.[49] In Georgia, one who receives from a carrier a pass over its line, issued on condition that the person accepting it agrees that the company shall not be liable under any circumstances for injury to the person or damage to the property, can not recover the value of baggage lost while traveling on the pass.[50]

Power to Limit Liability to Own Line.—See post, "Power to Limit Liability to Own Line," § 3509.

§ 3494. Manner of Limiting Liability.—A carrier can limit its common-law liability for loss of or injury to baggage only by express contract with the passenger, or by his express or implied assent to a notice or regulation brought to his knowledge.[51] A passenger, not assenting to a contract limiting the carrier's

45. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190.

46. Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

47. **New York rule.**—Gardiner *v.* New York, etc., R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A., N. S., 826, affirming order 123 N. Y. S. 865, 139 App. Div. 17, and answering certified question 125 N. Y. S. 1121, 140 App. Div. 907; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453.

48. **Free pass.**—Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

49. Hutto *v.* Southern Railway, 55 S. E. 445, 75 S. C. 295.

50. **Georgia doctrine.**—Holly *v.* Southern R. Co., 119 Ga. 767, 47 S. E. 188.

51. **Necessity for notice to and assent of passenger.** — *United States.*—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. Ed. 1039; Wiegand *v.* Central R. Co., 75 Fed. 370, judgment affirmed in 79 Fed. 991, 25 C. C. A. 681.

Arkansas.—Little Rock, etc., R. Co. *v.* Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. Rep. 67, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664.

Indiana.—Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640.

Iowa.—Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77.

Kansas.—Kansas, etc., R. Co. *v.* Rodebaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715, 34 Am. & Eng. R. Cas. 219.

Louisiana.—Logan *v.* Pontchartrain R. Co., 11 Rob. 24, 43 Am. Dec. 199.

Maine.—Bean *v.* Green, 12 Me. 199.

Massachusetts.—Malone *v.* Boston, etc., R. Corp., 12 Gray 388, 74 Am. Dec. 598; Hooker *v.* Boston, etc., Railroad, 209 Mass. 598, 95 N. E. 945.

New Hampshire. — Lessard *v.* Boston, etc., Railroad, 45 Atl. 712, 69 N. H. 648.

New York. — Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Cole *v.* Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Camden, etc., Transp. Co. *v.* Belknap, 21 Wend. 354; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 3 Am. R. Rep. 528, 8 Am. Rep. 543; Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153, affirming 42 N. Y. Super. Ct. 353; Gardiner *v.* New York, etc., R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A., N. S., 826; Prentice *v.* Decker, 49 Barb. 21; Hutchins *v.* Pennsylvania R. Co., 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537, affirming 86 N. Y. S. 1138, 92 App. Div. 612.

North Carolina.—Smith *v.* North Carolina R. Co., 64 N. C. 235.

Ohio.—Baltimore, etc., R. Co. *v.* Camp-

liability for baggage, is not bound thereby, even though the limitation be reasonable.[52]

Provisions in Check.—Acceptance of a check containing a limitation of the carrier's liability for loss of baggage will not in itself establish a contract for such limitation;[53] the passenger is not bound unless he had other notice of the restriction.[54] Where plaintiff delivered to defendant a trunk containing merchandise to be carried from the depot to a hotel, and received a check with the general object printed thereon in large letters, while in very small type was printed that the check was "good for ordinary personal baggage," it was held that the qualification was not such notice as would affect defendant's liability as a carrier, and defendant was liable for loss of the merchandise.[55]

Provisions in Ticket.—Where a passenger fully understands a clause in a ticket bought at a reduced rate, fixing a valuation on baggage and limiting the carrier's liability to such amount, which provision is not unreasonable, the provision is binding, though the carrier fixes the valuation without negotiation and without express tender of opportunity to name a different valuation.[56] Where a passenger accepts an excursion ticket in the form of a paper of some size, setting forth on its face clearly, prominently and legibly, a reasonable limitation of the carrier's liability as to baggage, unless special agreement be made, the passenger is presumed to have read the ticket, and will be bound by the limitation.[57] Where one who could neither read nor write and was not informed by any one, purchased a railroad passenger ticket containing a limitation of the liability of the carrier in respect to loss of baggage, it was held that he was not bound by the restriction.[58] A passenger in accepting and using a ticket for an ocean voyage known as a "Passenger's Contract Ticket," even if he did not read it, will be conclusively held to have assented to its terms.[59] Under the Montana statute, in the absence of fraud, a passenger signing a ticket containing stipulations limiting the liability of the carrier can not urge that he was not aware of the stipulations.[60]

General Notice.—A carrier may limit his liability for the loss of or injury to baggage by a general notice, but its terms must be clear and explicit; and the party with whom the carrier deals must be fully informed of the terms and its effect,

bell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

Tennessee. — Walker *v.* Skipwith, 19 Tenn. (1 Meigs) 502, 33 Am. Dec. 161.

Vermont.—Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761, 14 Am. & Eng. R. Cas., N. S., 416.

Virginia.—Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

Canada. — Anderson *v.* Canadian Pac. R. Co., 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624.

52. Black *v.* Atlantic, etc., R. Co., 64 S. E. 418, 82 S. C. 478.

53. **Acceptance of check containing limitation.**—Prentice *v.* Decker (N. Y.), 49 Barb. 21.

Where a passenger in a railroad car, dimly lighted at one end, delivers his baggage checks to an express messenger, and receives in return a card on which the number of the check is entered, and which contains an agreement limiting the liability of the express company, printed in much smaller type than that on the rest of the card, and so fine as to be illegible where the passenger is sitting, the limitation does not enter into the contract. Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701. See Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153, affirming 42 N. Y. Super. Ct. 353.

54. Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640.

55. Verner *v.* Sweitzer, 32 Pa. 208.

56. **Provision in ticket understood by passenger.**—Gardiner *v.* New York, etc., R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A., N. S., 826.

57. **Presumed to have read excursion ticket.**—Jacobs *v.* Central R. Co., 208 Pa. 535, 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562, 57 Atl. 982; Graham *v.* Cummings, 208 Pa. 516, 57 Atl. 943.

58. **Passenger unable to read or write.**—Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761, 14 Am. & Eng. R. Cas., N. S., 416.

59. **Passenger's contract ticket.**—Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660. See Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453.

60. **Montana statute.**—Section 2876, Mont. Civ. Code. Rose *v.* Northern Pac. R. Co., 35 Mont. 70, 88 Pac. 767.

so as to impliedly assent to the limitation.[61] So a public notice by a railroad company that all baggage is at the owner's risk, not brought home to the latter, will not exonerate the company from liability as a carrier.[62] And a passenger is not bound by written or printed notices, posted in the boat in conspicuous places, stating the carrier's regulations as to the delivery of baggage, though he is bound by such regulations, if reasonable, when informed of them in fact, whether by reading such notices or otherwise.[63] In New York it has been held that stage coach proprietors can not restrict their liability by a general notice that "the baggage of passengers is at the risk of the owners," brought home to the passenger.[64] It is held that in the absence of any provision in the interstate commerce law as to passengers' baggage, the filing and posting by a carrier, as a part of its schedules for passenger tariff for transportation between states, of a limitation of its liability to loss of baggage not exceeding a certain value, unless a greater value is declared and excess charges paid thereon at time of checking, does not make such limitation an essential part of the rate of transportation of passengers, so as to be binding on a passenger having no knowledge thereof.[65]

Time of Notice and Assent.—To restrict the liability of the common carrier for the loss of or injury to the baggage of a passenger, it must be shown that the passenger had notice of the limitation and expressly or impliedly assented to it before the journey commenced. Discovery of the condition after the journey has commenced will not affect the rights of the passenger.[66] It is held that a notice, limiting the liability of the carrier, printed on the back of a ticket, does not raise a legal presumption that the passenger knew of and assented to such condi-

61. General notice.—Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042, 20 Am. & Eng. R. Cas., N. S., 466; Jones *v.* Voorhees, 10 O. 145; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681; Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533; Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. 208, 84 Am. Dec. 490; Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

It has been held that a general notice of limitation of liability must be such as amounts to actual notice; or shown to have been so conspicuous that the party sought to be affected by it, could not have failed to discover it without gross negligence. Verner *v.* Sweitzer, 32 Pa. 208.

Though a stage owner posted notices that he would not be accountable for baggage unless the fare was paid, and the same entered on the waybill, he was liable for loss of a trunk through negligence, though the fare was not paid; notice not having been brought home to the owner, nor to his servant, who carried it to the stage office. Bean *v.* Green, 12 Me. 422.

Where the notice is in English, which the passenger did not understand, the carrier must prove the knowledge of the passenger of the limitation in the notice. Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681.

62. Logan *v.* Pontchartrain R. Co., (La.), 11 Rob. 24, 43 Am. Dec. 199.

63. Notice posted in boat.—Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

64. New York rule.—Cole *v.* Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Clark *v.* Faxton, 21 Wend. 153; Powell *v.* Myers, 26 Wend. 591; Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455.

65. Interstate commerce.—Hooker *v.* Boston, etc., Railroad, 209 Mass. 598, 95 N. E. 945.

66. Time of assent.—*United States.*—Mauritz *v.* New York, etc., R. Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286.

Louisiana.—Logan *v.* Pontchartrain R. Co., 11 Rob. 24, 43 Am. Dec. 199.

New York.—Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 3 Am. R. Rep. 528, 8 Am. Rep. 543, affirming 2 Abb. Prac., N. S., 220; Prentice *v.* Decker, 49 Barb. 21.

Ohio.—Kent *v.* Baltimore, etc., R. Co., 45 O. St. 284, 12 N. E. 798, 31 Am. & Eng. R. Cas. 125, 4 Am. St. Rep. 539.

Pennsylvania.—Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681.

Virginia.—Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

Where a stage proprietor was in the habit of carrying, in his coaches, persons, and baggage, or packages, regulations of his line, and instructions to his agents, not to receive goods to be carried except as the baggage of passengers, or in the care of passengers, and at the risk of the owner sending them, would not limit his liability for goods received by his agents, unless the owner or his agents was notified of the rule or instructions at the time of the receipt of the goods. Walker *v.* Skipwith, 19 Tenn. (1 Meigs) 502, 33 Am. Dec. 161.

tion before the journey was commenced; and whether the passenger did have actual notice of such condition before starting on the journey, is a question for the jury.[67]

Limitation in Pullman Car Ticket.—A pullman car ticket providing that "wearing apparel or baggage placed in the car will be entirely at the risk of the owner," does not innure to the benefit of the railroad company.[68]

§ 3495. Necessity for Consideration.—To render a stipulation purporting to limit the liability of the carrier for baggage valid, there must be a sufficient consideration, either express or implied.[69]

§ 3496. Construction and Operation of Limitation.—Construction of Stipulations in General.—Contracts limiting the liabilities of carriers for the loss of or injury to baggage are to be construed most strongly against them,[70] and in the light of public policy.[71] The carrier's contract as to baggage is not to be determined alone by the conditions in the ticket, but also by the circumstances of each case.[72]

General Limitation.—It is held that the limitation of liability for loss of baggage contained in a passenger's ticket is not invalid, because the limitation is general in its terms, without reference to negligence; but such limitation will be enforced as to all losses not resulting from the negligence of the carrier.[73] But it is also held that a stipulation in a contract between a passenger and carrier that the baggage liability was limited to wearing apparel only, not exceeding one hundred dollars in value, was not a stipulation of the value of the goods shipped, but limited the liability to one hundred dollars in any case.[74] In New York where a carrier may relieve itself of liability for losses caused by negligence it is held that a clause simply releasing a carrier from liability for loss of goods will not include a case of its own negligence, unless such exemption is expressly and plainly stated; but that a clause in consideration of reduced rates limiting the liability of a carrier to a specified valuation of baggage includes a case of loss or damage arising from negligence without express mention thereof.[75] Where the the negligent delay in transporting the baggage of a passenger was not the proximate cause of a loss of the baggage by fire while the baggage was held at an intermediate point, a general limitation of liability for loss of baggage contained in the passenger's ticket operated to relieve the carrier from liability.[76]

67. Brown *v.* Eastern R. Co. (Mass.), 11 Cush. 97. See Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

68. **Limitation in pullman car ticket.**—Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232.

69. **Necessity for consideration.**—Robert *v.* Chicago, etc., R. Co., 148 Mo. App. 96, 127 S. W. 925; Black *v.* Atlantic, etc., R. Co., 82 S. C. 478, 64 S. E. 418; Dillard Bros. *v.* Louisville, etc., R. Co., 70 Tenn. (2 Lea) 288; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

70. **Construction of contracts limiting liability.** — *United States.* — Hopkins *v.* Westcott, 6 Blatchf. 64, Fed. Cas. No. 6692.

Indiana.—St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302.

New York.—Earle *v.* Cadmus, 2 Daly 237.

Pennsylvania. — Atwood *v.* Reliance Transp. Co., 9 Watts 87, 34 Am. Dec. 503; Bingham *v.* Rogers (Pa.), 6 Watts & S. 495, 40 Am. Dec. 581.

Wisconsin.—Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 23 N. W. 425, 21 Am. & Eng. R. Cas. 70, 53 Am. Rep. 267.

71. **Construed in light of public policy.**—Gomm *v.* Oregon R., etc., Co., 101 Pac. 361, 52 Wash. 685, 25 L. R. A., N. S., 537.

72. **Circumstances of each case considered.**—Gomm *v.* Oregon R., etc., Co., 101 Pac. 361, 52 Wash. 685, 25 L. R. A., N. S., 537.

73. **General limitation of liability.** — French *v.* Merchants', etc., Transp. Co., 85 N. E. 424, 199 Mass. 433, 19 L. R. A., N. S., 1006; Saunders *v.* Southern R. Co., 128 Fed. 15, 62 C. C. A. 523, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

74. Wells *v.* Great Northern R. Co., 59 Ore. 165, 116 Pac. 1070, 34 L. R. A., N. S., 818, denying rehearing 114 Pac. 92.

75. Gardiner *v.* New York, etc., R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A., N. S., 826, affirming order 123 N. Y. S. 865, 139 App. Div. 17.

76. **Negligence of carrier not proximate cause.**—French *v.* Merchants', etc., Transp. Co., 199 Mass. 433, 85 N. E. 424, 19 L. R. A., N. S., 1006.

Limitations Not Applicable.—Under a contract of carriage, limiting the carrier's liability to $100 for loss of baggage, unless a declaration of the value thereof in excess of such sum be made by the passenger "at or before the issue of this contract or at or before the delivery of said luggage to the ship," the declaration need not be made before delivery of the baggage on the ship; and, the baggage having been delivered to the carrier's employees on the wharf without such declaration, for the purpose of having it placed on the ship, and it not having been placed thereon, the limitation does not apply.[77] And where a statute authorized carriers to limit their liability for loss of "goods, merchandise, or baggage" received for transportation by notice "inserted in the bills of lading or receipts given for such merchandise or in the tickets to passengers," a carrier's liability was not limited thereunder with respect to merchandise of a passenger transported in a packing case without extra compensation, where no bill of lading or receipt was given therefor except the passenger's ticket, which limited the company's liability to baggage defined as wearing apparel only.[78]

§§ 3497-3498. Charges and Liens—§ 3497. Charges.—Where a passenger accompanies his baggage, the fare charged for his passage usually includes compensation for its transportation.[79] Of course, it is not material whether the passenger pays for his passage himself, or it is paid for by others, to entitle him to the transportation of his baggage without further charge.[80] Common carriers, however, may, under their specific regulations, and as a condition precedent to a contract for the transportation of a passenger's baggage, require information from him as to its value, and demand extra compensation for any excess beyond that which he may reasonable demand to be transported as baggage under the contract to carry the person.[81] And a passenger has no right to carry as personal baggage, large sums of bullion without paying freight therefor.[82] In the absence of any special agreement, baggage forwarded after the departure of the passenger is liable to the payment of usual freight charges.[83] To charge a carrier for the loss of baggage of a passenger, it is not necessary that the passage money should have been paid in advance.[84] If a passenger, however, does not accompany his baggage, the carrier may claim compensation in advance for its transportation, or may postpone its claim till the delivery and rely on his lien or on the personal responsibility of the owner.[85]

§ 3498. Liens.—A common carrier of passengers has a lien on the baggage of a passenger in its possession and control for any sum due from the passenger for the transportation of either himself or his baggage, or for its storage, growing

77. **Limitation not applicable.**—Holmes *v.* North, etc., Steamship Co., 90 N. Y. S. 834, 100 App. Div. 36, affirmed in 184 N. Y. 280, 77 N. E. 21, 5 L. R. A., N. S., 650.

78. Saleeby *v.* Central R. Co., 184 N. Y. 597, 77 N. E. 1196, affirming 90 N. Y. S. 1042, 99 App. Div. 163, 15 N. Y. Ann. Cas. 353.

79. **Charge for baggage included in passenger's fare.**—The Elvira Harbeck, Fed. Cas. No. 4,424, 2 Blatchf. 336; Wood *v.* Maine Cent. R. Co., 56 Atl. 457, 98 Me. 98, 99 Am. St. Rep. 339; Jones *v.* Voorhees, 10 O. 145; Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818; Bomar *v.* Maxwell, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682.

The price paid by a passenger on a steamboat usually includes the charge for the transportation of his baggage. Perkins *v.* Wright, 37 Ind. 27.

80. **By whom fare may be paid.**—Van Horn *v.* Kermit (N. Y.), 4 E. D. Smith 453.

81. **Extra charge for excess.**—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

82. **Large sum of bullion.**—Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156.

83. **Baggage forwarded after departure of passenger.**—Wilson *v.* Grand Trunk Railway, 56 Me. 60, 96 Am. Dec. 435.

The trunk of one who does not go by the same train on which he expects it checked is received as freight, and the company assumes the duties and liabilities of a common carrier with reference to it, and is entitled to a reasonable compensation for transportation. Graffam *v.* Boston, etc., R. Co., 67 Me. 234.

84. **Necessity for payment of fare in advance.**—Van Horn *v.* Kermit (N. Y.), 4 E. D. Smith 453.

85. The Elvira Harbeck, Fed. Cas. No. 4,424, 2 Blatchf. 336, reversing Fed. Cas. No. 2,005.

out of or connected with such journey.[86] Where, however, a passenger pays the carrier in advance for transportation of baggage, and the carrier, without the assent of the passenger, employs another to perform the service, that other must look to the carrier, and has no lien on the baggage; but otherwise, if the passenger has not paid in advance.[87]

§§ 3499-3505. Carrier as Warehouseman—§ 3499. Baggage Awaiting Transportation.—Where a carrier voluntarily receives trunks containing samples an unreasonable time before the owner intends to take passage, it is liable for their loss as a warehouseman.[88] It has been held, however, that where plaintiff left his trunks with defendant's freight agent for storage overnight, intending the next day to take them to the passenger depot, and have them checked for transportation, but before that time they were lost, defendant, being a gratuitous bailee, was not liable as a warehouseman, in the absence of gross negligence.[89]

§§ 3500-3502. Baggage Awaiting Delivery to Passenger—§ 3500. In General.—The liability of a common carrier as such for the baggage of a passenger, terminates upon the expiration of a reasonable time for the passenger to claim and receive it after its arrival at destination; thereafter, when the baggage has been properly stored, the carrier is liable as a warehouseman only.[90] Failure of a passenger to call for his baggage within a reasonable time after arrival, though terminating the carrier's absolute liability therefor as an insurer, does not absolve it from liability as a warehouseman or bailee for the loss of the baggage

86. Lien on baggage.—Hutchings & Co. *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156, holding that what ever is carried into the passenger car of a railroad as baggage is so far considered in the possession of the conductor or agent of the road as to authorize him to exercise the right of retainer for dues for passage or freight on the article itself.

87. Payment in advance.—Nordemeyer *v.* Loescher (N. Y.), 1 Hilt. 499.

88. Goods awaiting transportation.—Fleischman, etc., Co. *v.* Southern Railway, 56 S. E. 974, 76 S. C. 237, 9 L. R. A., N. S., 519.

89. Gratuitous bailee.—Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548. See Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200.

90. Goods awaiting delivery to passenger.—*United States.*—Wiegand *v.* Central R. Co., 75 Fed. 370.

Alabama.—Central, etc., R. Co. *v.* Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240.

Arkansas.—Kansas, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111.

Georgia.—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

Illinois.—St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321; Chicago, etc., R. Co. *v.* Fairclough, 52 Ill. 106; Bartholomew *v.* St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45; Chicago, etc., R. Co. *v.* Addizoat, 17 Ill. App. 632; Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

Indiana. — Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162.

Iowa.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Porter *v.* Chicago, etc., R. Co., 20 Iowa 73; Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389.

Kansas.—Kansas, etc., R. Co. *v.* Patten, 45 Pac. 108, 3 Kan. App. 338.

Kentucky. — Louisville, etc., R. Co. *v.* Mahan, 8 Bush 184; Young *v.* Smith, 3 Dana 91, 28 Am. Dec. 57; Wald *v.* Louisville, etc., R. Co., 92 Ky. 645, 18 S. W. 850, 13 Ky. L. Rep. 853, 58 Am. & Eng. R. Cas. 125.

Massachusetts. — Norway Plains Co. *v.* Boston, etc., Railway, 1 Gray 263, 61 Am. Dec. 423; Nealand *v.* Boston, etc., Railroad, 161 Mass. 67, 36 N. E. 592.

Mississippi.—Under Code 1892, §§ 3568, 3569, the carrier's duty as such continues absolute until the baggage safely reaches its destination and the passenger has had a reasonable time and opportunity to obtain it. Zeigler Bros. *v.* Mobile, etc., R. Co., 39 So. 811, 87 Miss. 367.

Missouri.—Cohen *v.* St. Louis, etc., R. Co., 59 Mo. App. 66; Ross *v.* Missouri, etc., R. Co., 4 Mo. App. 583; Lin *v.* Terre Haute, etc., Railroad, 10 Mo App. 125.

Nebraska.—Campbell *v.* Missouri Pac. R. Co., 78 Neb. 479, 111 N. W. 126.

New York.—Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. 193; Watkins *v.* New York, etc., R. Co., 16 N. Y. St. Rep. 592, 3 N. Y. S. 946, 55 N. Y. Super. Ct. 570; Cary *v.* Cleveland, etc., R. Co., 29 Barb. 35; Torpey *v.* Williams, 3 Daly 162; Fairfax *v.* New York, etc., R.

through the negligence of its station agent.[91] The obligation of common carriers of passengers and baggage to exercise ordinary care in keeping and preserving property, as to which they have been relieved from their peculiar liability as insurers by the failure of the owner to call for his baggage within a reasonable time, is not a new and independent obligation, arising from the circumstance, accidental and unprovided for, of the property being left in the hands of the carrier, but is imposed by the contract of carriage.[92] During the time in which a railroad company may reasonably detain a passenger's baggage, the relation of carrier and passenger still exists between the parties and the liability of the company does not become that of a mere warehouseman. This is especially true if the passenger himself has exercised due diligence in point of time in calling for his baggage.[93] The carrier's liability as a common carrier continues until a reasonable time after the passenger has had opportunity to take away his baggage, although it may have delivered such baggage to a warehouseman.[94] And in order to remove the responsibility of a common carrier, for baggage, it is its duty to have a baggage master at hand to deliver baggage for a reasonable time after the arrival of a train, and at reasonable hours thereafter.[95] It is held that where upon arriving at his place of destination the passenger leaves his baggage in charge of the carrier, the liability of the carrier, as such, will not be changed to that of warehouseman, until the baggage is stored in a safe and secure warehouse. If the baggage be placed in an insecure room, and is stolen, the carrier will be responsible in that capacity, not as a warehouseman.[96]

Where a carrier retains baggage under his lien for fare, and articles are

Co., 67 N. Y. 11; Powell *v.* Myers, 26 Wend. 591; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Mattison *v.* New York Cent. R. Co., 57 N. Y. 552; Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225; Klein *v.* Hamburg, etc., Packet Co., 3 Daly 390; Mortland *v.* Philadelphia, etc., R. Co., 81 Hun 473, 30 N. Y. S. 1021, 63 N. Y. St. Rep. 215; Burgevin *v.* New York, etc., R. Co., 69 Hun 479, 23 N. Y. S. 415, 52 N. Y. St. Rep. 617; Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447.

North Carolina. — After baggage has been deposited in the usual place of delivery at destination, a sufficient time for the passenger to remove it, the carrier is thereafter only a warehouseman. Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 139 N. C. 382, 51 S. E. 973, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

Pennsylvania. — National Line Steamship Co. *v.* Smart, 107 Pa. 492.

Texas.—Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133; Gulf, etc., R. Co. *v.* Jackson, 4 Texas App. Civ. Cas., § 17, 15 S. W. 128; Galveston, etc., R. Co. *v.* Smith (Tex. Civ. App.), 24 S. W. 668; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33, 16 Am. & Eng. R. Cas. 118.

Vermont.—Onimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

Virginia. — Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A., N. S., 183.

Wisconsin.—Hoeger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 21 Am. & Eng. R. Cas. 308, 53 Am. Rep. 271; Pike *v.* Chicago, etc., R. Co., 40 Wis. 583; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

England.—Patscheider *v.* Great Western R. Co., 3 Ex. D. 154; Penton *v.* Grand Trunk R. Co., 28 U. C. Q. B. 367.

Canada.—Vineburg *v.* Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271; Brown *v.* Canadian Pac. R. Co., 3 Man. (Can.) 496.

91. Central, etc., R. Co. *v.* Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240.

Where a passenger neglects to take baggage from the possession of a railroad company within a reasonable time, the company is subject to a contractual liability to care therefor as warehouseman. Blackmore *v.* Missouri Pac. R. Co., 62 S. W. 993, 162 Mo. 455.

92. Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 8 Am. Rep. 61.

93. Reasonable time of detention by carrier.—Georgia R., etc., Co. *v.* Phillips, 93 Ga. 801, 20 S. E. 646.

94. Delivery by carrier to warehouseman.—Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162.

95. Must be ready to deliver.—Dininny *v.* New York, etc., R. Co., 49 N. Y. 546, 4 Am. R. Rep. 457.

96. Baggage placed in insecure warehouse.—Bartholomew *v.* St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45; Chicago, etc., R. Co. *v.* Fairclough, 52 Ill. 106.

taken therefrom while it is in his possession, he is liable for the loss.[97]

Effect of Custom.—The course of business and practice of the carrier with respect to the custody of baggage after it has reached its final destination is an important element in determining its liability therefor.[98]

§ 3501. What Constitutes Reasonable Time for Removal of Baggage.—What constitutes a reasonable time in which baggage must be removed in order to hold a common carrier liable as such for its loss depends on the particular facts and circumstances of each case.[99] A reasonable time for the removal of baggage is not the same as that allowed for the removal of freight.[1] It is held that the reasonable time, within which the owner must apply for his baggage, when it is transported by the same train on which he himself travels, is directly after its arrival and transfer to the platform, making due allowance for the confusion occasioned by the arrival and departure of the train, and for the delay necessarily caused by the crowd on the platform.[2] It is held that the lateness of the hour makes no difference if the baggage be put upon the platform.[3] And it has been held that the fact that the passenger arrived on Sunday, on which day labor was prohibited by statute, did not extend the reasonable time within which baggage should be removed.[4] A delay of twenty-four hours,[5] or until the day

97. **Retaining baggage under lien for fare.**—Southwestern R. Co. *v.* Bentley, 51 Ga. 311.

98. **Effect of custom.**—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

99. **What constitutes reasonable time.**—*United States.*—Jacobs *v.* Tutt, 33 Fed. 412; Wiegand *v.* Central R. Co., 75 Fed. 370.

Illinois.—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

Iowa.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Dittman, etc., Shoe Co. *v.* Keokuk, etc., R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352.

Kentucky.—Louisville, etc., R. Co. *v.* Mahan, 8 Bush 184.

Mississippi.—Zeigler Bros. *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. 811.

New York.—Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. 193; Nevins *v.* Bay State Steamboat Co., 17 N. Y. Super. Ct. 225; Matteson *v.* New York, etc., R. Co., 76 N. Y. 381; Dininny *v.* New York, etc., R. Co., 49 N. Y. 546, 4 Am. R. Rep. 457; Powell *v.* Myers (N. Y.), 26 Wend. 591.

Vermont.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

Virginia.—Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A., N. S., 183.

Wisconsin.—Tallman *v.* Chicago, etc., R. Co., 136 Wis. 648, 118 N. W. 205, 16 Am. & Eng. Ann. Cas. 711.

Canada.—Vineburg *v.* Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

In determining what will be reasonable time, the customs of the railway and of the station, the manner of transporting baggage therefrom, in short, the peculiar circumstances surrounding each case, must be considered. Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Dittman, etc., Shoe Co. *v.* Keokuk, etc., R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352.

1. **Reasonable time not that allowed for removal of freight.**—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

2. **Directly after arrival.**—Chicago, etc., R. Co. *v.* Addizoat, 17 Ill. App. 632, citing Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Louisville, etc., R. Co. *v.* Mohan (Ky.), 8 Bush 784; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286. See Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646, wherein the court said: "We believe it to be the usual custom to deliver and receive baggage, not only during what is called business hours of the day, but upon the arrival of trains in the night, and at almost any hour of the night. The traveler is rarely willing, after arriving at his destination, to leave his baggage at a railroad depot, and the railway companies are usually desirous to dispatch business, and be relieved from their responsibility. Hence, immediate delivery is the rule as to baggage."

3. **Lateness of hour of arrival.**—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

4. **Arrival on Sunday.**—Jones *v.* Norwich, etc., Transp. Co. (N. Y.), 50 Barb. 193.

5. **Delay of twenty-four hours.**—Where the owner of a valise which had been transported as baggage allowed it to remain in the company's open depot, where baggage was usually kept, without making any arrangement for it, for some twenty-four hours before calling for it, and in the meantime it was stolen, it was held that the liability of the company as carrier ceased upon the arrival of the baggage, and that therefore it was only liable as

after the arrival of baggage,[6] has been held unreasonable. Thus, where baggage arrived in the evening and was placed in the baggage room, according to custom, and could not be found in the morning, the liability of the railway company was that of warehouseman.[7] And where a passenger arrived after eleven o'clock, at night at a station where there were no conveyances running, the nearest being a mile distant, and left his baggage, which he saw on the platform, in the possession of the railway company, and it was destroyed by fire in the warehouse of the company on the same night at one o'clock, it was held that such passenger had a reasonable time in which to receive and remove the baggage.[8] Where a passenger on a steamboat arriving at one o'clock Sunday morning left the boat at nine o'clock without giving notice, and her baggage which had been placed in a warehouse early in the morning was burned by an accidental fire in the afternoon, it was held that the carrier was liable only as a warehouseman.[9]

Illness of Passenger.—Reasonable time for taking baggage away will not be extended by illness of the passenger, though the carrier may have given him a lay-over ticket on account of his illness.[10]

Convenience of Cabman.—Where a passenger leaves his baggage at the station until the following morning, for no other reason than that his cabman could not conveniently carry it, it is not taking it away within the reasonable time required by law; and in the meantime the liability of the company will be only that of a bailee.[11]

Instances Where Carrier's Liability Not Changed.—It has been held that failure to claim baggage until thirty-six hours after its arrival does not change the carrier's liability for its loss to that of a warehouseman without a showing that the loss was due to the delay.[12] Where a passenger waited after arriving at her destination for fifteen minutes to receive her baggage, the baggage master being absent, and then went away, and sent her son three hours afterwards for it, and he on arriving at the depot found the baggage master still absent, but finally found him, delivered his check, and received the baggage, and in the meantime the conveyance that he employed to remove it had gone, and being unable to procure another, he left the baggage with the baggage master for the night, and during the night the contents of the baggage were stolen, it was held that the liability of the carrier as insurer had not terminated.[13] And where a passenger reached his destination at 7:25 o'clock in the evening of a severe winter day, and his baggage was removed to the station to be weighed and the station was locked an hour later, when the agent left for the night, and there was no reasonable way in which the baggage could have been removed at night, except by breaking the seal of a loaded freight car and making passageway through it, and it did not appear that such passenger knew that that was possible, it was

bailee. Holdridge *v.* Utica, etc., R. Co. (N. Y.), 56 Barb. 191; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736.

6. **Day after arrival.**—It has been held that where a passenger fails to call for a trunk which has been checked on a railroad, until the day after his arrival at his destination, such delay under ordinary circumstances is unreasonable, and relieves the carrier of his responsibility as such, and such carrier is held to assume the duties of a warehouseman thereafter. Wiegand *v.* Central R. Co., 75 Fed. 370.

From the afternoon until between nine and ten o'clock of the next day is not a reasonable time for a passenger to delay demanding his baggage at the place of destination. Jacobs *v.* Tutt, 33 Fed. 412.

7. Campbell *v.* Missouri Pac. R. Co., 78 Neb. 479, 111 N. W. 126.

8. **Arrival late at night—No conveyances running.**—Kansas, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111.

9. Jones *v.* Norwich, etc., Transp. Co. (N. Y.), 50 Barb. 193.

10. **Illness of passenger.**—Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

11. **Convenience of cabmen.**—Vineburg *v.* Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

12. **Failure to claim baggage within thirty-six hours.**—Larned *v.* Central R. Co., 81 N. J. L. 571, 79 Atl. 289.

13. **Where carrier in fault.**—Diminny *v.* New York, etc., R. Co., 49 N. Y. 546, 4 Am. R. Rep. 457.

held, that the carrier was liable, as such, where the goods were destroyed during the night by fire.[14] Where upon plaintiff's arrival at destination about 5 p. m. on Sunday, there being no conveyances at the train, and his baggage being too heavy for him to carry, he left the baggage and the duplicate check therefor with the baggage master, stating that he would send for the grip that evening or the next morning, and it being very inconvenient for him to remove the baggage that evening, even if he could have secured a conveyance, it was not removed until between 8:30 and 9 the next morning, it was held, that a finding that the grip was removed within a reasonable time, so that defendant's liability as a carrier continued until its removal, was proper.[15]

Questions for Court or Jury.—The question what constitutes a reasonable time for the delivery of baggage to a passenger is generally one for the jury to determine from all the facts and circumstances of the case, but if the facts are undisputed, it is for the determination of the court.[16]

§ 3502. Special Contract for Storage.—A railway company's liability respecting baggage is that of a warehouseman, and not a carrier, where the carriage has been completed and a special contract made for storage.[17] So a railroad company in maintaining a parcel room where, for a nominal charge, persons may have their belongings cared for does not act in its capacity as a common carrier, as the articles are not checked for transportation but for safe-keeping and redelivery at the place of deposit, but acts in the capacity of a warehouseman.[18] Where a railroad company held itself out as willing to take charge of a suit case and redeliver it on presentation of a check, and demanded and received a certain compensation, that this compensation was small was of no consequence, its adequacy being a matter for the determination of the parties, and, they having agreed, the courts will not interfere and hold the contract a bailment for accommodation and not for hire.[19] Where a carrier posted in its baggage room at a depot a notice, fixing charges for storage of baggage remaining over 24 hours, and a passenger, with knowledge of and in reliance on the notice, deposited baggage and obtained a claim check, intending to pay and tendering payment of the prescribed charges, the carrier was a bailee for hire, and if it did not intend to avail itself of the right to charge it was required to so inform the passenger at the time he offered the baggage for storage; and hence it was liable for negligent loss of the baggage.[20]

Baggage Retained by Carrier for Accommodation.—It has been held that where the baggage of a passenger has been actually delivered to him at his destination, and he, for his own convenience, delivers it to the baggage master to be kept until sent for, the carrier after that is only liable for gross negligence as a gratuitous bailee.[21] And it has been held that where a passenger tells a station porter that he will leave his luggage at the station for a short time and then send

14. Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 52 S. E. 566, 104 Va. 788, 3 L. R. A., N. S., 183.

15. Tallman *v.* Chicago, etc., R. Co., 136 Wis. 648, 118 N. W. 205, 16 Am. & Eng. Ann. Cas. 711.

16. **When question for court or jury.**—*Iowa.*—Dittman, etc., Shoe Co. *v.* Keokuk, etc., R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352.

Kentucky.—Louisville, etc., R. Co. *v.* Mahan, 8 Bush 184.

Mississippi.—Zeigler Bros. *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. 811.

New York.—Burgevin *v.* New York, etc., R. Co., 69 Hun 479, 23 N. Y. S. 415, 52 N. Y. St. Rep. 617.

Canada.—Brown *v.* Canadian Pac. R. Co., 3 Manitoba L. Rep. 496.

17. **Special contract for storage.**—Yazoo, etc., R. Co. *v.* Hughes, 94 Miss. 242, 47 So. 662, 22 L. R. A., N. S., 975; National Line Steamship Co. *v.* Smart, 107 Pa. 492.

18. **Maintaining parcel room.**—Fraam *v.* Grand Rapids, etc., R. Co., 161 Mich. 556, 126 N. W. 851, 29 L. R. A., N. S., 834, 21 Am. & Eng. Ann. Cas. 96.

19. Fraam *v.* Grand Rapids, etc., R. Co., 161 Mich. 556, 126 N. W. 851, 29 L. R. A., N. S., 834, 21 Am. & Eng. Ann. Cas. 96.

20. Milwaukee Mirror, etc., Works *v.* Chicago, etc., R. Co. (Wis.), 134 N. W. 379.

21. **Baggage retained by carrier for accommodation.**—Minor *v.* Chicago, etc., R. Co., 19 Wis. 40, 88 Am. Dec. 670.

for it, and the porter replies that he will take care of it, this amounts to a delivery of his luggage by the company and a redelivery by the passenger to the porter as his agent; accordingly the company is not liable for the loss of such luggage.[22] It has been held, however, that where a railroad passenger is unable, from lameness, to take away his baggage himself on arriving at his destination, but makes an arrangement with the baggage master to retain it until he can send for it, the railroad company's liability as common carrier continues until it is so sent for.[23]

§ 3503. Baggage Awaiting Delivery to or by Connecting Carrier.—See post, "Liability as Warehouseman," § 3511.

§§ 3504-3505. Duties and Liabilities—§ 3504. In General.—Where a carrier's duty in relation to baggage has become that of a warehouseman, such duty requires the carrier to place the baggage in a proper and suitable place and to exercise ordinary care and diligence in safely keeping it there and in protecting it from exposure to the weather.[24] And the carrier is liable when it fails to store baggage in a secure place.[25] It has been held that no inference of negligence arises from the fact that the carrier had converted a box car into a depot,[26] or that a depot was constructed of pine timber where it was in a small town, and not exposed to any unusual danger from fire.[27] Where baggage is lost by fire, the fact that the agents of the company in charge of the depot failed to take steps to prevent a traction engine near the depot from being moved by steam at night is not evidence of negligence, as there was no reasonable ground to apprehend danger from escaping sparks.[28] Where a carrier maintained two places in its depot for the storage of baggage at slightly different rates, a passenger had the option to select either place, in the absence of any objection by the carrier that the right place was not selected when he tendered the baggage for storage; and the carrier, by accepting it for storage in one place, was estopped from asserting that it should have been taken to the other place.[29]

Keeping Night Watchman.—It has been held that a carrier liable as a warehouseman was under no duty to keep a night watchman at its station in a respectable residence part of the town where there was no lawless element to con-

22. Hodkinson *v.* London & N. W. R. Co., L. R., 15 Q. B. D. 228, W. R. 662, 5 Ry. & C. T. Cas. ix.

23. Curtis *v.* Avon, etc., R. Co. (N. Y.), 49 Barb. 148.

24. **Duties as warehouseman.**—Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 51 S. E. 973, 139 N. C. 382, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

25. **Baggage room insecurely fastened.**—A carrier which received a passenger's baggage on the station platform, and thence stored it in a baggage room which was insecurely closed, and from which the contents of the trunk were stolen, is liable as a warehouseman for failing to store it in a secure place. Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Trunk left in waiting room.—A passenger upon a railroad was promised by an agent of the road that his trunk, which was locked up in the baggage room of another road at the time he wished to start, should be sent by the next train. He inquired for the trunk at the depot the day after his arrival at his destination, and the following day. On the third day it was found that the trunk had been placed in the common passenger room, and while there had been rifled, that room having been broken into in the nighttime, when it was locked and the windows nailed down. Held, that the company was guilty of negligence, even if it was to be regarded as a warehouseman, and was therefore liable for the value of the stolen property. Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389.

26. **Box car used for depot.**—Levi *v.* Missouri, etc., R. Co., 157 Mo. App. 536, 138 S. W. 699.

27. **Depot constructed of pine timber.**—Wald *v.* Louisville, etc., R. Co., 92 Ky. 615, 13 Ky. L. Rep. 853, 18 S. W. 850, 58 Am. & Eng. R. Cas. 125.

28. **Traction engine near depot.**—Wald *v.* Louisville, etc., R. Co., 92 Ky. 615, 13 Ky. L. Rep. 853, 18 S. W. 850, 58 Am. & Eng. R. Cas. 125.

29. **Improper place for storage—Carrier estopped.**—Milwaukee Mirror, etc., Works *v.* Chicago, etc., R. Co. (Wis.), 134 N. W. 379.

tend with.[30] And it is also held that a carrier is not required to keep a night watch about a warehouse, or to have some one to sleep in it, where the average amount of goods stored in it does not exceed five hundred dollars.[31]

§ 3505. Liability Dependent upon Existence of Negligence.—A common carrier of passengers is required to exercise only ordinary care for the safety of a passenger's baggage while it is in its custody as a warehouseman, and so whether or not the carrier is liable as a warehouseman for the loss of or injury to such baggage depends upon whether such injury was the result of negligence for which it was responsible.[32] So a carrier while acting as a warehouseman is not liable for loss of baggage by fire,[33] or theft,[34] without fault on its part.

Gratuitous Bailee.—Where the carrier is liable only as a gratuitous bailee it is not liable for loss of baggage except upon proof of gross negligence on its part.[35]

§§ 3506-3514. Connecting Carriers—§§ 3506-3511. Liability of Initial Carrier—§ 3506. In General.—It is held that the liability of an initial carrier of baggage for its loss or injury, while it is on the line of or being car-

30. Night watchman.—Levi *v.* Missouri, etc., R. Co., 157 Mo. App. 536, 138 S. W. 699.

31. Pike *v.* Chicago, etc., R. Co., 40 Wis. 583.

32. Degree of care—Liability dependent upon existence of negligence.—*Arkansas.*—Kansas, etc., R. Co. *v.* Thomas, 97 Ark. 287, 133 S. W. 1030; Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200; Kansas, etc., R. Co. *v.* McGahey, 38 S. W. 659, 63 Ark. 344, 36 L. R. A. 781, 58 Am. St. Rep. 111.

Georgia.—Georgia R., etc., Co. *v.* Thompson, 86 Ga. 327, 12 S. E. 640; Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81; Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

Illinois.—Bradley *v.* Chicago, etc., R. Co., 147 Ill. App. 397.

Indiana.—Indiana, etc., R. Co. *v.* Zilly, 51 N. E. 141, 20 Ind. App. 569.

Iowa.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389.

Kansas.—Kansas, etc., R. Co. *v.* Patten, 3 Kan. App. 338, 45 Pac. 108.

Kentucky.—Louisville, etc., R. Co. *v.* Mahan, 8 Bush 184; Wald *v.* Louisville, etc., R. Co., 92 Ky. 645, 13 Ky. L. Rep. 853, 18 S. W. 850, 58 Am. & Eng. R. Cas. 125.

Massachusetts.—Nealand *v.* Boston, etc., Railroad, 161 Mass. 67, 36 N. E. 592; Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290.

Michigan.—Fraam *v.* Grand Rapids, etc., R. Co., 161 Mich. 556, 126 N. W. 851, 29 L. R. A., N. S., 834, 21 Am. & Eng. Ann. Cas. 96; Laffrey *v.* Grummond, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. Rep. 624.

Missouri.—Rossier *v.* Wabash R. Co., 91 S. W. 1018, 115 Mo. App. 515.

New York.—Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Robinson *v.* New York, etc., R. Co., 129 N. Y. S. 1030, 145 App. Div. 391, affirmed in 203 N. Y. 627, 97 N. E. 1115; Cary *v.* Cleveland, etc., R. Co. (N. Y.), 29 Barb. 35.

North Carolina.—Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169; Charlotte Trouser Co. *v.* Seaboard, etc., R. Co., 51 S. E. 973, 139 N. C. 382, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

Ohio.—Pennsylvania Co. *v.* Miller, 35 O. St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620.

Pennsylvania.—Hoffard *v.* New York, etc., R. Co., 43 Pa. Super. Ct. 303; National Line Steamship Co. *v.* Smart, 107 Pa. 492; Moyer *v.* Pennsylvania R. Co., 31 Pa. Super. Ct. 559.

Texas.—Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133.

Wisconsin.—Hoeger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271, 21 Am. & Eng. R. Cas. 308.

33. Loss by fire.—Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133; Kansas, etc., R. Co. *v.* Thomas, 97 Ark. 287, 133 S. W. 1030; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736.

A steamboat owner is not liable for loss by accidental fire of a passenger's baggage while stored in a warehouse, after the termination of the carriage, subject to delivery on call and presentation of baggage check. Laffrey *v.* Grummond, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. Rep. 624.

34. Loss by theft.—Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

35. Gratuitous bailee.—*Georgia.*—Southern R. Co. *v.* Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81.

Iowa.—Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548.

Massachusetts.—Clark *v.* Eastern R. Co., 139 Mass. 423, 1 N. E. 128.

Wisconsin.—Minor *v.* Chicago, etc., R. Co., 19 Wis. 40, 88 Am. Dec. 670.

ried by a connecting carrier, depends upon the carrier's express or implied contract for its transportation. Thus, it is competent for a railroad company to contract to carry passengers and their baggage beyond the terminus of its own line, over other roads, and even into other states, than that in which such company is located, and the company thus contracting is liable for loss of or injury to his baggage, on any of the roads over which it has contracted to carry him.[36] When no contract, express or implied, is made by any one of several roads to carry a passenger beyond its own line, each company is liable only for loss or injury happening on its own road.[37]

Running Own Cars Over Connecting Lines.—Where three railroad companies owned distinct parts of a continuous railroad, and ran their cars over the whole road, and employed the same agents to sell tickets, and to receive baggage to be carried over the said continuous road, it was held that a passenger may maintain an action against the company of whose agent he bought his ticket for the loss of baggage received at one end thereof to be transported over the entire road.[38]

Failure to Deliver to Connecting Carrier.—Where a passenger stopped over night at a town where the depot was used by the railroad company which brought her there, and by another company which took her away, and before her departure she gave her trunk check to an employee of the first road, who agreed to put the trunk in proper position for transportation, and it did not get aboard the train, and was lost, it was held that the first company was liable.[39]

Negligence as to Checking Baggage.—Where the initial carrier by mistake checks baggage over the wrong route it is liable for its loss while on such route.[40] And if various railroad companies whose lines connect have arranged together for an excursion train over their several roads, and the company at one end of the route issues tickets with coupons attached for the whole distance, and its agent refuses to give a check for the luggage of a purchaser of such ticket, saying that the same "would be perfectly safe, as he was to go through with them," and the luggage is accordingly put into one of the company's baggage cars, which is sent through the whole distance in charge of its agent, the company is liable

36. **Liability of initial carrier—Contract for through transportation.**—*Kansas.*—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 27 Am. & Eng. R. Cas. 257, 57 Am. Rep. 199.

Massachusetts.—Najac *v.* Boston, etc., R. Co., 7 Allen 329, 83 Am. Dec. 686; Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

New York.—Cary *v.* Cleveland, etc., R. Co., 29 Barb. 35; Kessler *v.* New York Cent. R. Co. (N. Y.), 7 Lans. 62, affirmed in 61 N. Y. 538. See Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61.

Ohio.—Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

Tennessee.—Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218. See Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852.

Washington.—Gomm *v.* Oregon R., etc., Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A., N. S., 537.

Contra.—In Hood *v.* New York, etc., R. Co., 22 Conn. 1, an action for personal injuries, it was held that a carrier has no power to contract for transportation beyond its own line.

37. **Absence of contract to carry beyond own line.**—Kessler *v.* New York Cent. R. Co. (N. Y.), 7 Lans. 62, affirmed in 61 N. Y. 538. See Milnor *v.* New York, etc., R. Co., 53 N. Y. 363, affirming 4 Daly 355.

38. **Running own cars over connecting lines.**—Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447. See Texas, etc., R. Co. *v.* Ferguson, 1 Texas App. Civ. Cas., § 1253, 9 Am. & Eng. R. Cas. 395.

39. **Failure to deliver to connecting carrier.**—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

40. **Negligence as to checking baggage.**—A. bought a ticket from New York to New Orleans over defendant's road to Niagara Falls, thence to New Orleans by the "Mobile Route." A. presented his ticket to defendant's baggage master in New York to have his trunk checked, and the baggage master by mistake checked it by the "Great Jackson Route," on which route it met with a mishap. Held, that defendant was liable, though the baggage master did not have express authority to send baggage by the Mobile route. Isaacson *v.* New York, etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188, reversing 25 Hun 350.

if the luggage is lost anywhere upon the route.[41]

Larceny by Servants of Initial Carrier after Delivery to Succeeding Carrier.—The delivery of baggage by a railroad company to the baggage master of a connecting steamboat line, who was authorized by agreement between the railroad company and the steamboat company to receive upon the trains or at the depot of the railroad company the baggage of through passengers, would not discharge the railroad company from liability on account of the larceny of the baggage by one of its servants, by reason of which it was not delivered at the boat, unless the baggage master was the agent of the passenger.[42]

Usual Practice Determines When Liability Terminates.—Where at the junction of connecting roads it becomes the usual course for the first company to deliver baggage going on over another road to the servants of such other road, the custody of the first as carrier, continues till the custody of the second begins. If the second train does not directly connect and leave on the arrival of the first, and there is a detention at the station for a short period of time, or even for a few hours, the custody of the railroad company thus assumed must be held to continue till the expected train departs, or the servants of the second company take the delivery of the baggage; the usual course of business determining their liabilities in this respect.[43]

§§ 3507-3508. Sale of Through Ticket or Collection of Fare for Entire Route—§ 3507. Holding That Initial Carrier Liable for Losses on Other Lines.—As a general rule, a through ticket over the lines of connecting carriers entitles the passenger to have his baggage transported to his destination.[44] And it seems to be the prevailing rule that a railroad company by merely selling a through ticket over its own and connecting roads, in the absence of a contract limiting its liability to its own line, becomes liable for the safety of the passenger's baggage over the whole route.[45] So, a passenger purchasing a

41. Najac *v.* Boston, etc., R. Co. (Mass.), 7 Allen 329, 83 Am. Dec. 686.

42. Larceny by servants of first carrier after delivery to succeeding carrier.—Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

43. Usual practice determines when liability terminates.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

44. Sale of through ticket.—Gomm *v.* Oregon R., etc., Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A., N. S., 537; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

45. Effect of through ticket on initial carrier liability.—*Arkansas.*—Kansas, etc., R. Co. *v.* Washington, 85 S. W. 406, 74 Ark. 9, 69 L. R. A. 65, 109 Am. St. Rep. 61; Little Rock, etc., R. Co. *v.* Record, 85 S. W. 421, 74 Ark. 125, 109 Am. St. Rep. 67, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664.

District of Columbia.—Croft *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 492.

Florida.—Bennett *v.* Filyaw, 1 Fla. 403.

Georgia.—Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37; Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58; Hawley *v.* Screven, 62 Ga. 347, 35 Am. Rep. 126; Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952; Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441.

Illinois.—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Iowa.—Angle & Co. *v.* Mississippi, etc., R. Co., 9 Iowa 487.

Kansas.—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 27 Am. & Eng. R. Cas. 257, 57 Am. Rep. 199.

New York.—Talcott *v.* Wabash R. Co., 66 Hun 456, 21 N. Y. S. 318, 50 N. Y. St. Rep. 423.

Ohio.—Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

South Carolina.—Bradford *v.* South Carolina R. Co., 7 Rich. L. 201, 62 Am. Dec. 411, distinguished in Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

Tennessee.—Carter *v.* Peck, 36 Tenn. (4 Sneed) 203; Furstenheim *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 238; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227; Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218. See, also, Nashville, etc., R. Co. *v.* Sprayberry, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705.

Virginia.—Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

Wisconsin.—Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

Washington.—See Gomm *v.* Oregon R., etc., Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A., N. S., 537.

England.—Muschamp *v.* Lancaster R. Co., 8 M. & W. 421; Watson *v.* Railway,

through ticket over connecting lines of the agent of the initial carrier and having his trunk checked accordingly, can recover of such carrier for the trunk, although it was shown that there were three connecting roads between his starting point and destination and that the initial carrier had safely delivered the trunk to the second carrier.[46] And it is immaterial to a passenger's right to recover for baggage lost that there was a change of cars at the terminus of the initial carrier's road.[47] Where the proprietors of a line of stages contracted with a railroad company to convey their passengers from one terminus of the road to various points, upon through tickets issued by the railroad company at the other terminus of the road, it was held that the proprietors of the stage line were the agents of the railroad company, and that the latter was liable for baggage lost on the stage line.[48]

Coupon Ticket.—A carrier contracting, without limitation of responsibility, to carry the baggage of a passenger, and giving a check therefor to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage in the same way, and to the same extent as a carrier of goods, although the passenger, whose baggage is thus checked, may purchase and travel upon a coupon ticket.[49]

Collection of Fare for Whole Route.—The collection by the contracting carrier of fare in advance for the entire journey, without agreement as to risks, renders it liable, on receipt of the traveler's baggage, to transport it safely to the end of the route, and there deliver it, on demand, to such owner.[50]

Under the Carmack Amendment to the interstate commerce act, a carrier receiving baggage for transportation to a point in another state beyond its own line is liable for its loss occurring upon the lines of a connecting carrier.[51]

§ 3508. Holding That Initial Carrier Not Liable for Losses on Other Lines.—Some of the cases hold that where a railroad company whose road connects with other roads receives baggage under a through ticket for transportation beyond the termination of its own line, it is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but the company may agree that its liability shall extend over the whole route.[52] The sale of a through ticket is a fact that may be taken into account in determining what the undertaking of the company issuing

15 Jur. 48; Webber *v.* Railway, 3 H. & C. 771. See post, "Effect of Agreements between Connecting Lines and Joint Liability," § 3513; "Presumptions and Burden of Proof," § 3514.

46. Hawley *v.* Screven, 62 Ga. 347, 35 Am. Rep. 126.

47. Effect of change of cars.—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

48. Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

49. Coupon ticket.—Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218. See also, Nashville, etc., R. Co. *v.* Sprayberry, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705.

50. Collection of fare for whole route.—Croft *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 492; Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

51. Interstate commerce act.—Act of Congress, June 29th 1906 amending Act of 1887, House *v.* Chicago, etc., R. Co., 30 S. Dak. 321, 138 N. W. 809.

52. Holding that initial carrier not liable for losses on other lines.—Mauritz *v.* New York, etc., R. Co., 21 Am. & Eng. R. Cas. 286, 23 Fed. 765, citing Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325. See Straiton *v.* New York, etc., R. Co. (N. Y.), 2 E. D. Smith 184; Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852. And see, "Effect of Agreements between Connecting Lines and Joint Liability," § 3513.

In Milnor *v.* New York, etc., R. Co., 53 N. Y. 363, the contracting carrier was sued for a loss occurring off of its line, and the court held it was not liable on the theory that it acted as the agent of the negligent carrier merely for the purpose of selling its tickets. The force of this case as an authority is probably overcome, if, indeed, the theory upon which it rests is not absolutely destroyed, by the later case of Hutchins *v.* Pennsylvania R. Co., 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537, wherein it was cited as controlling in the dissenting opinion. Gomm *v.* Oregon R., etc., Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A., N. S., 537.

the ticket was; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown, as make it evident that it was the understanding and agreement on both sides that the company selling the ticket undertook to be responsible for the safety of the baggage over connecting lines through to its ultimate destination.[53]

§ 3509. Power to Limit Liability to Own Line.—It is held that a carrier selling a ticket over its own and connecting lines may enter into a contract with the passenger limiting its liability for loss of or injury to his baggage to its own line.[54] But it has been held that the sale of a ticket by a carrier to a point beyond its own line renders it liable for the loss of baggage on a connecting line, though the ticket is a coupon ticket, specifying that the company selling it is agent for the connecting line, and shall only be liable for such damages as may occur on its own line.[55] And it has been held that where a carrier sold a passenger a through continuous ticket over its own and connecting lines and return, checking her baggage through to destination, and the baggage was lost by reason of a mistake of the last carrier in checking it for the return trip, the initial carrier was liable for the baggage under its contract of carriage, notwithstanding a limitation of liability to loss on its road only contained in the ticket.[56] It has also been held that although a through ticket given to a passenger specifies on its face, that each party to the contract is only liable for losses on his part of the line, a railroad company is liable for loss on a stage line, the proprietors of which have contracted with the railroad company to carry passengers and their effects to their destination, the proprietors of the stage being agents of the company.[57]

Limitation Held Not Applicable to Baggage.—Where an initial carrier sold tickets over its own and several connecting lines under a special contract which stated that the first company acted as agent, and was not responsible beyond its own line, such limitation, it was held, had reference only to personal injuries, and not to baggage.[58]

§ 3510. Effect of Release of Connecting Carrier.—Where an initial carrier contracted to carry a passenger over its own and several connecting lines so as to become liable for loss of baggage at any point, and the baggage was lost by the second carrier, and the subsequent carriers, on the return of the passenger, made a reduction in the rate, in consideration of release of all liability, it was held that, such subsequent carriers not being liable, the release in no way affected the initial carrier's liability by reducing or discharging it.[59]

§ 3511. Liability as Warehouseman.—Baggage Awaiting Delivery to Connecting Carrier.—Where trains arrive at a late hour of the night, and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning, by the next train, over a connecting road, to put it in their baggage room, and keep it for delivery in the morning to the servants of the other road, when requested to do so by the owner, their custody during the night is that of carriers and not of warehousemen.[60] And the fact that baggage, on its arrival at the connecting

53. Mauritz *v.* New York, etc., R. Co., 21 Am. & Eng. R. Cas. 286, 23 Fed. 765.

54. Power to limit liability to own line.—Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952; Peterson *v.* Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573; Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246; Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. 208, 84 Am. Dec. 490.

55. Talcott *v.* Wabash R. Co., 66 Hun 456, 21 N. Y. S. 318, 50 N. Y. St. Rep. 423.

56. Gomm *v.* Oregon R., etc., Co., 52 Wash. 685, 101 Pac. 361, 25 L. R. A., N. S., 537.

57. Wilson *v.* Chesapeake, etc., R. Co., 62 Va. (21 Gratt.) 654.

58. Limitation held not applicable to baggage.—Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

59. Effect of release of connecting carrier.—Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218.

60. Baggage awaiting delivery to connecting carrier.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

station, at a depot used by both carriers, is taken in charge by a common agent, and placed in the common baggage room, where it is destroyed by fire, is not sufficient to relieve the first carrier from such liability.[61]

Baggage Awaiting Delivery to Passenger.—It is held that the obligation of carriers to exercise ordinary care in keeping and preserving property, as to which they have been relieved from their peculiar liability as insurers by the failure of the owner to call for his baggage within a reasonable time, is not a new and independent obligation, arising from the circumstances, accidental and unprovided for, of the property being left in the hands of the carrier, but the duty is imposed by the contract of carriage, and rests upon the carrier with whom the contract was made, although the place of destination is beyond its route and upon the line of a connecting carrier.[62]

§ 3512. Liability of Intermediate or Last Carrier.—It has been held that where a passenger purchases a through ticket, with a coupon for each line of carriers, and checks his baggage to his destination, if on his arrival it is found to be lost, he can hold the last carrier responsible for the loss.[63] But it is held that in the absence of any proof of agency, or some contract or arrangement between connecting roads in regard to the selling of through tickets and the giving of through checks for baggage, the last line will not be held liable for the loss of baggage while in the hands of the first company.[64] The rule in the federal courts is that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, safely to carry over its own route and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach.[65]

Effect of Agreements between Connecting Lines and Joint Liability.—See post, "Effect of Agreements between Connecting Lines and Joint Liability," § 3513.

Each Responsible for Its Own Fault.—The carrier actually in fault for the loss of or injury to baggage may be sued by the passenger, even though the first carrier may also be liable by its contracts.[66]

61. Hyman *v.* Central Vermont R. Co., 66 Hun 202, 21 N. Y. S. 119.

62. **Baggage awaiting delivery to passenger.**—Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61.

63. **Baggage checked through on coupon ticket.**—Savannah, etc., R. Co. *v.* McIntosh, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269; Hawley *v.* Screven, 62 Ga. 347, 35 Am. Rep. 126; Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441; Peterson *v.* Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573; International, etc., R. Co. *v.* Foltg, 3 Tex. Civ. App. 644, 22 S. W. 541.

In Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447, the suit being against the last company on the route, notwithstanding there was no evidence in the case where the loss occurred, the company was held liable for the loss. Texas, etc., R. Co. *v.* Ferguson, 1 Texas App. Civ. Cas., § 1253, 9 Am. & Eng. R. Cas. 395.

In McCormick *v.* Hudson River R. Co. (N. Y.), 4 E. D. Smith 181, the last company was held responsible for the loss of a trunk, for which it had given its check at Buffalo long before the trunk reached its road. And there was no proof that the trunk ever came to the hands of the company, except that at Buffalo plaintiff received the company's check for the trunk and other baggage, and the additional fact that the company delivered the other baggage, but failed to deliver the trunk. Texas, etc., Railroad *v.* Fort, 1 Texas App. Civ. Cas., § 1252, 9 Am. & Eng. R. Cas. 392.

Application of statute.—Georgia Code, § 2084, providing that the last of a connecting line of railroads over, which goods are shipped, which receives them as in good order, is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage. Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441.

64. **Lost while in possession of initial carrier.**—Furstenheim *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 238.

65. Mauritz *v.* New York, etc., R. Co., 21 Am. & Eng. R. Cas. 286, 23 Fed. 765, citing Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

66. **Each responsible for its own fault.**—*Alabama.*—Southern Exp. Co. *v.* Hess, 53 Ala. 19.

Arkansas.—Packard *v.* Taylor, etc., Co., 35 Ark. 402, 37 Am. Rep. 37.

Illinois.—Chicago, etc., R. Co. *v.* Fahey,

Baggage Delivered to and Checked by Last Carrier.—When a passenger traveling on a ticket over two lines of road delivered his baggage at the point of transfer to the second road and took its check therefor, such second road was responsible for the loss of the baggage.[67]

Ticket Honored by Defendant's Conductor.—Where a passenger seeks to hold one of several roads in his line of transit liable for the loss of his baggage, the recognition of his ticket purchased at the beginning of his trip, by the conductor of such road, is, in effect, an admission that it was issued by some person having competent authority to bind the company; and in such case it is immaterial whether the ticket was issued by a special agent of the company sought to be held liable or by the ticket agent of some other company.[68]

Effect of Intermediate Carrier Giving Through Check.—Where plaintiff bought a through ticket over several connecting carriers, with the option of passing over an intermediate portion of the route on defendant's line or on another line, her baggage being checked over the latter, and she chose to go over defendant's line, and in return for her check received defendant's through check to the end of the route, it was held that defendant did not thereby enter into a new contract so as to be liable beyond its own route.[69]

Baggage Negligently Forwarded by Joint Agent.—Where plaintiff's baggage arrived with him over another road at an intermediate point, and was not delivered to defendant carrier, but was forwarded by mistake on another road, when he purchased his ticket from defendant railway company the next morning to continue his journey, it was not liable for its loss, though the baggage agent, who negligently forwarded the baggage, was the joint agent of all of the roads at the station.[70]

Duty to Notify Passenger of Failure to Receive Baggage.—If on a change of passage from one railroad to another, the agent of the latter road does not find the baggage which is checked, he should give immediate notice to the owner, or the company owning the road on which the passenger embarks will be held liable.[71]

Delivery to Last Carrier without Passenger's Assent.—Where a passenger bought from a railroad company a ticket by railroad to an intermediate point, thence by boat to his destination, and had his baggage checked to go by the same route, and the company's agent at the intermediate point delivered the baggage to another railroad company, which transported it to the passenger's destination it was held that the latter company incurred, at least, the liability of a warehouseman for the baggage, and, in case of its loss, could escape liability therefor only by proof that it was free from fault.[72]

52 Ill. 81, 4 Am. Rep. 587; Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

Kansas.—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257.

Massachusetts.—Schopman *v.* Boston, etc., R. Corp., 9 Cush. 24, 55 Am. Dec. 41.

Missouri.—Halliday *v.* St. Louis, etc., R. Co., 74 Mo. 159, 6 Am. & Eng. R. Cas. 433.

New Hampshire.—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.—Glasco *v.* New York Cent. R. Co., 36 Barb. 557.

Pennsylvania.—Johnson *v.* West Chester, etc., R. Co., 70 Pa. 357.

Tennessee.—Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227.

Texas.—International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

England.—Hooper *v.* London R. Co., 5 L. J. Q. B. D. 103, overruling Mylton *v.* Midland R. Co., 4 H. & N. 615.

67. Baggage delivered to and checked by last carrier.—Atchison, etc., R. Co. *v.* Brewer, 20 Kan. 669.

68. Ticket honored by defendant's conductor.—Chicago, etc., R. Co. *v.* Fahey, 52 Ill. 81, 4 Am. Rep. 587.

69. Effect of intermediate carrier giving through check.—Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

70. Baggage negligently forwarded by joint agent.—Yazoo, etc., R. Co. *v.* McCall, 100 Miss. 827, 57 So. 224.

71. Duty to notify passenger of failure to receive baggage.—Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

72. Delivery to last carrier without pas-

§ 3513. Effect of Agreements between Connecting Lines and Joint Liability.—It is held that the sale of through tickets and the checking of baggage over connecting roads which are associated together forming a continuous line, renders them liable as partners as to such through business, so that either road may be sued for a loss occurring anywhere on the line.[73] But in many cases it is held that the sale of through tickets and checking of baggage over several lines is not sufficient to show that they are partners so as to make them jointly liable.[74] Thus where three companies constitute a through line, and the fare received for through tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability for the loss of baggage checked through by the initial carrier but the connecting carriers are only responsible for losses occurring on their several lines.[75] And it is held that where several railroad companies enter into an arrangement by which through coupon tickets are sold and baggage checked for the united length of their lines, each company receiving fares for the passengers it has carried, such arrangement does not constitute them partners, and renders neither liable for losses on other than its own road.[76] Nor is the sale of a through ticket

senger's assent.—Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119, affirming 43 N. Y. Super. Ct. 18.

73. **Effect of sale of through tickets.**—Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441; Texas, etc., Railroad *v.* Fort, 1 Texas App. Civ. Cas., § 1252, 9 Am. & Eng. R. Cas. 392; Texas, etc., R. Co. *v.* Ferguson, 1 Texas App. Civ. Cas., § 1253, 9 Am. & Eng. R. Cas. 395; Missouri Pac. R. Co. *v.* Slater, 3 Texas App. Civ. Cas., § 7.

In Check *v.* Little Miami R. Co., 2 Disn. 237, 13 O. Dec. Reprint 146, it is held that where a party contracts for transportation over a route composed of several railroads, for which he pays an entire sum, and receives a through ticket or receipt, the contract is entire. If no partnership in fact exists between the roads, he may treat the contract as entire or several so far as the other parties are concerned, and subject all who are interested to an action for the value of lost baggage.

Reason for rule.—To hold these continuous or associated companies severally liable on these through contracts of transportation springs from the necessity of the rule. To remit the owner whose baggage has been lost or damaged on a through ticket to the company where the spoliation or loss occurred, is simply to deny him all redress. For he has no facility or means to ascertain the facts, only at the pleasure of the company, who it is presumed will not be prompt to furnish evidence of its own negligence and liability. To hold each company liable for negligence or loss incurred while transporting under one continuous and joint contract made with the owner, will interest all alike to be diligent, and if loss should occur, it is the more equitable for the losses to be apportioned among them as they apportion the profits of their joint enterprise, rather than the loss should be borne alone by the owner. The contract is made to transport with the joint continuous line; they act for each other, and receive its fruits as common agents one for the other. Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441.

74. *Alabama.*—Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749.

District of Columbia.—Croft *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 492.

Kansas.—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257.

Maine.—Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

New York.—Marmonstein *v.* Pennsylvania R. Co., 13 Misc. Rep. 32, 34 N. Y. S. 97, 68 N. Y. St. Rep. 172; Straiton *v.* New York, etc., R. Co., 2 E. D. Smith 184; Kessler *v.* New York Cent. R. Co., 7 Lans. 62.

South Carolina.—Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

Tennessee.—Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852.

Common agent to sell through tickets.—In Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749, it in held that the mere fact that the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through tickets, does not constitute them partners as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line.

75. Croft *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 192, cited in Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

76. Straiton *v.* New York, etc., R. Co. (N. Y.), 2 E. D. Smith 184.

and the checking of baggage to the end of the route evidence of a joint contract by which a connecting carrier is liable for a loss by the first,[77] or the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination.[78] And it has been held that if one of several companies, composing a public line of travel, by agreement with the others, receive fare and give a through ticket over the entire route, the company selling the ticket shall be regarded as the agent of the other companies, when the ticket itself imports this and nothing else appears.[79]

§ 3514. Presumptions and Burden of Proof.—Presumptions.—Where one buys a through ticket over several lines, the agent who sells it is presumed to be the agent of each and all the carriers, and each is bound by his statements and agreements.[80] The possession of the check of a connecting carrier and delivery of part of the baggage at the end of its line will raise a presumption that all of the baggage was received by it.[81] If a passenger checks his baggage in good condition over connecting lines, and it is delivered to him damaged at destination, the presumption is that the damage occurred on the last line.[82] And the last carrier is prima facie responsible for baggage which is shown to have come into its possession.[83] But the mere failure on the part of the last carrier to deliver baggage, which it is not shown to have received, is not of itself proof of negligence.[84]

Plaintiff's Burden of Proof.—In a suit against one of the several carriers of connecting lines the plaintiff must show the liability for loss of baggage on the part of the defendant sued.[85] In order to recover against an intermediate or the last carrier for the value of lost baggage, plaintiff must prove that it came into its possession.[86] And this requirement will not be obviated by suing all of the carriers in one suit.[87] Nor can a passenger recover from a connecting carrier for articles taken from a trunk on a presumption of loss in transit over the connecting lines, where the trunk was shipped over one line as a distinct transaction before it was delivered to the connecting carriers, and where the condition of the goods when delivered to them was not shown.[88] And it has been held that where

77. **Sale of through ticket not evidence of joint contract.**—Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

78. Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257.

79. Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852.

80. **Authority of agent.**—Young *v.* Pennsylvania R. Co., 115 Pa. 112, 7 Atl. 741, 28 Am. & Eng. R. Cas. 114.

81. **Delivery to carrier.**—McCormick *v.* Hudson River R. Co. (N. Y.), 4 E. D. Smith 181; Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218.

82. **Presumption of damage on last line.**—Moore *v.* New York, etc., R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298.

83. McCormick *v.* Hudson River R. Co. (N. Y.), 4 E. D. Smith 181.

84. **Mere failure of last carrier to deliver.**—Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140; Kessler *v.* New York, etc., R. Co., 61 N. Y. 538; Milnor *v.* New York, etc., R. Co., 53 N. Y. 363; Ward *v.* New York, etc., R. Co., 56 Hun 268, 9 N. Y. S. 377, 30 N. Y. St. Rep. 604; Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

85. **Plaintiff's burden of proof.**—Anchor Line *v.* Dater, 68 Ill. 369; Boston, etc., Railroad *v.* Ordway, 140 Mass. 510, 5 N. E. 627; McCormick *v.* Hudson River R. Co. (N. Y.), 4 E. D. Smith 181; Kessler *v.* New York, etc., R. Co., 61 N. Y. 538; Midland R. Co. *v.* Bromley (Eng.), 17 C. B. 372.

86. **Delivery to defendant.**—Kessler *v.* New York, etc., R. Co., 61 N. Y. 538, affirming 7 Lans. 62.

Plaintiff purchased, at the office of the B. & O. R. R. Co. at W., a coupon ticket from W. to B., over several connecting railroads, the last of which was that of defendant. She received a check for her baggage, with the names of all the roads stamped upon it. On arriving at B., she demanded her baggage, but it could not be found, and no trace could be found of it after it was checked. Held that in the absence of proof that the baggage came into defendant's possession, it was not liable. Kessler *v.* New York, etc., R. Co., 61 N. Y. 538, affirming 7 Lans. 62.

87. Anchor Line *v.* Dater, 68 Ill. 369; Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

88. **Condition of baggage.**—Sheble *v.* Oregon R., etc., Co., 51 Wash. 359, 98 Pac. 745.

a passenger sues a connecting line, it can not recover by proving that his baggage was checked over it; but he must also show that he paid his fare over the connect-line.[89]

Defendant's Burden of Proof.—A carrier which has accepted baggage to be carried beyond its own line must prove a delivery to the connecting carrier before it can be relieved of its obligation as a common carrier.[90] And to relieve itself from liability the carrier receiving baggage for a connecting line must show that it delivered it to such connecting line by evidence that would be sufficient to charge it if the suit was against it.[91] If it appears that the baggage was damaged when delivered by the defendant carrier to the connecting carrier, the burden is on the defendant to show that the damage was occasioned by some cause exempting him from absolute liability for safe delivery.[92] Where baggage sent over several lines arrives at its destination in a damaged condition, or rifled of part of its contents, in a suit against the last carrier it must show that it was so damaged or rifled before it received the baggage.[93] And the failure of an intermediate carrier to deliver baggage, according to the terms of his contract, to the next succeeding carrier, prima facie shows negligence; and the burden of accounting for the default lies upon it.[94] But it is held that where baggage, for the transportation of which over three connecting railroads, operated by separate and independent companies, through checks have been issued by one of the terminal roads, is shown to have been in good condition when delivered to the intermediate road, but damaged when delivered at the destination, it does not devolve on the intermediate road, in the absence of any special contract or arrangement between the companies, to show that it was in good condition when delivered to the last terminal road.[95]

§ 3515. Palace and Sleeping Car Companies.—The duties and liabilities of palace and sleeping car companies in respect to the effects of passengers is treated elsewhere.[96]

§§ 3516-3530. Actions—§ 3516. In General.—An action for loss of baggage should be founded on the tort, rather than on the contract with the pas-

89. **Payment of fare.**—Green *v.* New York R. Co. (N. Y.), 12 Abb. Prac., N. S., 473, 4 Daly 553.

90. **Delivery to succeeding carrier.**—Kent *v.* Midland R. Co. (Eng.), L. R., 10 Q. B. 1; Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; Hyman *v.* Central, etc., R. Co., 66 Hun 202, 21 N. Y. S. 119, 49 N. Y. St. Rep. 313.

Where, under a through ticket, a carrier receives baggage for transportation over its line and that of a connecting carrier, it is liable for the loss of the baggage, in the absence of proof that it was safely transported over its road and delivered to the connecting carrier. Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

91. Hyman *v.* Central, etc., R. Co., 66 Hun 202, 21 N. Y. S. 119, 49 N. Y. St. Rep. 313.

92. **Damaged when delivered to succeeding carrier.**—Montgomery, etc., R. Co. *v.* Culver, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas., 411; Lin *v.* Terre Haute, etc., Railroad, 10 Mo. App. 125.

93. **Damaged when delivered at destination.**—*Alabama.*—Southern Exp. Co. *v.* Hess, 53 Ala. 19; Montgomery, etc., R. Co. *v.* Culver, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411.

Maine.—McQuesten *v.* Sanford, 40 Me. 117.

Minnesota.—Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

New York.—Smith *v.* New York Cent. R. Co., 43 Barb. 225.

North Carolina.—Dixon *v.* Richmond, etc., R. Co., 74 N. C. 538.

Tennessee.—Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

Texas.—International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541.

Vermont.—Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665.

Wisconsin.—Laughlin *v.* Chicago, etc., R. Co., 28 Wis. 204.

94. **Failure of intermediate carrier to deliver.**—Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575.

95. **Condition when delivered by intermediate road.**—Montgomery, etc., R. Co. *v.* Culver, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411.

96. **Palace and sleeping car companies.**—See post, "Palace Cars and Sleeping Car Companies," Chapter XXX.

senger, because a less strict degree of proof is required.[97] Where baggage has been damaged and retained by the owner, if he wishes to recover damages, he must bring his action for the tort or wrong by which the baggage was injured. He can not maintain an action to recover, upon a verified account, for the value of the baggage so injured.[98] Assumpsit is not maintainable to recover for the loss of baggage gratuitously carried.[99] Where baggage is wrongfully detained by a carrier, the owner may assign his title, and the assignee, after a fresh demand thereof, may maintain an action against the carrier in the nature of trover.[1] A demand, before action, for baggage wrongfully detained, is sufficient, when made of the agents of the railroad company, who are charged with the whole duty of receiving, keeping, and delivering property; and in such case a demand of the directors is unnecessary.[2]

§ 3517. Right of Action and Parties.—Where baggage is not the property of the passenger delivering it for transportation, but is in his possession and control as agent of the owner, an action will lie at the suit of such owner to recover for any loss or damage arising from a violation of the duty of the carrier in respect to such property,[3] though his ownership was not disclosed at the time it was checked.[4] And it has been held that the owner is the proper party to sue for loss of the baggage, and not the user of the ticket.[5] But it has been held that where the traveler is liable to such owner for any loss or damage to the baggage, he may be treated as the owner for the purposes of an action against the carrier for damage thereto.[6] And a traveler may maintain an action against a common carrier of passengers for the recovery of the value of a trunk containing the wearing apparel of his daughter, when such trunk was delivered on board of the boat on which he was traveling as passenger on a through ticket, and "checked through," and the check for the same delivered to him with those for other baggage.[7] A husband may maintain an action against a carrier for the loss of baggage, although the baggage was not carried on the train with him, but was carried on another train with his wife, who was in charge of the baggage, which included articles for the use of the husband and his family.[8] A passenger who, having a free pass over a railroad for himself, buys a ticket for his wife, and delivers her trunk to the railroad corporation without informing them that it is not his, may maintain an action against them for a loss of the trunk during the carriage.[9] It has been held that a wife is properly joined with her husband in a suit against a common carrier for the loss of her baggage;[10] and in such case the right

97. **Form of action.**—Weed *v.* Saratoga, etc., R. Co. (N. Y.), 19 Wend. 534.

98. **Damaged baggage retained by owner.**—Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043.

99. **Assumpsit.**—Flint, etc., R. Co. *v.* Wier, 37 Mich. 111, 26 Am. Rep. 499.

1. **Where baggage wrongfully detained.**—Cass *v.* New York, etc., R. Co. (N. Y.), 1 E. D. Smith 522.

2. **Sufficiency of demand.**—Cass *v.* New York, etc., R. Co. (N. Y.), 1 E. D. Smith 522.

3. **Where traveler is not owner.**—Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, 8 Am. & Eng. R. Cas., N. S., 533.

Where the contract for the transportation of trunks, the contents of which were damaged during transportation, was made by the passenger as agent for the owner, the passenger paying the compensation for carriage for the account of and in the conduct of the owner's business, an action for such damages is properly brought in the name of the owner himself. Sloman *v.* Great Western R. Co., 67 N. Y. 208, 5 Am. R. Rep. 113.

4. **Ownership not disclosed when checked.**—Trimble *v.* New York, etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115, 17 Am. & Eng. R. Cas., N. S., 176.

5. Brick *v.* Atlantic, etc., R. Co., 145 N. C. 203, 58 S. E. 1073, 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629, 13 Am. & Eng. Ann. Cas. 328.

6. Illinois Cent. R. Co. *v.* Matthews, 24 Ky. L. Rep. 1766, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. Rep. 316, 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769.

7. Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575.

8. Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271.

9. Malone *v.* Boston, etc., R. Corp. (Mass.), 12 Gray 388, 74 Am. Dec. 598.

10. **Joinder of husband and wife.**—Keith *v.* New York Cent. R. Co., 1 West. L. M. 451, 2 O. Dec. 125; Yazoo, etc., R.

to maintain the action is not affected by the fact that the husband was traveling with the wife without a ticket and without paying fare.[11]

The assignee of the title of the owner of baggage wrongfully detained by a carrier may maintain an action against the carrier.[12]

Where property of a firm is carried as the personal baggage of a member of the firm, the carrier is not liable to the firm for injuries done to such property.[13]

§§ 3518-3519. Pleading and Proof—§ 3518. Necessity and Sufficiency of Allegations.—A complaint in an action for loss of a passenger's baggage, which alleges that plaintiff holds the check of the carrier, only alleges evidence of delivery, and is bad for failing to allege a delivery, of the baggage to the carrier.[14] And a complaint in an action against the second of two connecting carriers for the loss of baggage, does not state a cause of action where it fails to allege that the carriers were joint contractors, or that the second carrier received the baggage.[15] In an action to recover the value of a sample trunk and contents, consisting of merchandise, belonging to plaintiffs, which they claim was delivered by one of their commercial travelers to defendant, to be transported as his baggage on one of its trains, where such trunk had been either lost or stolen, the complaint must show, not only the custom or manner of carrying trunks of commercial travelers as baggage, but must aver particularly the custom, so as to cover all the facts in the case.[16] A bill of particulars which does not state in terms that the plaintiff was a passenger on the carrier's railroad, or that the carrier was guilty of any negligence, but alleges that the property was delivered to its agent to be forwarded as baggage on the first passenger train of the carrier, and that the carrier refused to deliver the property to plaintiff, but kept and retained it, is sufficient.[17] An allegation that a party took his trunk to the baggage room in the evening and on the next morning bought a ticket and asked that the baggage be checked, and was informed that it had been sent by mistake to another point, that it would be forwarded to the passenger's destination, but that it never was so delivered, does not show notice to the carrier that he would be subject to special damages in case of nondelivery.[18]

§ 3519. Evidence Admissible under Pleadings.—Although the declaration in an action to recover for lost baggage does not allege that plaintiff was a passenger, yet proof of that fact may be introduced.[19] Under a declaration alleging that defendant, as a common carrier, agreed, for hire, to carry a box containing specified articles, and that the box was lost by defendant's negligence, evidence that plaintiff bought a ticket, and defendant received the box as baggage, is admissible, it being unnecessary to describe the box as baggage, or to allege that the hire for carrying it was a part of money paid for the ticket.[20] As in an action brought simply for breach of contract against a common carrier, the actual damage arising from the breach is the measure of recovery, where the breach al-

Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

11. Yazoo, etc., R. Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599, 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

12. **Assignee.**—Cass *v.* New York, etc., R. Co. (N. Y.), 1 E. D. Smith 522.

13. **Property of firm.**—Pennsylvania R. Co. *v.* Knight, 58 N. J. L. 287, 33 Atl. 845.

14. **Necessity of alleging delivery to carrier.**—Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573.

15. Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

16. **Custom to carry sample trunks as baggage.**—McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

17. **Sufficiency of allegation of failure to deliver to passenger.**—Chicago, etc., R. Co. *v.* Conklin, 32 Kan. 55, 3 Pac. 762, 16 Am. & Eng. R. Cas. 116.

18. **Notice of special damages.**—Wehman *v.* Southern Railway, 74 S. C. 286, 54 S. E. 360.

19. **That plaintiff was a passenger.**—Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

20. **Purchase of ticket and acceptance of baggage.**—Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761, 14 Am. & Eng. R. Cas., N. S., 416.

leged was the loss of a trunk and contents, it was error to admit testimony to prove an extra expenditure for clothing to supply immediate wants occasioned by the loss of the trunk.[21] But in an action against a railroad company for damages in "breaking a trunk," and in delay of "goods checked," evidence of damage to any articles such as a passenger might carry as baggage and have checked, is admissible.[22]

§§ 3520-3522. Presumptions and Burden of Proof—§ 3520. In General.—The failure to deliver baggage to a passenger at its destination, in the absence of any explanation, establishes a prima facie case against the carrier.[23] It is held that in such case the presumption is that the property is still in the carrier's possession or converted.[24]

Presumption of Negligence.—It has been held that the unexplained failure of a carrier, holding goods delivered by a passenger and liable for loss only in case of negligence, to deliver the goods on demand, is prima facie evidence of negligence.[25] And the unexplained loss of baggage, is sufficient to establish a prima facie case of negligence.[26] Proof of the loss of baggage after arrival raises a presumption that the carrier's agent was negligent.[27] And it has been held that, in the absence of all proof that the baggage had been properly stowed when such proof was peculiarly within the reach of the carrier, the loss must be presumed to have arisen from imperfect stowage.[28] The failure of the carrier to account in some manner for the loss of a trunk which it had agreed to store over night and deliver on the following morning warrants the inference that the trunk was stolen by its servants or was lost in consequence of their gross neglect.[29] A presumption of negligence arises from the derailment of a train, by reason of which a passenger's baggage was destroyed.[30] However, in an action by a passenger for a loss of baggage destroyed by a flood of such extraordinary character that it could not be foreseen or provided against, there is no presumption of negligence because of the accident, the flood being an act of God.[31]

21. Evidence as to damages.—New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

22. International, etc., R. Co. *v.* Philips, 63 Tex. 590.

23. Failure to deliver to passenger.—*Alabama.*—Central, etc., R. Co. *v.* Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240.

Georgia.—Southern R. Co. *v.* Edmundson, 123 Ga. 474, 51 S. E. 388; Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

Kansas. — Atchison, etc., R. Co. *v.* Brewer, 20 Kan. 669.

Mississippi.—Zeigler Bros. *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. 811.

New York.—Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Hasbrouck *v.* New York, etc., R. Co., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150; Saleeby *v.* Central R. Co., 184 N. Y. 597, 77 N. E. 1196.

North Carolina.—Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328.

Pennsylvania.—Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 681.

South Carolina.—Meyer *v.* Atlantic, etc., R. Co., 92 S. C. 101, 75 S. E. 209; Fleischman, etc., Co. *v.* Southern Railway, 76 S. C. 237, 56 S. E. 974, 9 L. R. A., N. S., 519.

24. In possession of carrier or converted.—Hasbrouck *v.* New York, etc., R. Co., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150.

25. Presumption of negligence.—Hasbrouck *v.* New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912D, 1150; Campbell *v.* Missouri Pac. R. Co., 78 Neb. 479, 111 N. W. 126; Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

26. Saleeby *v.* Central R. Co., 77 N. E. 1196, 184 N. Y. 597, affirming 90 N. Y. S. 1042, 99 App. Div. 163, 15 N. Y. Ann. Cas. 353.

27. Central, etc., R. Co. *v.* Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240.

28. Improper stowage.—The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190.

29. Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

30. Derailment of train.—Thomas *v.* Southern R. Co., 131 N. C. 590, 42 S. E. 964.

31. Act of God.—Long *v.* Pennsylvania R. Co., 147 Pa. 343, 23 Atl. 459, 29 Wkly. Notes Cas. 375, 30 Am. St. Rep. 732, 14 L. R. A. 741.

Rebuttal of Presumption of Negligence.—See post, "Weight and Sufficiency of Evidence," § 3525.

Knowledge of Limitation.—A notice that a railroad corporation would not "be liable for the baggage of passengers beyond a certain amount, unless, etc.," printed on the back of the passage ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party, at the time of receiving the ticket, and before the train leaves the station, had knowledge of the limitations or conditions which the carrier had attached to the transportation of the baggage of passengers.[32] And there is no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed upon the back of a check delivered to him, having on its face the words, "Look on the back," and also printed on a placard posted in the cars, and containing other notices which he has read.[33]

That Baggage Checked on Pass.—Where plaintiff, riding on a pass, accompanied by his son, riding on a ticket, had two bundles checked as baggage, it may be assumed, in the absence of evidence, that the one containing his own gun was checked on the pass.[34]

Authority of Agent.—Where, in an action to recover for loss of baggage, plaintiff showed that she purchased a ticket for herself and her baggage from one who purported to be an agent of the road for the sale of tickets, and that it was accepted by the conductors of the road and no other fare was demanded, a presumption arose from the acts of the company's conductors that the act of the agent was valid and binding upon the company.[35]

Law of Sister State.—Where under a state statute the limitation of the liability of a railroad company for wearing apparel in a passenger's baggage to the value of one hundred dollars, by a provision printed in the ticket, is ineffectual, and where the contract for transportation is made in another state, to be executed in the former state, it will be presumed, in absence of proof to the contrary, that the law of such other state is to the same effect.[36]

Presumption Arising from Custom.—The assent of a common carrier that the baggage of a traveler may be left at a railway station without notice to the carrier or agent may be implied from the course of business or custom of the carrier.[37]

It can not be conclusively presumed that an entire shipment is baggage where an emigrant carries trunks and other ordinary baggage, and at the same time turns over other boxes of goods to the carrier for transportation, paying freight for the weight in excess of her baggage allowance, and the general character of the shipment is known to the carrier, so as to make applicable the rule that there can be no recovery in case of loss except for such articles contained in the boxes as would properly be designated as necessary baggage.[38]

Presumptions in Actions against Connecting Carriers.—See ante, "Presumptions and Burden of Proof," § 3514.

§ 3521. Plaintiff's Burden of Proof.—Delivery to Carrier.—Delivery of the baggage to the carrier must be proved, in order to charge the carrier for its loss.[39] So a railroad corporation will not be held liable for lost baggage unless

32. **Knowledge of limitation.**—Brown *v.* Eastern R. Co. (Mass.), 11 Cush. 97.

33. Malone *v.* Boston, etc., R. Corp. (Mass.), 12 Gray 388, 74 Am. Dec. 598.

34. **That baggage checked on pass.**—Denver, etc., R. Co. *v.* Johnson, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627.

35. **Authority of agent.**—Glasco *v.* New York Cent. R. Co. (N. Y.), 36 Barb. 557.

36. **Law of sister state.**—Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 19 N. W. 77; Code Iowa, §§ 1308, 2184.

37. **Presumption arising from custom**—Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100.

38. **That entire shipment is baggage.**—Hamburg-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662.

39. **Delivery to carrier.**—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

it is shown to have been in its possession, or that the company had contracted in some way to transport the baggage.[40] And a street car passenger, to recover for the loss of her baggage, must show either that the carrier accepted the baggage under a contract, express or implied, to carry and deliver it as a carrier, or that the loss was due to its negligence.[41]

Condition of Baggage before Delivery to Carrier.—To charge a carrier with the value of articles stolen from a trunk, it must appear with reasonable certainty that the trunk was not opened and rifled before coming to the possession of the carrier.[42] So a passenger who, before starting on her journey, delivered her trunk to an expressman for delivery at the depot, could not, after completing the journey, hold the railroad company liable for goods stolen from the trunk, without showing that the trunk was not opened while in the possession of the drayman.[43]

Notice of Nature of Goods.—Where a trunk is delivered to a carrier as baggage, the carrier can assume that it contains personal baggage only of the passenger, and hence the burden, in the absence of negligence, of proving that the carrier had notice of the nature of the property, is on the passenger seeking to recover for its loss.[44]

Payment of Fare.—In a suit against stage owners for loss of baggage payment of fare need not be expressly proved.[45]

Negligence as Warehouseman.—In an action against a carrier for loss of baggage where its liability is that of a warehouseman, the burden is on the plaintiff to show that the defendant was negligent.[46] So in an action against a carrier for baggage burned after it had reached its destination, and the carrier's liability had become that of a warehouseman, the burden is on the plaintiff to show want of ordinary care by defendant.[47]

In Actions against Connecting Carriers.—See ante, "Presumptions and Burden of Proof," § 3514.

§ 3522. Defendant's Burden of Proof.—Delivery to Passenger.—The burden of proving delivery to the passenger is on the carrier.[48]

Cause of Failure to Deliver to Passenger.—The burden is on the carrier to show legal excuse for failure to deliver on demand baggage received by it.[49] Where a passenger shows delivery of his baggage to a carrier and the carrier's

40. Michigan, etc., R. Co. *v.* Meyres, 21 Ill. 627.

41. Sperry *v.* Consolidated R. Co., 79 Conn. 565, 65 Atl. 962, 10 L. R. A., N. S., 907.

42. **Condition of baggage before delivery to carrier.**—McQuesten *v.* Sanford, 40 Me. 117.

43. Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219.

44. **Notice of nature of goods.**—Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199.

45. **Payment of fare.**—McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

46. **Negligence as warehouseman.**—A., intending to take a trip on a steamer which was to sail on Monday, sent his valise to the office of the steamship company on Saturday, where it was received by the company's agent, who declined to sign a receipt for it. On Monday A went to the office in time to have the valise checked and inquired for it, but it could not be found. The rules of the company required a ticket to be presented in order to have baggage checked, and A. presented such a ticket. The usual precautions were taken by the company for the protection of the baggage. Held, in an action by A. against the company for conversion of the valise, the burden of proof was on the plaintiff to show that the defendant was negligent. Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290.

47. Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169.

A passenger suing for baggage that was burned on a steamship company's pier after he had requested the company to keep it until he could call for it has the burden of showing that the company was negligent. National Line Steamship Co. *v.* Smart, 107 Pa. 492.

48. **Delivery to passenger.**—Matteson *v.* New York, etc., R. Co., 76 N. Y. 381.

49. **Excuse for failure to deliver.**—Southern R. Co. *v.* Edmundson, 51 S. E. 388, 123 Ga. 474; Williams *v.* Southern R. Co., 155 N. C. 260, 71 S. E. 346, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 13 Am. & Eng. Ann. Cas. 328; Zeigler Bros. *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. 811; Meyer *v.* Atlantic, etc., R. Co., 75 S. E. 209, 92 S. C. 101.

failure to deliver the same, the burden is on the carrier to show that it has not converted the property.[50] The failure of a carrier whose liability for baggage has become that of a warehouseman to deliver baggage when demanded throws the burden of accounting for the default upon the carrier.[51]

Absence of Negligence.—In an action against a carrier for the loss of baggage entrusted to it for storage over night by an incoming passenger, it is incumbent on the carrier to show that the loss was not attributable to the want of care on the part of its servants or agents.[52] A carrier, undertaking pursuant to an express contract limiting liability to carry a passenger's baggage, has the burden of disproving that the negligence of its servants resulted in the loss of the baggage.[53]

Limitation of Liability.—In an action against a carrier to recover for loss of baggage, the burden of proving a limitation of the carrier's liability is on the party setting it up.[54]

In Actions against Connecting Carriers.—See ante, "Presumptions and Burden of Proof," § 3514.

§ 3523. Witnesses.—Contents of Baggage.—It is generally held that in an action against a carrier to recover for the loss of his baggage the passenger is, from the necessity of the case, a competent witness to prove the contents of his baggage where no other evidence is obtainable;[55] and for the same reason the evidence of his wife is admissible.[56] And a person, who may have had some of the articles lost, in his trunk, or may have had articles which belonged to him in the trunk lost, is a competent witness.[57]

50. Fleischman, etc., Co. *v.* Southern Railway, 56 S. E. 974, 76 S. C. 237, 9 L. R. A., N. S., 519.

51. Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61.

A carrier can not relieve itself from responsibility for a trunk which it had agreed to store over night and deliver on the following morning to a carrier using the same station, unless in some manner it accounts for the loss of the trunk and shows how it left its custody. Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

52. Absence of negligence.—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. 67, 55 Am. Dec. 481.

53. Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1076, 34 L. R. A., N. S., 818.

54. Limitation of liability.—Verner *v.* Sweitzer, 32 Pa. 208.

55. Right of passenger to testify to contents of baggage.—*Alabama.*—Douglass *v.* Montgomery, etc., R. Co., 37 Ala. 638, 79 Am. Dec. 76.

Georgia.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151; Parmelee *v.* McNulty, 19 Ill. 556.

Indiana.—Indiana Cent. R. Co. *v.* Gulick, 19 Ind. 83, citing Doyle *v.* Kiser, 6 Ind. 242.

Maine.—Herman *v.* Drinkwater (Me.), 1 Greenl. 27; Pudor *v.* Boston, etc., Railroad, 26 Me. 458.

Missouri.—By statute the plaintiff is a competent witness. R. C. 1855, p. 435, § 45. Nolan *v.* Ohio, etc., R. Co., 39 Mo. 114; Williams *v.* Frost, 39 Mo. 516.

Ohio.—Mad River, etc., R. Co. *v.* Fulton, 20 O. 318.

Pennsylvania.—Whitesell *v.* Crane (Pa.), 8 Watts & S. 369; McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

Tennessee.—Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

A shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which, on the passage, he broke open and rifled of its contents, the owner of the goods, proving the delivery of the trunk and its violations, was properly admitted as a witness, in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. Herman *v.* Drinkwater (Me.), 1 Greenl. 27.

56. Competency of wife.—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323; Mad River, etc., R. Co. *v.* Fulton, 20 O. 318; Keith *v.* New York Cent. R. Co., 1 West. L. M. 451, 2 O. Dec. 125. See Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849.

"The principle of necessity which alone enables a party, under certain circumstances, to prove the contents of a box, or trunk, applies, with as much, if not greater force, to the wife as to the husband." McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

57. Parmelee *v.* Austin, 20 Ill. 35.

Value of Baggage.—It is held that a passenger whose baggage has been lost may, from the necessity of the case, be a competent witness to prove its value;[58] and for the same reason his wife may also testify as to its value.[59] Where a husband sues a carrier for the loss of his wife's trunk while a passenger, the husband may testify as to the value after the wife has testified as to the contents.[60] It is held that where the value of articles can be proved by other evidence, that of the party interested or his wife can not be received for such purpose.[61] And where the testimony of the interested party is received on the question of value, and it is not shown that there are no witnesses capable of proving the value, the judgment will be reversed.[62]

Testimony Restricted to Articles of Baggage.—The rule allowing the owner or his wife to testify as to the contents of baggage, and their value, will not be extended further than to the proof of such articles as are commonly carried as baggage.[63] In one case the court said that the rule is without this limitation when the evidence is admitted upon the ground of fraud or spoliation.[64] In an action against a common carrier for the loss of a box alleged to contain medical books, medicines, surgical instruments, and chemical apparatus, it has been held that plaintiff should not be allowed to prove the contents of the box on his own oath, although it did not appear that he had any other means of showing it.[65]

In Louisiana a passenger suing for the loss of baggage is incompetent as a witness to testify as to the contents of the trunk and its value, under Civ. Code, arts. 2257, 2940.[66]

In Massachusetts it has been held that in an action by a passenger against a railroad company to recover for the negligent loss of a trunk, plaintiff is not

58. Value of baggage. — *Alabama.* — Douglass *v.* Montgomery, etc., R. Co., 37 Ala. 638, 79 Am. Dec. 76.

Missouri.—By statute the plaintiff is a competent witness. R. C. 1855, p. 435, § 45. Nolan *v.* Ohio, etc., R. Co., 39 Mo. 114; Williams *v.* Frost, 39 Mo. 516.

Ohio.—Mad River, etc., R. Co. *v.* Fulton, 20 O. 318.

Pennsylvania.—Whitesell *v.* Crane (Pa.), 8 Watts & S. 369; McGill *v.* Rowand, 3 Pa. 451, 45 Am. Dec. 654.

Tennessee.—Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

59. Mad River, etc., R. Co. *v.* Fulton, 20 O. 318; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

60. Battle *v.* Columbia, etc., Railroad, 70 S. C. 329, 49 S. E. 849.

61. Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

See Parmelee *v.* McNulty, 19 Ill. 556, wherein it appeared from the evidence that the necessity did not exist; as the value of articles might have been proved by a witness, he being acquainted with them; and, of course, their value could have been proved by him, or at least the reason should have been given why he could not state their value.

And see Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151, holding that the owner of lost baggage should not be permitted to prove the value of the articles in which it is packed, or of other articles, the value of which may be established from description.

"Articles can be described, their quality, style, and all particulars pertaining to them, and when described, dealers in such articles can, from the description, place the value upon them, so that there is no necessity for the testimony on this point of the interested party." Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323. See also Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Davis *v.* Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

"There is other evidence in every town and city in the state quite accessible to the party; and the jurors themselves, when the property is described, may have a proper measure of damages in their own knowledge of values." Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

62. Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323.

63. Testimony restricted to articles of baggage.—Mad River, etc., R. Co. *v.* Fulton, 20 O. 318.

The testimony of the plaintiff in an action against a common carrier for the loss of a package, in respect to the contents, should be limited to clothing and personal ornaments. Pudor *v.* Boston, etc., Railroad, 26 Me. 458.

64. Johnson *v.* Stone, 30 Tenn. (11 Humph.) 419.

65. Pudor *v.* Boston, etc., Railroad, 26 Me. 458.

66. Passenger incompetent in Louisiana.—Block *v.* Trent, 18 La. Ann. 664.

a competent witness as to the contents and value of the trunk, though he has no other evidence.[67] But by a subsequent statute it was provided that in any action brought by a passenger against any common carrier, the plaintiff, after proof of the bailment of his trunk to the defendants, and of its loss "by the fault of such carrier, or of the agents of such carrier," shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself; and such statute applies to the case of the loss of a trunk left by the passenger with the baggage master of a railroad corporation after arriving at his place of destination.[68]

In North Carolina, a passenger suing to recover for the loss of his trunk is not a competent witness to prove the loss of the trunk or its contents, though he offers to swear that he has no means of proving these facts or either of them except by his own oath.[69]

Affidavit of Plaintiff.—In an action against a railroad company by a passenger to recover the value of a lost trunk, the ex parte affidavit of plaintiff is not competent evidence to prove the contents of the trunk.[70]

§ 3524. Admissibility of Evidence.—Contract for Transportation.—In an action for delay of carrier in delivering baggage, the owner thereof may testify that he contracted with the carrier to transmit it to a certain point without producing his check.[71]

Parol Evidence of Passage Over Railroad Lines.—Where a passenger seeks to recover for the loss of her baggage, the fact that she bought a ticket to pass over various lines of railroad from her starting point to her destination, the ticket having coupons attached, and that she did so pass may be shown by parol independently of the ticket as the contents of the ticket are not involved.[72]

Delivery to Carrier.—In an action to recover for baggage lost by defendant, evidence that plaintiff, who was being transported over the lines of several connecting carriers, gave his checks to defendant's station agent, and that the agent promised to forward his baggage over defendant's line, is admissible as tending to show that defendant received the baggage.[73]

Delivery to Passengers.—Evidence that the personal baggage of a passenger on a railroad, who took passage in July, had been seen at the place of his destination in November following, can not be given as proof of proper transportation and delivery of such baggage in a suit against the company for the loss of it.[74]

Declarations and Admissions of Agents.—In an action against a carrier by a passenger for the loss of his trunk, the admissions of the conductor, baggage master, or station master, as to the manner of the loss, made in answer to inquiries in behalf of the passenger the next morning after the loss, are admissible in evidence against the carrier.[75] And where a passenger, as soon as practicable after his arrival at destination, presented to the agent in charge of the baggage room a check for his baggage and demanded the same, but the

67. **Massachusetts rule.**—Snow *v.* Eastern R. Co. (Mass.), 12 Metc. 44, holding that the rule only applied where the defendant or its employees, had been convicted by other evidence of an act of willful spoliation, or of felony.

68. St. 1851, c. 137, § 5; Harlow *v.* Fitchburg R. Co. (Mass.), 8 Gray 237. And see St. 1870, c. 393.

69. **Rule in North Carolina.**—Smith *v.* North Carolina R. Co., 60 N. C. 202.

70. **Affidavit of plaintiff.**—Indiana Cent. R. Co. *v.* Gulick, 19 Ind. 83, wherein the court, in referring to Doyle *v.* Kiser, 6 Ind. 242, said "In that case, the affidavit of the plaintiff was admitted in evidence, but the facts, which do not appear in the report are, that the affidavit was admitted by consent, after the court had determined that the plaintiff was a competent witness."

71. **Contract for transportation.**—Strange *v.* Atlantic, etc., R Co., 77 S. C. 182, 57 S. E. 724.

72. **Parol evidence of passage over railroad lines.**—Central R. Co. *v.* Wolff, 74 Ga. 664.

73. **Delivery to carrier.**—Kansas Pac. R. Co. *v.* Montelle, 10 Kan. 119.

74. **Delivery to passenger.**—Glasco *v.* New York Cent. R. Co. (N. Y.), 36 Barb. 557.

75. **Declarations and admissions of agents.**—Morse *v.* Connecticut River R. Co. (Mass.), 6 Gray 450.

agent, being unable to find the baggage, took the number of the check and requested the passenger to call again, which he did on the same evening, when the agent informed him that he had made further search and the baggage could not be found, such acts and declarations of the agent were competent evidence for the passenger in his action against the carrier for loss of such baggage.[76]

Nature and Value of Baggage.—In an action for the loss of a trunk, slight and prima facie evidence of the contents of the trunk is admissible and competent.[77] And the testimony of one who saw the trunk packed, six or eight weeks before the shipment, is admissible evidence to show the contents and their value at the time of shipment, although the lapse of time between the two periods would weaken the force of such testimony.[78] The value of any article contained in lost baggage may be shown by the opinion of witnesses, and it is not necessary that such witnesses should be experts. If they have any knowledge of such value they may give their opinions in respect thereto.[79]

Testimony of Owner or Wife as to Nature and Value of Baggage.—See ante, "Witnesses," § 3523.

Custom.—In an action against a carrier to recover for merchandise contained in a commercial traveler's trunk, evidence that defendant transports large numbers of commercial travelers, that trunks similar to the one in question are of special construction, and known as sample trunks, and that such travelers receive checks for their trunks and are transported for the price of the tickets, is inadmissible.[80]

The pauper affidavit made by plaintiff in a suit in a justice's court brought to recover against a railway company for the loss of a trunk and contents in order to appeal the case to the superior court is not admissible on the trial of the case in that court to show that the plaintiff's financial condition was such that she did not probably own the property claimed to have been contained in the trunk.[81]

Evidence as to Damages.—In an action against a railroad for delay in delivering baggage of a traveling salesman, whereby he was unable to sell goods, evidence that the time of the year was that in which such business was most active was admissible.[82] But in an action against a transportation company for the loss of a trunk, it was error to admit testimony as to expenditures by plaintiff for wearing apparel, as leading the jury to consider such expenditures outside of the value of the contents of the trunk.[83]

Evidence Admissible under Pleadings.—See ante, "Evidence Admissible under Pleadings," § 3519.

§ 3525. **Weight and Sufficiency of Evidence.—Contract for Transportation.**—Evidence that a passenger purchased a ticket for herself and her baggage from one who purported to be an agent of the carrier for the sale of tickets, that the conductors accepted it as evidence of her right to ride in the cars, marked it, and finally took it, shortly before arrival, and demanded no other fare of her, is sufficient proof of an undertaking on the part of the carrier to transport her and her goods.[84]

76. Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246, affirming 6 Wkly. L. Bull. 208.

77. **Nature and value of baggage.**—Peixotti *v.* McLaughlin (S. C.), 1 Strob. 468, 47 Am. Dec. 563.

78. Sugg *v.* Memphis, etc., Packet Co., 40 Mo. 442.

79. **Opinion evidence.**—Central R. Co. *v.* Wolff, 74 Ga. 664.

80. **Custom to carry sample trunks as baggage.**—Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667, citing Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140.

81. **Pauper affidavit.**—Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952.

82. **Evidence as to damages.**—Webb *v.* Atlantic, etc., R. Co., 76 S. C. 193, 56 S. E. 954, 9 L. R. A., N. S., 1218, 11 Am. & Eng. Ann. Cas. 834.

83. Merrill *v.* Pacific Transfer Co., 63 Pac. 915, 131 Cal. 582.

84. **Contract for transportation.**—Glasco *v.* New York Cent. R. Co. (N. Y.), 36 Barb. 557.

Joint Contract of Transportation.—Where in a joint action against three railroad companies, operating connecting lines, to recover for baggage lost at some unknown point on their lines, the evidence showed that plaintiff purchased for a single fare from another company, a common agent of defendants, a through ticket over its own and defendants' lines, with coupons attached, on each of which were the initials of all of defendants; that when plaintiff reached the end of the line of the initial company, which had expressly limited its liability to such injuries as might occur to plaintiff's baggage while on its own line, she received from the next company a through check for her baggage over all of defendants' lines and was charged for extra weight; that the baggage was carried through to the end of the journey on the same train with plaintiff, the evidence was sufficient to authorize a finding that defendants jointly undertook to carry the baggage safely through to the end of the journey.[85] Evidence that a company operating a railroad and a company operating a line of boats advertised that they had formed a line between certain points, and that they had a common agent, who sold through passenger tickets and another common agent who checked baggage through, was held to support a finding that they had entered into an arrangement for carrying passengers and baggage between such points, rendering them jointly liable for the loss of a passenger's baggage.[86]

Delivery to Carrier and Custody of Baggage.—In an action against a carrier for loss of baggage, the testimony of its transfer agent, to whom plaintiff delivered it at his house that he delivered the same at its (the carrier's) freight depot, is sufficient proof that the baggage came into the custody of the carrier.[87] Where in an action against a street railroad for the loss of a passenger's baggage, there was no evidence that the railroad held itself out as undertaking to assume the control of baggage, and the conductor was not requested to take the passenger's baggage into his charge, and he took it when it was handed to him, and placed it in the car within sight and control of the passenger, while assisting her, the evidence was insufficient to justify a finding that the conductor assumed the custody of the baggage so as to render the railroad liable for its loss.[88]

Knowledge of Nature of Baggage.—Where plaintiff had traveled over defendant's road for six years, carrying samples of merchandise in trunks different in style from the ordinary, and a witness testified that on the last of these trips the baggage master stated that plaintiff was a dress man, and that he had ladies' dresses, but the trunks were received as passenger's baggage, and some of the contents stolen, there was evidence from which the jury might infer knowledge on defendant's part as to the character of the contents, and a verdict for plaintiff will not be disturbed.[89] But when a passenger presents a valise containing merchandise to the baggage master to be checked, but does not notify him of its contents, the company is not rendered liable because there is evidence tending to show that baggage masters at other stations on the same line had previously checked the same valise, with a knowledge of its contents.[90]

Rebuttal of Presumption of Negligence.—The inference of negligence arising from the failure of the carrier to account in some manner for the loss of a trunk which it had agreed to store over night and deliver on the following morning is not sufficiently met by evidence showing that the building used for the storage of baggage was safe and secure, in charge of trusty agents and servants, and properly guarded both day and night.[91] And the presumption of negligence

85. **Joint contract of transportation.**—Peterson *v.* Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573.

86. Wolf *v.* Grand Rapids, etc., Railway, 112 N. W. 732, 149 Mich. 75.

87. **Delivery to carrier.**—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 112 N. W. 732.

88. **Custody of baggage.**—Sperry *v.* Consolidated R. Co., 79 Conn. 565, 65 Atl. 962, 10 L. R. A., N. S., 907.

89. **Knowledge of nature of baggage.**—Amory *v.* Wabash R. Co., 130 Mich. 404, 90 N. W. 22, 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

90. Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

91. **Rebuttal of presumptions of negligence.**—Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

arising from the derailment of a train, by reason of which a passenger's baggage was destroyed, is not rebutted by the fact that the derailment and wrecking of the train were caused by a slide of dirt and rocks on the track.[92]

Conversion.—Evidence of the retention of plaintiff's baggage by defendant after a refusal to give him checks therefor, and a subsequent failure to deliver it to him at a certain point on the road, as promised, make out a case of conversion sufficient to entitle plaintiff to a verdict.[93]

Where a carrier holds baggage as warehouseman only, proof that it was received and deposited in the baggage room, and, when the traveler claimed it, could not be found, will, if no explanation is given, warrant a verdict in his favor.[94] And evidence showing that the agent of a carrier undertook, in compliance with a passenger's request, to store her trunk at the point of her destination until she should send for it, but that he failed to do so and the trunk was stolen, is sufficient to warrant a recovery.[95]

Custom to Carry Bundles of Merchandise.—Evidence that passengers on a railroad have been in the habit of carrying with them bundles of merchandise without objection has no legal tendency to prove an agreement on the part of the company that such bundles are to be regarded as part of the passenger's baggage.[96]

§ 3526. Questions for Court or Jury.—Delivery to Carrier.—The question of the delivery of baggage to the carrier is for the jury, where the evidence is conflicting as to whether the baggage, which was stolen, was delivered at the usual and proper place at the depot.[97] And whether the custom has been established that delivery of baggage at the station without notice to the carrier is regarded by the latter as a delivery to its servants binding upon itself, is also a question for the jury.[98]

Delivery to Passenger.—Where in an action by a railroad passenger to recover for loss of her baggage, there was proof that on her arriving at her destination she delivered the checks therefor to the baggage master on his assurance that the trunk would be "just as safe without the checks as with them;" that a few days after, on her calling for her trunk, it could not be found, he having delivered it to a stranger; and that he was prohibited by the company from thus keeping baggage, the question whether there was a delivery of the trunk to her by the company was for the jury.[99] And where, upon a passenger arriving at the end of his journey, his hand baggage was taken from him by a railway porter to be placed in one of the cabs standing at the station, but was never seen again, and it was shown that it was the custom of the railway company to have their porters assist in transferring baggage from the coaches to cabs at its stations, it was held that there was evidence that the company has contracted to deliver the carpet bag to the cab, and that whether the plaintiff had accepted a delivery on the platform was a question for the jury.[1]

Whether Person Receiving Baggage Agent of Carrier or Passenger.—In an action against a railroad company to recover the value of certain baggage, on evidence that the baggage was delivered by the railroad company to the baggage master of a connecting steamboat line to be delivered to the boat, the ques-

92. Thomas *v.* Southern R. Co., 131 N. C. 590, 42 S. E. 964.

93. **Conversion.**—McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6, overruling 80 N. Y. 353.

94. **Carrier liable as warehouseman.**—Fairfax *v.* New York, etc., R. Co., 67 N. Y. 11, reversing 40 N. Y. Super. Ct. 128.

95. Georgia R., etc., Co. *v.* Thompson, 86 Ga. 327, 12 S. E. 640.

96. **Custom to carry bundles of merchandise.**—Smith *v.* Boston, etc., Railroad, 44 N. H. 325.

97. **Delivery to carrier.**—McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

98. **Question as to custom.**—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410.

99. **Delivery to passenger.**—Matteson *v.* New York, etc., R. Co., 76 N. Y. 381.

1. Butcher *v.* London R. Co. (Eng.), 16 C. B. 13.

tion whether such baggage master was the agent of the railroad company or the agent of the passenger is a question for the jury.[2]

Negligence of Carrier.—In an action against a steamship company for damages for the loss of certain baggage, where it appears that the vessel stopped nowhere until the port of destination was reached, that all the baggage was then placed on the dock without system, and that the baggage in question was never delivered to the owner, the question of negligence is for the jury.[3] Where a passenger kept his baggage in his state room, which, by the custom of the ship, was kept open; and the state room opened on a passage connected with the cabin, and lights were kept burning, and a watchman was on duty at night in the cabin, who was required to report every hour; and the passenger's baggage was stolen while he was asleep; and the watchman had stopped temporarily when reporting at the bridge, and state rooms on both sides of the cabin were robbed that night; and there was some evidence that a fellow passenger, who had a state room near, was the thief, whether the company was negligent should have been submitted to the jury.[4] The question whether a room in which a carrier stored the personal baggage of a passenger on reaching its destination was in a reasonably safe condition for the storage of baggage is for the jury.[5] But whether a carrier used ordinary care to protect a passenger's baggage while in a warehouse after it had reached its destination is for the court, rather than the jury, where the facts are undisputed.[6]

What Constitutes Baggage.—See ante, "Questions for Court or Jury," § 3445.

Reasonable Opportunity to Call for and Receive Baggage.—What constitutes a reasonable opportunity for passengers to call for and receive their baggage after its arrival at destination is a question of fact for the jury, dependent upon the circumstances of the particular case.[7]

Reasonable Time to Call for Baggage.—See ante, "What Constitutes Reasonable Time," § 3501.

Reasonable Time for Checking Baggage.—Plaintiff, who took his trunk to defendant's station at night, 12 hours before train time, intending to check it as baggage the next morning, and knowing that defendant's rules prohibited the checking of baggage till half an hour before train time, can not complain that, in an action to hold defendant liable as carrier—it having been burned during the night—the court submitted to the jury the question whether the limit of 30 minutes was unreasonable, or the 12 hours a reasonable time.[8]

2. **Whether person receiving baggage agent of carrier or passenger.**—Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

3. **Negligence of carrier.**—Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729, 3 Silvernail Ct. App. 276, reversing 52 Hun 75, 5 N. Y. S. 101, 22 N. Y. St. Rep. 590.

4. American Steamship Co. *v.* Bryan, 83 Pa. 446.

5. **Condition of baggage room.**—Nealand *v.* Boston, etc., Railroad, 161 Mass. 67, 36 N. E. 592.

6. **When facts undisputed.**—Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169.

7. **Reasonable opportunity to call for baggage.**—Zeigler Bros. *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. 811.

Plaintiff's traveling agent arrived at K. on December 5th by the 7:40 p. m. train, with two trunks, for which he would have to pay overweight charges and surrender a waybill, after they had been reweighed. He went to his hotel without attempting to get them, and in the night they were burned with the depot. It appeared that the depot was closed very soon after that train left, and that it was the custom of traveling men to leave their trunks at the depot over night. The hotel porter testified that on special request, and surrender of checks, trunks were sometimes left out on the platform when the station closed. There was some testimony that plaintiff could have gotten his trunks without special pains. Held, that it was for the jury to say whether reasonable facilities were extended to him, the special arrangement described by the porter being unreasonable. Dittman, etc., Shoe Co. *v.* Keokuk, etc., R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352.

8. **Reasonable time for checking baggage.** Goldberg *v.* Ahnapee, etc., R. Co., 80 N. W. 920, 105 Wis. 1, 47 L. R. A. 221, 76 Am. St. Rep. 899, 17 Am. & Eng. R. Cas., N. S., 65.

Notice of Contents of Receipt.—Whether a passenger, who has accepted from a common carrier a receipt for his baggage, has taken it with notice of its contents, is a question of fact for the jury.[9]

Knowledge of Limitation of Liability.—Where a notice limiting the carrier's liability for baggage was printed on the back of a passage ticket and detached from what ordinarily contains all that is material for the passenger to know, it was held in an action to recover for loss of baggage, that it is a question for the jury whether plaintiff knew of the limitation before beginning the journey.[10]

Genuineness of Check and Authority to Direct Return of Baggage.—Where a passenger, who was traveling with plaintiff as her husband, presented a check for plaintiff's trunk, and, on being informed of its nonarrival requested the agent to return the trunk to a certain place which was done, whether the check presented by the passenger was the genuine check issued for the trunk or was forged, and whether he had authority to direct the return of the trunk, was for the jury.[11]

§ 3527. Instructions.—An instruction in an action for injuries to baggage that, when the railroad gave a check for the trunk it took the burden of care in transporting and delivering the trunk, is not erroneous as a charge on the facts.[12] A charge that baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the class to which he belongs, either with reference to his immediate necessities or to the purposes of the journey, properly submits to the jury whether shotguns carried by a passenger in his valise, to hunt with as opportunity presented, are baggage.[13] Where plaintiff was in the habit of carrying merchandise in his trunk as personal baggage, contrary to the regulations of defendant railroad, in an action against defendant for refusal to check and transport plaintiff's trunk, an instruction which left in doubt whether the occasion alluded to therein as the time when plaintiff had not endeavored to deceive the defendant was the occasion mentioned in the declaration, or some former occasion, was erroneous.[14] Improper instructions may be ground for reversal, notwithstanding proper instruction on the same subject had been previously given.[15]

Refusal to Charge.—Where a chest containing property belonging to two passengers on a train, to whom a check was issued jointly, is lost, in an action to recover for its value the court's refusal to charge that, as the evidence showed some of the articles were owned in severalty, no recovery could be had therefor,

9. **Notice of contents of receipt.**—Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153.

10. **Knowledge of limitation of liability.**—Brown *v.* Eastern R. Co. (Mass.), 11 Cush. 97; Malone *v.* Boston, etc., R. Corp. (Mass.), 12 Gray 388, 74 Am. Dec. 598.

11. **Genuineness of check and authority to direct return of trunk.**—St. Louis, etc., R. Co. *v.* Stone, 78 Ark. 318, 95 S. W. 470.

12. **Instructions—Charge on facts.**—Harzburg & Co. *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75.

13. **What is baggage.**—Little Rock, etc., R. Co. *v.* Record, 85 S. W. 421, 74 Ark. 125, 109 Am. St. Rep. 67, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664.

14. **Refusal to check and transport trunk.**—Norfolk, etc., R. Co. *v.* Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110.

15. **Error not cured by other instructions.**—Plaintiff, a passenger on defendant's steamboat, on retiring at night to the berth assigned to him, placed his vest, in which were $73 in money, a gold watch, gold pen and pencil, and railroad tickets, under his pillow. When he awoke in the morning, the vest and these articles had been stolen. In an action against defendant, the court charged the jury that, if it was negligent for plaintiff to have the amount of money in his berth, instead of giving it to defendant's employees to take care of, defendant was entitled to a verdict; and that plaintiff had a right to carry such articles with him on his trip, but not to retain them in his berth. Held, error, for which a judgment for defendant must be reversed, notwithstanding proper instructions on the subject had been previously given. Dunn *v.* New Haven Steamboat Co., 58 Hun 461, 12 N. Y. S. 406, 35 N. Y. St. Rep. 251.

is not error, the evidence being admitted without objection, and no motion made to sever the causes of action.[16]

§§ 3528-3530. Damages—§ 3528. Nominal Damages.—Where plaintiff delivered his baggage before procuring his tickets, and subsequently refused to pay a charge for excess baggage, and a return to him of the baggage was refused, it having been put on the car, and afterwards he waived the conversion by agreeing to accept the baggage at the point of destination, where it was destroyed by a fire caused by lightning, the plaintiff could recover nominal damages only.[17] And in an action against a carrier for the loss of laces, an heirloom, where no evidence is given by plaintiff as to the value of such laces measured by a money standard, nominal damages only will be awarded.[18]

§ 3529. Punitive or Exemplary Damages.—The negligent violation of the duties of a carrier to a passenger will not justify an award of exemplary damages, unless the carrier is guilty of willfulness, wantonness, or conscious indifference to consequences, from which malice will be inferred.[19] Where a ticket agent refused to check the baggage of a passenger to a point on another line to which the passenger had bought a ticket, because under the rules of the company he could only check to the junctional point, and on return of the check to the junctional point he threw the baggage out of the car and refused to take further charge of it, it authorizes a recovery of punitive damages by the passenger.[20] And where a passenger's baggage was wrongfully carried beyond the station at which he desired it delivered to him, exemplary damages may be given if the jury believe the act to be committed willfully, or with such negligence as indicates a wanton disregard of the rights of others.[21] But where defendant railroad made an earnest effort to trace and deliver plaintiff's baggage which had miscarried, an inference of willful misconduct was not warranted, and plaintiff could not recover punitive damages for delay in delivery.[22] In an action for delay in delivery of baggage punitive damages are recoverable for any willful or wanton failure to transport the baggage with reasonable dispatch, or where the negligence is so gross and reckless as to assume the nature of wantonness and willfulness.[23] Punitive damages may be allowed where the carrier has refused to allow a passenger to board its car with proper personal baggage.[24] And it has been held

16. **Refusal to charge.**—Anderson *v.* Wabash, etc., R. Co., 65 Iowa 131, 21 N. W. 485.

17. **Nominal damages.**—McCormick *v.* Pennsylvania Cent. R. Co., 80 N. Y. 353.

18. Fraloff *v.* New York, etc., R. Co., Fed. Cas. No. 5,025, 10 Blatchf. 16.

19. **Punitive or exemplary damages.**—Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726.

20. **Refusal to check beyond own line.**—Sullivan *v.* Southern Railway, 74 S. C. 377, 54 S. E. 586.

21. **Baggage carried beyond station.**—Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

22. **Effort to trace baggage.**—Black *v.* Atlantic, etc., R. Co., 82 S. C. 478, 64 S. E. 418.

23. **Delay in delivery.**—Webb *v.* Atlantic, etc., R. Co., 76 S. C. 193, 56 S. E. 954, 9 L. R. A., N. S., 1218, 11 Am. & Eng. Ann. Cas. 834.

Several distinct acts of negligence.—Where there was a delay of four days in the transportation of a trunk caused by three separate and distinct acts of negligence on the part of the carrier, it authorized punitive damages. Webb *v.* Atlantic, etc., R. Co., 76 S. C. 193, 56 S. E. 954, 9 L. R. A., N. S., 1218, 11 Am. & Eng. Ann. Cass 834.

24. **Refusal to permit passenger to board car with proper baggage.**—Where, in an action against a street railway company for refusal to permit plaintiff to board a car, the evidence showed that plaintiff and the conductor had had a previous difficulty, that plaintiff attempted to board the car in a proper manner and with proper personal baggage, consisting of a small piece of ice so wrapped as to prevent leakage, that he informed the conductor of the urgency of his carrying the ice to a sick man, that plaintiff offered to stay on the platform with the ice and to pay for its transportation, but that the conductor rudely shut the gate and would not let him get aboard, and that the conductor following on the next car permitted plaintiff to board the car with the ice, there was evidence of willful invasion of plaintiff's rights, justifying

that if a street railway waived its rule prohibiting passengers from bringing large and unwieldly articles into the car by permitting a passenger to bring a graphophone horn into the car with him, it will be held liable to punitive damages for afterwards refusing to allow plaintiff to become a passenger with a graphophone horn.[25]

§ 3530. **Compensatory Damages.—Loss of Baggage.**—In an action for damages for the loss of baggage the measure of damages is the value of the property at the place of its destination,[26] without taking into account any expense incurred in the effort to recover it, or in being deprived of its use, or in the purchase of other material, where there was no notice to the carrier of special circumstances.[27] Where the baggage consisted in part of articles of clothing, the passenger is entitled to recover the full value of such clothing for use to him, and not merely what it may be sold for in money.[28] If there is no proof of the value of the contents of a lost trunk, or of what they consisted, the jury may give damages proportioned to the value of the articles, which they, in their judgment, think the trunk did and might fairly contain.[29]

Injury to Baggage.—In an action against a carrier for damage to baggage consisting of household goods or wearing apparel, the measure of damages is the difference in their actual value prior and subsequent to the injury, and not the difference in the market value of similar goods at such time, at the nearest place where such market obtains.[30]

Tender of Damaged Baggage in Action for Loss.—Where in an action for loss of baggage, defendant on the day of trial produced the baggage, which it tendered to plaintiff, who refused to accept it, the measure of damages was any reasonable loss and expense occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value according to their condition at the time and place of tender.[31] But it is held that a passenger after bringing an action for damages for the loss of a trunk, and after the original answer generally denying the complaint has been filed, is not bound to accept, when tendered, the property concerning which the action has been brought, and to recover only for the detention and any damage to the property.[32]

Delay in Delivery.—The measure of damages for failure of a carrier to deliver promptly a traveling man's sample trunks, which the carrier received with knowledge of their contents, is the value of the use of the property during the delay,[33] including such incidental expenses and damages as were in the contemplation of the parties when the contract was entered into.[34] Thus, the passenger may recover for the loss of his time in going from the town where the trunks were checked to the town where they should have been delivered, and return, and the expense of the trip, and the profit on sales that he could have made.[35] He

punitive damages. McIntosh *v.* Augusta, etc., R. Co., 87 S. C. 181, 69 S. E. 159, 30 L. R. A., N. S., 889.

25. Vlasservitch *v.* Augusta, etc., R. Co., 85 S. C. 291, 67 S. E. 306, 35 R. R. R. 721, 58 Am. & Eng. R. Cas., N. S., 721.

26. **Loss of baggage.**—Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724; Turner *v.* Southern Railway, 75 S. C. 58, 54 S. E. 825, 7 L. R. A., N. S., 188.

27. Turner *v.* Southern Railway, 75 S. C. 58, 5 S. E. 825, 7 L. R. A., N. S., 188.

28. Fairfax *v.* New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119, cited in Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

29. Dill *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 158, 62 Am. Dec. 407.

30. **Injury to baggage.**—St. Louis, etc., R. Co. *v.* Dickerson, 29 Okla. 386, 118 Pac. 140.

31. **Tender of damaged baggage in action for loss.**—Wall *v.* Atlantic, etc., Railroad, 71 S. C. 337, 51 S. E. 95.

32. **Where passenger not bound to accept damaged baggage.**—Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

33. **Delay in delivery.**—Conheim *v.* Chicago, etc., R. Co., 104 Minn. 312, 116 N. W. 581, 17 L. R. A., N. S., 1091, 15 Am. & Eng. Ann. Cas. 389; Brooks *v.* Northern Pac. R. Co., 58 Ore. 387, 114 Pac. 949.

34. Conheim *v.* Chicago, etc., R. Co., 104 Minn. 312, 116 N. W. 581, 17 L. R. A., N. S., 1091, 15 Am. & Eng. Ann. Cas. 389.

35. Carnahan *v.* Chesapeake, etc., R. Co., 145 Ky. 676, 141 S. W. 49.

may recover for all injury to the special business attributable to the delay, including the expense and loss of time incurred in a search for the delayed baggage. This does not include speculative profits resting on the mere hope of particular future transactions.[36] In an action by a passenger against a railroad company for delay in the transportation of his baggage, plaintiff may recover the damages sustained by him by being compelled to buy clothes to replace those with his baggage; also the damages sustained in waiting for the arrival of the baggage.[37] The measure of damages for delay in the transmission of baggage, by which a passenger was delayed in his journey, is not the difference in value of the goods when they did arrive from what it would have been had they arrived on time.[38]

Special Damages.—A passenger can not recover special damages for failure to deliver his baggage in time, unless the carrier had notice of the special circumstances at the time of receiving the baggage.[39]

Expenses of Search.—In an action by a passenger against a common carrier for loss of baggage, as a general rule he can not recover for his expenses in searching for his baggage.[40]

Mental Suffering.—In an action against a carrier for damage to a trunk and contents, plaintiff is not entitled to recover for mental suffering.[41]

36. Strange *v.* Atlantic, etc., R. Co., 77 S. C. 182, 57 S. E. 724.

37. International, etc., R. Co. *v.* Philips, 63 Tex. 590.

38. International, etc., R. Co. *v.* Philips, 63 Tex. 590.

39. **Notice of special damages.**—Strange *v.* Atlantic, etc., R. Co., 77 S. C. 182, 57 S. E. 724.

40. **Expenses of search.**—Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671.

41. **Mental suffering.**—Chicago, etc., R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835, 32 R. R. R. 152, 55 Am. & Eng. R. Cas., N. S., 152, 21 Am. & Eng. Ann. Cas. 726.

CHAPTER XXX.

Palace Cars and Sleeping Car Companies.

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§ 3531. Nature of Liability in General.—Palace and sleeping car companies are not, properly speaking, engaged in transportation. They offer to those to be transported by railway companies the comforts and convenience of their cars and the services of their employees. They are not common carriers, and in no proper sense can they be held liable as such.[1] They have no control over the

1. Nature of liability—Not liable as common carriers.—*United States.*—Lemon *v.* Pullman Palace Car Co., 52 Fed. 262; Meyer *v.* St. Louis, etc., R. Co., 58 Am. & Eng. R. Cas. 111, 54 Fed. 116, 4 C. C. A. 221; Blum *v.* Southern Pullman Palace Car Co., Fed. Cas. No. 1,574, 1 Flip. 500, 21 Am. & Eng. R. Cas. 447; Calhoun *v.* Pullman Palace Car Co., 149 Fed. 546.

Alabama.—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53; Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Georgia.—Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Indiana.—Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010, 3 Am. & Eng. R. Cas., N. S., 427.

Kentucky.—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

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New York.—Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 4 N. P. 26, 6 O. Dec. 85.

Tennessee.—Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947.

Texas.—Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31, 34 Am. & Eng. R. Cas. 217; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112; Belden *v.* Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22.

The Mississippi constitution, § 195, declares that sleeping car companies are common carriers. Pullman Co. *v.* Kelly, 86 Miss. 87, 38 So. 317; Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53, wherein the court said, "They seem to be quasi common carriers."

contract for transportation and are not responsible for the manner in which it is performed;[2] their contract being to lodge the passengers.[3] And while sleeping car companies bear a relation to the public somewhat similar to that occupied by innkeepers, insomuch as they furnish sleeping accommodations to the traveling public, they are not liable as innkeepers.[4] But in one case it has been held that insofar as they render service similar in kind to innkeepers, they are subject to the same liabilities.[5] The character and extent of the obligations resting upon sleeping car companies have not yet been defined with exactness, and may in some particulars be dependent upon the relation existing between them and the railway company upon whose line their cars are used.[6] They are public service

2. Calhoun *v.* Pullman Co., 159 Fed. 387, 86 C. C. A. 387, affirming 149 Fed. 546; See Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947; Pullman's Palace Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

3. Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.

4. Not liable as innkeepers.—*United States.*—Blum *v.* Southern Pullman Palace Car Co., Fed. Cas. No. 1,574, 1 Flip. 500, 21 Am. & Eng. R. Cas. 447.

Alabama. — Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

Georgia.—Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Kentucky.—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Mississippi.—See Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 4 N. P. 26, 6 O. Dec. 85.

Tennessee.—Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947.

Texas.—Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112; Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 25 Am. & Eng. R. Cas. 149; Belden *v.* Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 32 S. W. 335.

Innkeepers and sleeping car companies distinguished.—In Blum *v.* Southern Pullman Palace Car Co., Fed. Cas. No. 1,574, 1 Flip. 500, 21 Am. & Eng. R. Cas. 447, holding that there are good reasons for not extending the liability of an innkeeper to the proprietor of a sleeping car, the court said: "First, the peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection. Second, as a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment. Third, the innkeeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those. Fourth, the innkeeper is bound to furnish food as well as lodging and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging. Fifth, the conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend on private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose. Sixth, the innkeeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movements. Seventh, the sleeping car can not even protect its guests, for the conductor of the train has a right to put them off for nonpayment of fare, or violation of its rules and regulations."

5. Pullman Palace Car Co. *v.* Lowe, 28 Neb. 239, 44 N. W. 226, 40 Am. & Eng. R. Cas. 637, 6 L. R. A. 809, 26 Am. St. Rep. 325.

6. Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 4 C. C. A. 221, 58 Am. & Eng. R. Cas. 111.

corporations,[7] and owe, by force of law, independently of contract, certain duties to the public as common carriers.[8]

§ 3532. Statutory Regulations as to Empty Berths.—It has been held that a statute providing that the upper berths in sleeping cars shall be closed when unoccupied, at the option of the occupant of the lower berth, is not sustainable as a regulation for the promotion of public health, as the option given to the occupant of the lower berth indicates that it was to promote private rather than public interests.[9]

§§ 3533-3535. Duty to Receive Passengers—§ 3533. In General.—The duty of palace and sleeping car companies to receive all proper persons as passengers is based on reasons very similar to those for which carriers in general are required to accommodate all proper persons.[10] The liability of such companies to persons seeking their accommodations rests solely on the breach of their implied obligation to furnish such accommodations as they hold themselves out as offering to the public.[11] So, where a passenger, who, under the rules of a sleeping car company, is entitled to a berth upon payment or tender of the usual fare, and to whom no personal objection attaches, enters the company's car at a proper time for the purpose of procuring accommodation, and in an orderly and respectful manner applies for a berth, offering to pay or tendering the customary price therefor, the company is bound by law to furnish it, provided it has a vacant one at its disposal.[12] But a sleeping-car company has the right to sell a whole section to one person, and no cause of action arises from the refusal of its conductor to sell the upper berth in such section to another passenger, though that berth was in fact unoccupied.[13] And where a berth has been sold for occupancy to a certain point, no cause of action arises for the refusal of the conductor, before that point is reached, to sell another person a ticket entitling him to such berth from there to the end of the journey.[14]

Discrimination—Reasonable Regulation.—A sleeping-car company is obligated, independent of contract, like a common carrier, to treat all persons without unjust discrimination, and is liable for breach of such duty to the party injured.[15] Yet the right of a person to a berth or passage on a sleeping car is not unlimited, but is subject to reasonable regulations.[16] A regulation excluding insane persons is reasonable.[17] And a sleeping car company is not bound to admit

7. **Are public service corporations.**—Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761; Pullman Co. *v.* Lutz, 154 Ala. 517, 45 So. 675, 14 L. R. A., N. S., 907.

8. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688, cited in Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53. See post, "Duty to Receive Passengers," §§ 3533-3535.

9. **Statutory regulations as to empty berths.**—State *v.* Redmon, 134 Wis. 89, 114 N. W. 137, 143, wherein the court said: "The law is not, in reality, a police regulation but an unwarranted interference with property rights; an attempt in the circumstances specified to give to any person, at his option, who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof. * * * It is not intended to foreclose the question of whether the scope of police power extends to preventing, as a rule, the letting down of upper berths in sleeping cars when not occupied or engaged, in cases where the lower ones are occupied."

10. **Duty to receive passengers.**—See ante, "In General," § 2118.

11. Calhoun *v.* Pullman Palace Car Co., 149 Fed. 546; Pullman's Palace Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

12. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688. See Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

13. **Refusal to sell engaged but unoccupied berth.**—Searles *v.* Mann Boudoir Car Co., 45 Fed. 330.

14. **Refusal to sell berth before vacated by occupant.**—Searles *v.* Mann Boudoir Car Co., 45 Fed. 330.

15. **Discrimination.**—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688.

16. **Reasonable regulation binding.**—Pullman Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A., N. S., 103.

Regulations as to tickets.—See post, "Regulations as to Tickets," § 3535.

17. **Insane persons.**—Pullman Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A., N. S., 103.

persons as passengers on its cars who are afflicted with a contagious or infectious disease, so that there would be a probability of other passengers contracting the same.[18]

Right of Railway Company to Determine.—A sleeping car company not being a common carrier, and its cars being under the control of the railroad company, except as to furnishing lodging to those who may pay for it, the agents of the railroad company are entitled to determine who shall occupy the sleeping cars, as part of the train.[19]

§ 3534. Right to Demand Compensation.—The payment of first-class fare does not entitle one to demand carriage in a car equipped with adjustable reclining chairs and lavatory and served by a special porter. And where a railway company furnishes sufficient first-class cars with the usual appliances and service, for the accommodation of those entitled to first-class passage, and upon the same train carries a chair car which furnishes extra service and accommodations, it may lawfully demand a reasonable extra compensation of passengers who from choice take passage in it, and this right is not denied or restricted by a statute which limits the sum railways may charge for first-class passage.[20] But it is held that a passenger may take a seat in a drawing room car without the payment of additional compensation where there are no vacant seats in the ordinary coaches.[20a] The right of the holder of a first-class ticket who enters a train composed of sleepers only is subject to observance of all reasonable rules adopted by the carrier, including the requirement of payment of Pullman car fare, though he have no notice of such rules.[21] And an advertisement by a railway company in which it was stated generally that free reclining-chair cars would be run upon its road, and specially that free reclining-chair cars would be run to a certain point, does not warrant the inference that such cars were free to all passengers under all circumstances; but if such inference could be drawn it would not warrant a recovery, except upon a showing that the plaintiff had been misled in that regard, and thereby sustained some loss.[22]

§ 3535. Regulations as to Tickets.—A sleeping car company may lawfully require those seeking to be carried to purchase tickets when convenient facilities to that end are afforded, to exhibit them to the person designated by the company for that purpose, and to surrender them, after securing their seats, when required by the person in charge. Such requirements are reasonable ones to protect it against imposition and the fraud of its employees.[23]

Requiring First-Class Ticket.—Where a sleeping car company, under its arrangement with a railroad company, is bound to comply with its reasonable regulation requiring a passenger to have a first-class ticket before he can be assigned to a berth in a sleeping car, it is not liable for refusing to assign a berth to one not holding a first-class ticket.[24] It is held that when a passenger agent who was engaged in selling tickets, both for railroad fare and for sleeping car berths, re-

18. **Persons afflicted with contagious diseases.**—Pullman Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A., N. S., 103.

19. **Right of railway company to determine.**—Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

20. **Right to demand compensation.**—St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711. See Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

20a. Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325.

21. **Trains composed exclusively of sleeping cars.**—Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 115 Pac. 401, 36 L. R. A., N. S., 1139, holding that a railway rule governing trains composed exclusively of sleepers requiring passengers boarding a train before 7 o'clock a. m. to pay a sleeping berth rate is not unreasonable.

22. **Advertisement offering free chair cars.**—St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711.

23. **Regulation as to tickets.**—Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232. See Pullman Palace Car Co. *v.* Marsh, 24 Ind. App. 129, 53 N. E. 782.

24. **Requiring first class ticket.**—Pullman Palace Car Co. *v.* Lee, 49 Ill. App. 75.

fused to sell a sleeping car berth to a passenger, on the ground that the latter had not a first-class ticket, in determining that the ticket was not first-class, the agent acted as the agent of the railroad company, and the car company was not responsible therefor.[25]

§§ 3536-3544. Contracts for Accommodations—§ 3536. In General.—The relation between the sleeping car company and the purchaser of a check for a seat or berth is created through the sale of such check by the duly authorized agent of the company.[26] When a passenger buys a right to a berth in a sleeping car, the ticket he receives is not a contract, but little more than a symbol indicating to the sleeping car company's agents that the passenger is entitled to passage on the car named in the ticket, and, if the ticket is incorrect by reason of the fault of the selling agent, the sleeping car company is bound by the contract in fact made.[27] While, as between the conductor of a sleeping car and a passenger, the passenger's ticket is the sole evidence of the contract, yet the company is charged with knowledge of the real contract made by its agent, and if by mistake of such agent the ticket does not evidence the contract actually made, the sleeping car company can not shield itself from liability for nonperformance of the actual contract, on the ground that it had made a regulation which precluded its conductors from making any inquiries as to the real contract, or from carrying it out.[28]

Authority of Agent.—In an action against a sleeping car company for breach of contract in failing to furnish apartments, evidence that certain railway agents were in the habit in the usual course of business of making such contracts for the sleeping car company, and that plaintiff had previously transacted the same character of business with such agents, and that the sleeping car company had always ratified such authority and fulfilled the contracts, was sufficient to show that such agents had authority to bind the company.[29] Where the porter of a sleeping car acts in the capacity of both conductor and porter, collects fares, assigns passengers to their berths, and is the sole representative of the company on that car, he must be regarded as a vice principal and his acts are binding on the company.[30]

§ 3537. Operation and Effect in General.—A sleeping car company which sells a ticket on a certain sleeper from one place to another, to one having a railroad ticket between such places, undertakes to furnish him a berth in that or another sleeper, if the railroad company haul it.[31] A traveler purchasing a particular berth in a particular sleeping car, and receiving therefor a ticket purporting to entitle him to the same between certain stations, becomes thereby entitled to a continuous passage in such berth, on such car, or to an equally desirable berth in the same locality in that car or another of equal safety, convenience, and comfort.[32] Where plaintiff was entitled to Pullman accommodations on a particular train, but was required at an intervening point to leave that train and accept accommodations on the second section thereof, there was a breach of contract; but it was held that there could be no recovery of damages where both sections arrived at the same time.[33] Where plaintiff contracted for a sleeping car accommodation between certain points on a particular train, but not for space in the sleeping car in which her relatives also purchased accommodations, she could not

25. Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

26. **Creation of relation.**—Pullman Co. *v.* Custer (Tex. Civ. App.), 140 S. W. 847.

27. **Ticket not a contract.**—Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

28. Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

29. **Authority of agent.**—Pullman Co. *v.* Willett, 27 O. C. C. 649. And see Smith *v.* Pullman Co., 119 S. W. 1072, 138 Mo. App. 238.

30. Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

31. **Operation and effect.**—Pullman Palace Car Co. *v.* Cain, 15 Tex. Civ. App. 503, 40 S. W. 220.

32. **Right of passenger to berth purchased.**—Pullman Palace Car Co. *v.* Taylor, 65 Ind. 153, 32 Am. Rep. 57.

33. Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

recover damages because of her subsequent separation from them on being required to accept a berth in a car transported on a second section of such train.[34]

A contract to carry a negro in a sleeping car from a point outside of, to a point in, Texas, is not in violation of the Texas statute prohibiting the carrying of white and negro passengers in the same car, so as to prevent recovery for his being put out of that sleeper, on arrival at the state line, without being furnished a berth in another sleeper; he having a right to assume that at the state line he would be furnished like accommodations in a car separate from white passengers.[35]

§ 3538. Breach of Contract to Reserve Berth.—A person who has contracted with a sleeping car company through its proper agent for the reservation of a berth for him in one of its cars, may recover damages resulting to him from the breach of the contract to reserve the berth.[36] It is no excuse for the sleeping car company that another person demanded it before plaintiff presented himself to pay for and occupy it, and that there was no other unoccupied.[37] And the sleeping car company can not relieve itself from liability to one who has purchased a berth by an offer to refund his money.[38] But where the conductor by mistake sells a berth reserved for passengers getting on at a certain station, and, a reasonable time before reaching such station, notifies the passenger to whom he has sold it of his error, and tenders another berth equally good, such passenger has no cause of action if she refuses to accept the berth so offered, and voluntarily leaves the car.[39]

§ 3539. Contract for Use of Berth in Daytime.—It has been held that a sleeping car company is liable in damages for the breach of its contract to allow one of its berths to be used as a bed during the daytime.[40]

§ 3540. Failure of Railroad Company to Haul Sleeper.—It is held that a sleeping car company which sells accommodations in its cars between points on a railroad to passengers of the railroad company, the cars being hauled by the railroad company in its trains under a contract between the two companies, is not liable to a passenger for breach of contract because the car in which such passenger is riding is diverted by the railroad company on account of a wreck and does not reach the passenger's point of destination, in consequence of which he is compelled to change into another car.[41] And a sleeping-car company, which furnishes a suitable car with proper connections and in readiness for a continuous passage, is not liable to a passenger therein for the failure of a connecting line to send forward the train, on account of a riot.[42] But it is also held that where a sleeping car company, operating its cars under a contract with a railroad company, contracts to furnish sleeping car accommodations to a passenger from one point to another, but breaches its contract before the destination is reached, it is not absolved from liability by reason of the railroad company's failure to haul the sleeper further; such condition not having been expressed in the contract of transportation with the passenger, who had no knowledge of the contract

34. Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

35. **Duty as to negro passenger.**—Pullman Palace Car Co. *v.* Cain, 15 Tex. Civ. App. 503, 40 S. W. 220.

36. **Contract to reserve berth.**—Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

37. Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719.

38. **Offer to refund money.**—Braun *v.* Webb, 65 N. Y. S. 668, 32 Misc. Rep. 243, affirming 62 N. Y. S. 1037, 31 Misc. Rep. 794.

39. Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

40. **Contract for use of berth in daytime.**—Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268.

41. **Failure of railroad company to haul sleeper.**—Louisville, etc., R. Co. *v.* Fisher, 83 C. C. A. 584, 155 Fed. 68, 11 L. R. A., N. S., 926; Duval *v.* Pullman's Palace Car Co., 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715.

42. Simms *v.* Pullman Southern Car Co., Fed. Cas. No. 12,869a.

between the railroad company and the sleeping car company.[43]

§ 3541. Voluntary Abandonment of Contract Rights.—Where a person having a contract with a sleeping car company for accommodations voluntary abandons the contract, he has no right of action for the failure of the company to perform its contract.[44] So though a pass entitled plaintiff and his wife, but not his son, to sleeping accommodations, plaintiff could not recover, where the son, at the consent of plaintiff, occupied the berth, on the theory that the son was a trespasser, whom the sleeping-car company permitted to occupy the berth, while it excluded plaintiff from the accommodations to which he was entitled.[45] And it has been held in an action against a sleeping car company and a railway company by a passenger compelled to leave a sleeping car before reaching her point of destination, and to complete the journey in a chair car, the railway company desiring to use the sleeper for the accommodation of passengers on one of its trains bound in the opposite direction, that if plaintiff left the sleeper in order to accommodate an acquaintance and his family who desired a sleeper on such train, it was voluntary and she could not recover.[46]

§ 3542. Right of Husband and Wife to Occupy Same Berth.—When a berth is contracted for by the husband, either with an express understanding that it is engaged for the joint occupancy of himself and wife, or under circumstances that are not misleading within themselves, the refusal to permit such joint occupancy, without other reason than the difference of sex, and when such refusal would be a breach of contract, would give the injured party a right of action for damages. But where a wife engages one berth and her husband engaged another she has no right of action against the railroad company for being excluded from the one occupied by her husband, though the employees of the company acted with great rudeness.[47]

§ 3543. Condition Precedent to Rescission of Contract.—Where, after a sleeping car company has contracted to furnish plaintiff a berth in a sleeping car, it elects to rescind the contract for proper cause (e. g. contagious disease of plaintiff), it is bound as a condition precedent to such rescission to offer to return the purchase price of the ticket.[48]

§ 3544. Implied Agreement of Passenger.—Where a berth in a sleeping car is engaged, the passenger impliedly agrees to conduct himself in a quiet and orderly manner, to take due and proper care of the berth while in his possession, and surrender the same at the end of his journey in as good condition as when assigned to him, necessary wear excepted.[49]

§§ 3545-3548. Duties and Liabilities as to Person of Passenger—§ 3545. In General.—Where a berth in a sleeping car is engaged, the sleeping car company impliedly stipulates to use all reasonable and proper means to preserve order and decorum in the sleeper, to furnish and keep on hand such supplies and conveniences as are usually found in like sleepers, and are necessary

43. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

44. **Voluntary abandonment of contracted rights.**—Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

45. Pullman Palace Car Co. *v.* Marsh, 53 N. E. 782, 24 Ind. App. 129.

46. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

47. **Right of husband and wife to occupy same berth.**—Pullman Palace Car Co. *v.* Bales (Tex.), 14 S. W. 855, wherein the court said: "No question can exist with regard to the right of the husband and wife to occupy the same berth in a sleeping car. At the same time, the proprietors of such conveyances imperatively owe to the traveling public the duty of seeing that men and women who do not occupy to each other that relation shall not occupy the same one."

48. **Condition precedent to rescission of contract.**—Pullman Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A., N. S., 103.

49. **Implied agreement of passenger.**—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688.

to the health, comfort and safety of passengers, and also to permit the passenger to quietly and peaceably occupy his berth for the time engaged.[50] The company owes to the passenger the duty of exercising care in protecting him from injury.[51] A sleeping car company, however, is bound to exercise only ordinary and reasonable care and diligence in watching over its passengers to protect them from injury.[52] Where there has been no negligence, or failure to exercise this ordinary care and diligence, there can be no right of action against the sleeping car company for personal injury.[53] A sleeping car company is liable for injuries sustained by occupant of its sleeping car through the negligence or willful misconduct of the employee whom it places in charge of the car.[54]

Failure to Answer Bell Calls.—A sleeping car company, by providing call bells for its berths, holds out notice that such bells will be responded to when rung, and a failure to answer bell calls is negligence.[55]

Leaving Suit Cases in Aisle.—It is negligent for a sleeping car company to allow suit cases or valises to stand in the dimly lighted aisles of its cars, where passengers are apt to stumble over them.[56]

Duty to Provide Means of Approach to Upper Berth.—Giving a passenger an upper berth in a sleeping car imposes upon the company the duty of providing reasonably safe means for him to get out of it, and having steps it is necessary, if they are movable, that servants be employed to bring them to the aid of the passenger.[57]

50. Duties and liabilities as to person of passenger.—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688.

In Mississippi, it is held "that a sleeping car company owes to all passengers whom it receives all the obligations and duties which a common carrier owes to passengers, except, of course, that a sleeping car company, not controlling the motive power, and not having the management of the train of which its car is a part, can not be held liable to its passengers for injuries occurring to them by reason of any defect or failure in the machinery which furnishes the motive power, or by reason of any want of care, miscarriage, or default in the management of the train." Nelson *v.* Illinois Cent. R. Co. (Miss.), 53 So. 619, quoting Pullman Co. *v.* Kelly, 86 Miss. 87, 38 So. 317.

51. Pullman Co. *v.* Norton (Tex. Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

52. Degree of care required.—St. Louis, etc., R. Co. *v.* Hatch, 94 S. W. 671, 116 Tenn. 580.

Care commensurate with danger.—Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421.

53. Absence of negligence.—Plaintiff, a sleeping car passenger, during the night went to the ladies' dressing room, and, seeing the porter there, closed the door, and placing her hand, as she thought, on the side of the passageway, started back to her berth. The porter opened the door, came out, and closed it after him, when he discovered that the plaintiff's fingers in some manner had been caught in the jamb. Held that, in the absence of proof that the porter had any knowledge that plaintiff's hand was in a dangerous position when he closed the door, there was no negligence. Wilkins *v.* Pullman Co., 166 Fed. 1004.

A ventilator at the top of a sleeping car was left open at night, in midsummer, and rain drove in upon the occupant of an upper berth, in consequence of which, as he claimed, he contracted a cold, and was made ill. It appeared that such windows were usually left open at that season, but were always opened or closed as requested by the person occupying the upper berth, and could be opened or closed by such person. The occupant in the case in question was an experienced traveler. He made no request that the window be closed, and there was nothing to give notice to the servants of the sleeping car company that he required special care or attention. Held, that such facts did not establish negligence on the part of the company which rendered it liable for his illness. Edmundson *v.* Pullman Palace Car Co., 92 Fed. 824, 34 C. C. A. 382.

54. Campbell *v.* Pullman Palace Car Co., 42 Fed. 484, 44 Am. & Eng. R. Cas. 391.

55. Failure to answer bell calls.—Pullman's Palace Car Co. *v.* Fielding, 62 Ill. App. 577. See St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671.

56. Negligence in leaving suit case in aisle.—Levien *v.* Webb, 61 N. Y. S. 1113, 30 Misc. Rep. 196.

57. Duty to provide means of approach to upper berth.—Pullman's Palace Car Co. *v.* Fielding, 62 Ill. App. 577.

Duty to Keep Car Repaired.—A sleeping car company contracting with a railway company to furnish sleeping cars, and to keep the same in good repair, is liable to a passenger injured in consequence of its negligence in failing to keep a car in repair without reference to the question for whom it acted, and though it were but a servant of the railway company.[58]

Proximate Cause of Injury.—Where a passenger, having through railroad transportation and a check evidencing his right to occupy a through sleeping car, was directed to leave his car at an intermediate point and there board another car, and after alighting from the car, he was directed to go to the depot, and while walking on the depot platform he fell and was injured, it was held, that the failure of the sleeping car company to fulfill its contract for continuous passage was not the proximate cause of the injury.[59]

§ 3546. Assaults, Insults, etc.—It is the duty of sleeping car companies to watch their cars and guard their passengers from assaults of third persons.[60] And they are liable for negligent failure to protect passengers from assaults.[61] The care which they are required to exercise for the protection of their passengers from assault, however, is only ordinary care or diligence.[62] When a sleeping car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented;[63] but it is held the company can not be deemed to have anticipated nor be expected to guard and protect him against a crime so horrid as that of murder, so it is not liable for such a death where there was no notice to the company nor its agents of impending danger and under circumstances which could not have put them upon inquiry nor have excited their apprehension.[64]

58. **Duty to keep car repaired.**—Pullman Co. *v.* Norton (Tex. Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

59. **Proximate cause of injury.**—Pullman Co. *v.* Stern, 88 Miss. 390, 41 So. 383.

60. **Duty to protect passengers from assaults.**—St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671.

61. **Liable for negligence.**—Calder *v.* Southern R. Co., 89 S. C. 287, 71 S. E. 841, wherein the court said: "The rule that the duty of the carrier to a passenger, from the wrongful acts of a fellow passenger or stranger, only applies when the carrier has knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is not applicable to passengers asleep in their berths. In the case of passengers, other than those in sleeping cars, it may reasonably be expected that they will be able to give notice of the necessity for protection, but knowledge of the fact that a passenger is asleep in his berth is, in itself, notice of the necessity for taking proper precautions to safeguard him, as at that time he may be presumed to be powerless to give notice of threatened danger."

Since violence is often a concomitant of sneak thieving or robbery of a sleeping victim, a sleeping car company bound to keep watch over its passengers to prevent robbery was bound to take notice of the fact that violence was liable to accompany the robbery of passengers while asleep, and hence the company was liable for personal injuries to a passenger caused by a robber inflicting a blow on him while he was asleep in order to effect the robbery, all of which was due to the sleeping car company's negligence in failing to keep a sufficient watch. Hill *v.* Pullman Co., 188 Fed. 497.

Employees absent from car.—A railroad company and a sleeping car company can not escape liability for indignities inflicted upon a passenger in the sleeper, upon the ground that there was no reason for supposing that any such wrong would be committed, where their employees were absent from the sleeper for two hours, and failed to answer any of the numerous bell calls, for this is not the exercise of the vigilant care exacted of the railroad company, nor of the reasonable care required of the sleeping car company. St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671.

62. **Degree of care required.**—St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671.

63. Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 5 Am. & Eng. R. Cas., N. S., 333, 32 L. R. A. 792, 57 Am. St. Rep. 786.

64. **Where passenger murdered.**—Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 5 Am. & Eng. R. Cas., N. S., 333, 32 L. R. A. 792, 57 Am. St. Rep. 786. See Calder *v.* Southern R. Co., 89 S. C. 287, 71 S. E. 841, wherein the court in referring to the case just cited said: "If it is to be construed as ruling that a sleep-

Assaults by Employees.—Parlor and sleeping car companies are liable for assaults by their employees made within the scope of their employment. Thus, it has been held that a porter on a sleeping car, who makes an assault on a passenger who has just called him and requested food, inflicts the injury while discharging duties in the scope of his employment, where he is the porter charged with answering the calls of passengers and supplying them with food.[65] If, however, an assault, though within the scope of the employment, is justifiable as upon sufficient provocation, there is no liability on the company.[66] It is held that as a general rule a sleeping car company is not liable for assaults on its passengers by its employees when such assault is wanton and wholly foreign to the employment of the employee inflicting the assault.[67] It has been held otherwise, however, as to an indecent assault on a female passenger by the porter in charge of the car in which she was a passenger.[68] A sleeping car company is not liable for an assault made by one of its stewards on a passenger on one of the regular cars of the train, who has, without right, entered defendant's car attached to such train, to induce the steward to sell him liquors, in violation of the law and the company's orders.[69]

Insults and Rudeness.—A sleeping car company is bound to see that its servants treat passengers with due consideration and do not subject them to insults.[70] However, rudeness alone, by the servants of a sleeping car company, in the discharge of their duty, does not of itself render the sleeping car company liable for an action of damages, there being no use of force.[71]

§ 3547. Duty as to Discharging Passengers.—A sleeping car company owes a passenger the duty to safely discharge him at his destination.[72] It must notify him of his arrival at destination and give him a reasonable opportunity to alight.[73] A sleeping car company has been held liable for discharging passengers at five o'clock in the morning at a water tank a half mile from the station.[74]

ing car company can not be held liable for damages, when a passenger is murdered by a stranger, although both the conductor and porter went to sleep, leaving the passengers unprotected, on the ground that murder was a danger not reasonably to be anticipated, then such a rule is not to be followed. We, however, do not think the court intended to go to that extent, as it did not appear in that case that the sleeping car company had failed to keep a general watch over the passengers. Therefore that case can not be regarded as authority for the proposition that it is not the duty of a sleeping car company to take proper care to keep watch over its passengers, even before it has notice of danger, or of circumstances sufficient to put it on inquiry, which, if pursued with due diligence, would lead to knowledge of the danger."

65. **Assaults by servants of sleeping car company.**—Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

66. **Sufficient provocation.**—Plaintiff after purchasing a seat in defendant's parlor car, ordered a meal and later objected that he was not being served in his turn. The porter politely informed him that ladies' orders were served first, whereupon plaintiff started to the platform of the car to complain to the conductor, and in doing so called the porter a "black bastard," whereupon the porter assaulted him. Held, that plaintiff provoked the assault, and that the parlor car company was therefore not responsible therefor, under the rule that parlor car companies are only bound to provide competent and careful servants, and are liable for assaults or violence of the servants only when not provoked by the wrongful conduct of the passenger. Rohrback *v.* Pullman's Palace Car Co., 166 Fed. 797.

67. **Assaults not in scope of employment.**—Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 33 Am. & Eng. R. Cas. 407, 8 Am. St. Rep. 512.

68. **Indecent assault.**—Campbell *v.* Pullman Palace Car Co., 42 Fed. 484, 44 Am. & Eng. R. Cas. 391.

69. **Assault by servant asked to violate law.**—Cassedy *v.* Pullman Palace Car Co. (Miss.), 17 So. 373.

70. **Insults and rudeness.**—Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

71. Pullman Palace Car Co. *v.* Bales, 80 Tex. 211, 15 S. W. 785.

72. **Duty as to discharging passengers.**—Pullman Co. *v.* Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315.

73. **Notice of arrival.**—Pullman Co. *v.* Lutz, 154 Ala. 517, 45 So. 675, 14 L. R. A., N. S., 907; Pullman Co. *v.* Kelly, 86 Miss. 87, 38 So. 317.

74. Plaintiff and his wife occupied

Sleeping Passenger.—A sleeping car company is bound to awaken and notify a passenger occupying a berth in its car in time for him to prepare to safely and comfortably leave the train at his destination.[75]

Sick Passenger.—Where the servants of a sleeping car company accept a sick person as a passenger on her way to a hospital it is their duty to see that she is properly taken from the car at her destination to the depot. In such case the company's failure to notify the train conductor of the passenger's condition and of the necessity of assisting her to embark is actionable negligence.[76] The primary duty of a sleeping car company to assist to alight and convey from the car to the depot a sick passenger, is not waived by the sleeping car conductor telegraphing for an ambulance and friends of the passenger to meet her.[77] Evidence that the conductor agreed to make certain arrangements by telegraph for her removal from the station to the hospital in an ambulance and to notify her friends constituted him her agent for that purpose.[78]

§ 3548. Contributory Negligence of Passenger.—A passenger on a sleeping car may be guilty of such contributory negligence as will bar a recovery for injuries sustained by him though the defendant was also negligent.[79] But a blind passenger who asked a Pullman porter, telling him that he was blind, to assist him into a sleeping car, and the porter took hold of his arms and put him on the steps, was not negligent in feeling his way along the car up the steps until he reached what he thought was a door but which was in fact the open space on the other side of the car, whereby he fell and was injured, since he was entitled to conclude that the porter, knowing of his infirmity, would watch him and guide his movements.[80]

§§ 3549-3557. Ejection of Passengers—§ 3549. Right to Eject.—For proper cause, a sleeping car company has the right to eject a passenger.[81]

berths in a sleeping car. At 5 o'clock a. m. the train stopped at a water tank a half mile from their destination. The porter and conductor of the sleeping car awoke them suddenly, and told them they were at the depot. They were hurried off, partly dressed, and the train left them before they discovered where they were. The exposure resulted in injury to the wife's health. Held that, the sleeping car company having offered no evidence of the duties of its servants and the usages and rules in force on its cars, it will be presumed that the conductor and porter were acting within the scope of their employment, and that the company was liable. Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

75. **Sleeping passenger.**—Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215. See Missouri, etc., R. Co. *v.* Kendrick (Tex. Civ. App.), 32 S. W. 42; McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 8 Am. & Eng. R. Cas., N. S., 219, 59 Am. St. Rep. 910, 35 L. R. A. 252.

76. **Sick passenger.**—Pullman Co. *v.* Finley (Wyo.), 125 Pac. 380.

77. **Duty not waived.**—Pullman Co. *v.* Finley (Wyo.), 125 Pac. 380.

78. **Arrangements at destination.**—Pullman Co. *v.* Finley (Wyo.), 125 Pac. 380.

79. **Contributory negligence of passenger.**—Plaintiff was a passenger on a sleeping car on defendant's railroad. The car was a vestibuled car, having doors opening from the platforms to the steps of the car. The men's washroom was at one end of the car, and from it doors opened into the porter's closet and the water-closet. Plaintiff had frequently traveled on such cars before, and was familiar with their arrangements. During the night, after plaintiff boarded the car, he went to the water-closet in the men's washroom, and he knew its location. When he got up in the morning, it being a foggy, dark morning, he attempted to go again to the water-closet, found the end of the car and the washroom in darkness, the lamps having become extinguished, and, in searching for the door of the closet, walked beyond the washroom, and upon the platform of the car, opened the door of the vestibule, stepped off the train, and was injured. Held that, whether or not the defendant was negligent in allowing the lamps to be extinguished, plaintiff was guilty of such contributory negligence as to bar his recovery. Piper *v.* New York, etc., R. Co., 50 N. E. 851, 156 N. Y. 224, 41 L. R. A. 724, 66 Am. St. Rep. 560, reversing 34 N. Y. S. 1072, 89 Hun 75.

80. **Blind passenger.**—Denver, etc., R. Co. *v.* Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A., N. S., 761.

81. **Right to eject.**—See post, "Grounds for Ejection," §§ 3552-3555.

And its rights in this particular are no more limited than those of a railway company.[82]

§§ 3550-3551. Liability for Wrongful Ejection—§ 3550. In General.—Where a passenger engages sleeping car services, is assigned a berth in a sleeping car, and is afterwards ejected without cause, the sleeping car company is liable therefor.[83] In such case, there is both a tort and a breach of contract.[84] Where the holder of a sleeping car ticket is assigned to a berth in a car, other than that called for by his ticket, and is subsequently ejected, the sleeping car company is liable in damages for the mistake, even though the ejection is by the demand of the person holding the ticket calling for the berth assigned by mistake to the party ejected.[85]

§ 3551. Ejection by Railway Company.—Where a sleeping car not belonging to a railroad company is transported by it in one of its trains, the sleeping car and its conductor and porter being under the control of the railroad conductor, the act of the railroad conductor and the brakeman in ejecting a passenger from the sleeping car is the act of the railroad company, and not of the owner of the sleeping car;[86] and the sleeping car company is not liable for the wrongful ejection.[87] But it has been held that where a sleeping car company's employee aided the employees of a railway company, over whose tracks its cars were drawn, in forcing a passenger, who had engaged a berth in a sleeper, to leave the car and complete the journey in a chair car, the sleeping car company was not released from liability by the fact that its employees acted under orders from the train conductor.[88]

Fault of Sleeping Car Company.—A sleeping car company is liable for the expulsion of a passenger by the employees of the railway company due to selling him a sleeping car ticket between two points over a route other than that called for by his railroad ticket, where the ticket was in the possession of the sleeping car company's agent, and subject to his inspection.[89]

§§ 3552-3555. Grounds for Ejection—§ 3552. Failure to Pay Fare.—Where a passenger declines to pay a proper extra charge for passage in a chair car, and on request he declines to leave it, he can not complain if removed to the first-class car, where such removal is not effected by unnecessary force.[90] But where a passenger, finding no vacant seats in the ordinary coaches, proceeded to a drawing-room car owned by a private

82. Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 4 C. C. A. 221, 58 Am. & Eng. R. Cas. 111. See, generally, "Ejection of Passengers," Chapter 25.

83. **Ejection of passengers.**—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688.

84. **Ejection both tort and breach of contract.**—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688; Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719.

85. Taylor *v.* Wabash R. Co., 130 Mo. App. 582, 109 S. W. 1059.

86. **Ejection by railway company.**—Pullman Palace Car Co. *v.* Lee, 49 Ill. App. 75. See Calhoun *v.* Pullman Palace Car Co., 149 Fed. 546.

87. Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

88. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

89. **Fault of sleeping car company.**—Nashville, etc., R. Co. *v.* Price, 125 Tenn. 646, 148 S. W. 219.

Plaintiff, having a railroad coupon ticket for passage from New Orleans to New York over connecting lines of road, on application to an agent of defendant, and on showing his ticket, was sold a berth in a sleeping car from New Orleans to Jersey City. From Washington to Jersey City such car was run over a line different from that named in plaintiff's ticket, and on his refusing to pay fare he was ejected by the employees of the railroad company. Held, that defendant, by selling plaintiff accommodations in a particular car, virtually represented and warranted that such car passed over the lines named in plaintiff's ticket, and was liable for a breach of the contract when plaintiff, under the circumstances stated, was compelled to leave the car before reaching Jersey City. Pullman's Palace Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

90. **Failure to pay fare.**—St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711.

individual and there took a seat, for which he refused to pay extra fare, whereupon the porter of the drawing-room car attempted to eject him, it was held that the railroad company was liable for the assault.[91] A passenger ejected from a Pullman train for refusal to pay a full berth rate can not recover on account of the porter's mistake in excluding from the train a fellow passenger who might have shared the berth and the charge therefor where the ejected passenger relied on the unreasonableness of the rule; and not on the misinformation given by the porter.[92]

§ 3553. Failure to Procure Proper Railroad Ticket.—Where the holder of a void railroad ticket buys a Pullman ticket, he can not recover damages for ejection from the Pullman.[93] Where a contract between a railroad and a sleeping car company provided that the latter should be governed by regulations of the former, one of which was that passengers should not be entitled to purchase sleeping car accommodations unless they held "through tickets" and a passenger, holding a "split ticket," having applied for a sleeping car ticket, and the railroad company's agent having refused to sell him one, he was expelled from the sleeping car, its conductor assisting the train conductor in leading him from that car to one of the other passenger cars on the train, no special force being used or bodily harm done him, it was held that he could not recover damages of the sleeping car company.[94]

§ 3554. Loss of Ticket.—When a passenger buys a Pullman ticket, and, before it is delivered to those in charge of the Pullman car, looses it, he does not thereby loose his right to the seat or berth, to which the purchase of the ticket entitled him. Where such passenger offers sufficient evidence to those in charge of the car of his right to the seat, they have no right to eject him, for his refusal to pay again for the berth or seat.[95]

§ 3555. Bringing Improper Articles into Car.—A passenger may be ejected from a Pullman car, without liability on the part of the Pullman car company, when such passenger brings into the car improper articles, and refuses to allow them to be removed therefrom.[96] The passenger is entitled to a reasonable

91. Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325.

92. Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 115 Pac. 401, 36 L. R. A., N. S., 1139.

93. Failure to procure proper railroad ticket.—Calhoun *v.* Pullman Palace Car Co., 149 Fed. 546, holding that where the ticket must be countersigned to entitle the holder to transportation, and the agent of the Pullman car company tells the holder that it need not be signed, and sells him a Pullman ticket, and, after boarding the train, the holder is ejected, there can be no recovery from the Pullman Car Company.

94. Lawrence *v.* Pullman's Palace Car Co., 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58.

95. Loss of ticket.—Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 239.

Plaintiff purchased from defendant's agent a ticket for a seat in defendant's drawing-room car. Having lost it, he applied to the agent for another. This the agent refused, as the diagram showing the seats for which tickets had been issued was no longer in his possession, but he gave plaintiff his personal card, on which he wrote and signed a statement that plaintiff held such seat. Plaintiff presented the card, with the explanation, to the conductor of the car, but he refused to permit plaintiff to occupy the seat, although it was marked on the diagram as sold, and no other person had claimed it, and informed plaintiff that he must pay for the seat or leave the car; whereupon plaintiff passed into a common car, and continued there to the end of his trip. Held, that the exclusion of plaintiff from the seat was unreasonable, and defendant was liable in damages sufficient to compensate plaintiff for the injury. Buck *v.* Webb, 58 Hun 185, 11 N. Y. S. 617, 33 N. Y. St. Rep. 824.

96. Bringing improper articles into car.—Rolls of foreign blankets being taken home by a passenger to be used as portieres do not constitute baggage which he may take with him into a Pullman car, and upon his insisting on doing so the Pullman Company is entitled to terminate the relation of carrier and passenger and eject him from the car. Pullman Co. *v.* Custer (Tex. Civ. App.), 149 S. W. 847.

opportunity to check such articles or make other disposition of them. The company, however, need not take the initiative by tendering opportunity to check; and the passenger can not excuse the failure to request an opportunity to check the articles by any impropriety in the conductor's manner.[97]

§ 3556. What Constitutes Ejection.—To constitute ejection from a sleeping car it is not essential that the passenger has ever entered the car. If he is entitled to enter, and is prevented from so doing by the employees of the company, this constitutes ejection.[98]

Voluntary Abandonment.—If a passenger leaves the Pullman voluntarily, even though under order of those in charge of the car, there is no ejection.[99] Where the passenger leaves the car for the accommodation of others it is a voluntary abandonment.[1] If, however, the leaving is to prevent being carried to a place other than the destination of the passenger, the abandonment is not voluntary.[2] Where the passenger leaves under protest, at the order of those in charge of the car, even though he makes no physical resistance, he can not be said to have voluntarily abandoned the car.[3]

§ 3557. Manner of Ejection.—A sleeping car company's employees in ejecting a passenger must use no more force than is reasonably necessary and must act in a courteous and considerate manner.[4]

§§ 3558-3573. Duties and Liabilities as to Property of Passengers —§ 3558. Nature of Liability.—Sleeping car companies are not liable as insurers of the wearing apparel and effects belonging to passengers upon their cars, nor are they liable as innkeepers, or as common carriers.[5] Their liability at most is that of bailees for hire.[6] But in one case it has been held that a sleeping car company so far as it renders service similar in kind to an innkeeper is subject to

97. Pullman Co. *v.* Custer (Tex. Civ. App.), 140 S. W. 847.

98. **What constitutes ejectment.**—Pullman Co. *v.* Custer (Tex. Civ. App.), 140 S. W. 847.

99. **Voluntary abandonment.**—Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009. See, also,Pullman Palace Car Co. *v.* Cain, 15 Tex. Civ. App. 503, 40 S. W. 220.

Evidence that plaintiff, while on a car which was both an eating and sleeping car, ordered his berth to be made up; that the porter replied that it would be done as soon as he had furnished two lunches previously ordered; and that, after an angry dispute, plaintiff went into a forward car, and sat up all night, though the berth was made up for him, does not sustain a verdict for damages for plaintiff. Pullman's Palace Car Co. *v.* Ehrman, 65 Miss. 383, 4 So. 113.

1. **Leaving car for accommodation of others.**—Pullman Palace Car Co. *v.* Hocker, 93 S. W. 1009, 41 Tex. Civ. App. 607.

2. **Abandonment to prevent being carried to wrong place.**—Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

3. **Leaving under protest.**—Pullman Palace Car Co. *v.* Cain, 15 Tex. Civ. App. 503, 40 S. W. 220, holding that where the passenger leaves the car under such circumstances, he may show that had he not left the car he would have been forcibly ejected.

4. **Manner of ejection.**—Pullman Co. *v.* Custer (Tex. Civ. App.), 140 S. W. 847.

5. **Nature of liability to property of passengers.**—*Alabama.* — Pullman Palace Car Co. *v.* Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

Georgia.—Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Indiana.—Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010, 3 Am. & Eng. R. Cas., N. S., 427.

Missouri.—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199; Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

New York.—Williams *v.* Webb, 58 N. Y. S. 300, 27 Misc. Rep. 508, modifying judgment 49 N. Y. S. 1111, 22 Misc. Rep. 513; Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712; Welch *v.* Pullman Palace Car Co. (N. Y.), Sheld. 457; Sessions *v.* New York, etc., R. Co., 78 Hun 541, 29 N. Y. S. 628, 61 N. Y. St. Rep. 170.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 4 N. P. 26, 6 O. Dec. 85.

6. **Liability that of bailee for hire.**—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199; Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

the same liabilities.[7] It has been said that a sleeping car company is responsible as a common carrier of passengers would be in relation to the baggage of a passenger not given into its exclusive custody.[8]

§§ 3559-3564. Duty to Protect Property—§ 3559. In General.—It is the duty of sleeping car companies to protect the baggage of their passengers by keeping a sufficient watch and if it is lost or stolen, through their failure to properly guard it, they are liable therefor.[9] While palace and sleeping car companies are not required to exercise extraordinary care to guard the property of their passengers, they are bound to exercise reasonable and ordinary care.[10] They must use a degree of care commensurate with the danger to which the property is exposed.[11] A failure to use ordinary care proportionate to the danger reasonably to be apprehended would be negligence which would ordinarily render such companies liable for a loss of baggage.[12]

7. **Holding that carrier liable as innkeeper.**—Pullman Palace Car Co. *v.* Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325, 40 Am. & Eng. R. Cas. 637.

8. Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31, 34 Am. & Eng. R. Cas. 217, cited in Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010, 3 Am. & Eng. R. Cas., N. S., 427. As to the liability of carriers of passengers for baggage retained in the custody of the passenger, see ante, "Property under Control of Passengers," § 3474.

9. **Duty to protect property of passengers.**—*Georgia.*—Pullman Co. *v.* Schaffner, 55 S. E. 933, 126 Ga. 609, 9 L. R. A., N. S., 407; Pullman Palace Car Co. *v.* Martin, 92 Ga. 161, 18 S. E. 364; Pullman Co. *v.* Green, 57 S. E. 233, 128 Ga. 142, 10 Am. & Eng. Ann. Cas. 893; Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Massachusetts. — Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

Missouri.—Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

South Carolina. — Godfrey *v.* Pullman Co., 69 S. E. 666, 87 S. C. 361.

Tennessee.—Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.

Texas.—Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31, 34 Am. & Eng. R. Cas. 217; Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112; S. C., 32 S. W. 335; Pullman Sleeping Car Co. *v.* Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771.

10. **Degree of care required.**—*United States.*—Hill *v.* Pullman Co., 188 Fed. 497; Blum *v.* Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574, 21 Am. & Eng. R. Cas. 447.

Georgia.—Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407; Pullman Co. *v.* Green, 128 Ga. 142, 57 S. E. 233, 10 Am. & Eng. Ann. Cas. 893; Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293; Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Indiana.—Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 9 Am. & Eng. R. Cas. 294, 84 Ind. 474, 43 Am. Rep. 102.

Kentucky.—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Massachusetts. — Lewis *v.* New York Sleeping Car Co., 28 Am. & Eng. R. Cas. 148, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024.

Missouri.—Scaling *v.* Pullman Palace Car Co., 24 Mo. App. 29.

Texas.—Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112; S. C., 32 S. W. 335; Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149; Belden *v.* Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31, 34 Am. & Eng. R. Cas. 217; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

The care which a sleeping car company is required to exercise in protecting a passenger from loss of his property is that ordinary diligence which every prudent man uses to protect his own property of a similar nature. If the company exercises this ordinary care and diligence, then a passenger can not recover for property lost by him even though it was lost while he was on the company's car. Pullman's Palace Car Co. *v.* Harvey, 101 Ga. 733, 28 S. E. 989.

Care as to sleeping passengers.—See post, "While Passengers Are Asleep," § 3560.

11. **Care commensurate with danger.**—Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

12. Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149.

Liable for Negligence Only.—A sleeping car company is liable for property lost by its passengers only when it is shown to have been negligent,[13] or that its servants in charge purloined the property.[14] So it has been held that, where property is stolen from a moving train, by a person from without, by catching on to the moving sleeping car, and snatching the property from a seat, and drawing it through an open window, there being no negligence shown, the sleeping car company can not be held liable.[15] Where there is no evidence that the car was at any time unguarded, there is no liability for a theft committed by a fellow passenger; that is a theft the circumstances of which are unknown to the employees, and not such as might be committed by one in the presence of the servants, or under such circumstances as would reasonably suggest to such servants that a theft was being or about to be committed.[16] But where money is stolen from a passenger by some other passenger approaching the berth from the outside, where the thief could be seen, the sleeping car company should be held liable for such loss.[17]

Failure to Close Windows.—Where there is a regulation requiring the win-

13. **Liable for negligence alone.**—*Georgia.*—Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Indiana. — Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294.

Massachusetts.—Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148; Whicher *v.* Boston, etc., R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314.

Missouri.—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

New York.—Welch *v.* Pullman Palace Car Co. (N. Y.), 16 Abb. Prac., N. S., 352; Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712; Welding *v.* Wagner (N. Y.), 1 City Ct. R. 66; Sessions *v.* New York, etc., R. Co., 78 Hun 541, 29 N. Y. S. 628, 61 N. Y. St. Rep. 170.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 6 O. Dec. 85, 4 N. P. 26.

Pennsylvania.—Springer *v.* Pullman Co., 234 Pa. 172, 83 Atl. 98.

Texas.—Pullman Sleeping Car Co. *v.* Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771; Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149.

A sleeping car company is not liable for the loss of a scarf pin placed by a passenger in a receptacle at the head of his berth on retiring for the night, unless it is shown that the company or its agents were chargeable with negligence. Pullman Palace Car Co. *v.* Gaylord, 6 Ky. L. Rep. 279.

A sleeping-car company is not liable for the loss of baggage of a passenger which was left by him in his berth, and lost or abstracted therefrom during his temporary absence, if it exercised reasonable care to prevent the loss, or such care as is customarily used in such cases. Efron *v.* Wagner Palace Car Co., 59 Mo. App. 641.

A passenger on a railroad train in the daytime went into a sleeping car, the porter accompanying him, carrying his hand bag. The hand bag was placed in the section nearest the door, and the passenger stood beside it for 10 minutes, and then went into the smoking compartment, where he remained half an hour, and then returned to his hand bag, and, taking something out of it, returned to the smoking compartment, where he remained five hours. The train, moving all the time, stopped at a number of stations. when he again returned to where the handbag was left, it was missing. Held, that neither the railroad company nor the sleeping car company was liable therefor, neither being negligent. Whicher *v.* Boston, etc., R. Co., 57 N. E. 601, 176 Mass. 275, 79 Am. St. Rep. 314.

Plaintiff went upon a sleeping car between 12 and 1 o'clock at night. He did not leave his valise in charge of any servant or employee of the company, nor did he call the attention of the conductor or porter to the fact that he had a valise. He placed his valise in the aisle near the smoking room and immediately returned to his berth. In the morning the valise was gone. Held, that no negligence was shown on the part of the sleeping car company, and hence no cause of action against it was established. Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149.

14. Pullman Sleeping Car Co. *v.* Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771. See post, "Thefts by Employees," § 3567.

15. Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

16. Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

17. Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 6 O. Dec. 85, 4 N. P. 26.

dows of a Pullman car to be closed, while the train is at a station, a violation of this regulation is negligence.[18]

Duty to Provide Safe Depository.—No duty rests upon a sleeping car company to provide its cars with a safe depository for the valuables of its passengers.[19]

§ 3560. While Passengers Are Asleep.—A sleeping car company owes the duty to properly watch over its cars at night, while its passengers are asleep, in their berths, and guard their property from loss by theft or otherwise. If property belonging to its passengers be so lost, by the failure of the sleeping car company to so watch over its car, it is liable therefor.[20] A higher degree of care to protect the goods of a sleeping passenger would seem to be required than that which the company must exercise when the passenger is awake and able to protect himself, and while extraordinary diligence is not required by the law in either case, yet it must exercise a reasonable degree of care to protect his goods while he is sleeping.[21] The duty to guard over its passengers arises even before the

18. **Failure to close windows.**—While plaintiff was a passenger on a sleeping car, his valise was stolen from the car at a station in Mexico. The rules of the company required the rear door and windows of the car to be closed while at such stations. The conductor and porter testified that they were so closed just before entering the station, and that while there they stood on the platform near the car. Plaintiff stepped out of the car, leaving the valise near an open window at which two passengers sat. They moved away while he was gone, without closing the window, and soon after the train started the loss was discovered. Held, that findings that the company's employees were negligent in not keeping the window closed, or in failing to see and prevent the theft, and that plaintiff was not negligent, were justified. Pullman Palace Car Co. *v.* Arents, 66 S. W. 329, 28 Tex. Civ. App. 71.

19. **Duty to provide safe depository.**—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

20. **While passengers are asleep.** — *United States.*—Blum *v.* Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1574, 21 Am. & Eng. R. Cas. 447; Hill *v.* Pullman Co., 188 Fed. 497.

Georgia.—Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480; Pullman Palace Car Co. *v.* Martin, 92 Ga. 161, 18 S. E. 364.

Indiana. — Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 9 Am. & Eng. R. Cas. 294, 43 Am. Rep. 102.

Missouri.—Morrow *v.* Pullman Palace Car Co., 73 S. W. 281, 98 Mo. App. 351.

New York.—Williams *v.* Webb, 58 N. Y. S. 300, 27 Misc. Rep. 508, modifying judgment 49 N. Y. S. 1111, 22 Misc. Rep. 513; Carpenter *v.* New York, etc., R. Co., 15 N. Y. St. Rep. 345.

Pennsylvania.—Pullman Palace Car Co. *v.* Gardner (Pa.), 16 Am. & Eng. R. Cas. 324.

South Carolina.—Calder *v.* Southern R. Co., 71 S. E. 841, 89 S. C. 287.

A sleeping car company may be liable for failing to keep a watch, whereby a passenger's property was stolen, though it was stolen after the passenger's companion had left the berth, and while he was walking up and down the aisle. Pullman Palace Car Co. *v.* Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

When a passenger on a sleeping car, in which there were only curtains dividing the sections and separating them from the aisle, and no special watch was kept, lost personal effects which he had placed under his pillow, the company was liable as for negligence, either in not furnishing apartments that could be securely closed, or in not supplying a watch. Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294.

21. **Degree of care required.**—*United States.*—Barrott *v.* Pullman's Palace Car Co., 51 Fed. 796.

Georgia.—Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

Indiana.—Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 9 Am. & Eng. R. Cas. 294, 84 Ind. 474, 43 Am. Rep. 102.

Kentucky.—Myers *v.* Pullman Co., 149 S. W. 1002, 149 Ky. 776, 41 L. R. A., N. S., 799; Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Massachusetts.—Lewis *v.* New York Sleeping Car Co., 28 Am. & Eng. R. Cas. 148, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Whicher *v.* Boston, etc., R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314.

Missouri.—Scaling *v.* Pullman Palace Car Co., 24 Mo. App. 29; Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

New York.—Carpenter *v.* New York, etc., R. Co., 47 Am. & Eng. R. Cas. 421,

sleeping car company has notice of any danger, or facts sufficient to cause it to anticipate any danger, to its passengers or their property.[22] And a sleeping car company is liable for negligently permitting thieves to steal a passenger's property while he was sleeping, though he did not notify the company that he had the property.[23] A sleeping car company has not exercised reasonable care to protect the baggage of a sleeping passenger where it allows several passengers to leave the car with baggage, without paying any attention as to whose it is, and its porter, might by attention prevent the removal of the sleeping passenger's baggage from the car by a stranger.[24]

Careful and Continuous Watch.—It is the duty of a sleeping car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property is stolen by a fellow passenger or by an intruder on the train, in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value.[25] But, the duty of the company does not extend to keeping in actual view of its servants the person and clothing of the passengers during the night; and in case of theft it is liable for negligence only by reason of a failure to continuously watch the passageway and the berths from the outside, and to prevent any intrusion or larceny which could be detected by such continuous watching.[26] Where the doors of the car are left open and unguarded so that unauthorized persons may have access to it, or the officers charged with its superintendence leave it without that supervision by them which the passengers had a right to rely on, it would seem that such negligence is shown as would render the company liable for a loss.[27]

124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 4 N. P. 26, 6 O. Dec. 85.

Pennsylvania.—Pullman Palace Car Co. *v.* Gardner (Pa.), 16 Am. & Eng. R. Cas. 324.

Texas.—Pullman Palace Car Co. *v.* Pollock, 34 Am. & Eng. R. Cas. 217, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

22. Calder *v.* Southern R. Co., 71 S. E. 841, 89 S. C. 287.

23. Pullman Palace Car Co. *v.* Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

24. Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

25. Careful and continuous watch.—*Kentucky.*—Myers *v.* Pullman Co., 149 Ky. 776, 149 S. W. 1002, 41 L. R. A., N. S., 799.

New York.—Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

Pennsylvania.—Pullman Palace Car Co. *v.* Gardner (Pa.), 16 Am. & Eng. R. Cas. 324.

Tennessee.—Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.

Where it appeared that the only employee kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter, and bootblack, it was held that defendant had not exercised due care in protecting its passengers while asleep. Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

Where it appeared that the porter was found asleep at an early hour of the morning in a position from which no view could be had of that part of the car in which the passengers were asleep; and that the porter was required to be on duty for thirty-six hours continuously, which included two nights, it was held that there was evidence of negligence on the part of the defendant proper to be submitted to the jury. Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

26. Carpenter *v.* New York, etc., R. Co., 13 N. Y. St. Rep. 718.

27. Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846, citing Blum *v.* Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574, 21 Am. & Eng. R. Cas. 447, and Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294.

Where, in an action against a sleeping car company for the value of goods stolen from an occupant of a car, it appeared that two sleeping cars in the train were under the charge of one conductor, that he left the train in the nighttime, so that for a distance of 84 miles there was no conductor in charge of the cars, and that thereafter one con-

Duty to Provide Sufficient Competent Employees.—A sleeping car company is bound to exercise due diligence to employ honest and sufficient porters and is bound to give them such hours that they will be able to sit up at night a proper length of time and watch the aisle, while passengers are asleep.[28] It is held that one competent and faithful watcher at a time is enough for each car.[29]

§ 3561. While Passengers Are in Toilet Room.—There is generally in sleeping cars a toilet room, which the company invites the passenger to use when he rises in the morning. When the invitation of the company is accepted, the duty to guard his personal effects left in his berth, while he is absent therefrom, is founded upon a similar reason to that which requires a guard to be maintained while he is asleep during the night. He can not guard his effects himself while he is asleep; neither can he guard his effects in his berth during the morning when he is necessarily absent therefrom for the purpose of making his toilet in a place set apart by the company for that purpose.[30] The company is bound to exercise such reasonable care in guarding the traveler's baggage in the case of his temporary absence from the berth as is customary in such cases. If a certain guard is customary, the traveler has a right to rely on the custom, and the omission of a customary guard would constitute negligence.[31]

§ 3562. Passenger Sleeping in Smoker.—Though a sleeping car company is under no obligation to permit a passenger to occupy a bed in the smoking compartment of the car, yet where the servant in charge of the car permits the passenger to do so the company assumes to the latter the same duties as if he occupied a regular berth, in the absence of any collusion between the servant and the passenger to defraud the company of its fare. The passenger in such case does not assume any risk as to the safety of his personal belongings different from that of passengers occupying regular berths.[32]

§ 3563. Duty to Anticipate Presence of Thief.—Where a passenger was robbed while boarding the car, a duty rested upon the sleeping car company to use the means at its command to have prevented the theft only in so far as it could reasonably have anticipated the presence of the thieves when and where the passenger was robbed. And it is not negligence for the porter or conductor to fail to recognize thieves as such, and give notice of their presence to the passengers, in the absence of knowledge of their presence, although they knew of similar recent thefts.[33]

§ 3564. Duty of Ticket Agent to Remove Thief.—A ticket seller having no control over the depot or vicinity is under no duty to remove thieves therefrom or give warning of their presence, and, even though he be negligent, a sleeping

ductor had charge of four cars, and that the porters had duties to perform which were inconsistent with keeping watch over the occupants of the car, the particular porter having charge of plaintiff's car being absent from the car for part of the night, a finding that the company had not exercised reasonable care in the prevention of thefts was justified. Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294.

28. **Duty to provide sufficient competent employees.**—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 6 O. Dec. 85, 4 N. P. 26. See Pullman Palace Car Co. *v.* Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

29. Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

30. **Duty to guard property while passengers in toilet room.**—Pullman Co. *v.* Green, 128 Ga. 142, 57 S. E. 233, 10 Am. & Eng. Ann. Cas. 893; Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

31. Efron *v.* Wagner Palace Car Co., 59 Mo. App. 641.

32. **Duty to passengers sleeping in smoker.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

33. **Duty to anticipate presence of thief.**—Myers *v.* Pullman Co., 149 S. W. 1002, 149 Ky. 776, 41 L. R. A., N. S., 799.

car company, whose agent he is for selling tickets, is not liable on account thereof for a theft from one of its patrons.[34]

§ 3565. Property Left in Car.—A sleeping car company's liability can not be said to end until after the passenger has safely reached his destination with all his effects.[35] Proper diligence on the part of the company towards one of its patrons involves the exercise of ordinary care in looking out for and taking care of such property as may by him be casually left in the car upon his leaving it, and the restitution of the property to the owner, when ascertained; and where such property is actually found by servants of the company, or is left or dropped in such place and under such circumstances as that, by the exercise of ordinary care, it ought to have been found by them, the company will be liable for its value.[36] But it is held that if a passenger negligently leave his pocketbook in the car when he reaches his destination, and its contents are abstracted by persons other than the servants of the company there would be no liability on the part of the company. When a passenger leaves the train at his destination the company may reasonably think that he has taken with him all those things which one is accustomed to carry about his person, and until it is shown that the property is discovered by its agents to have been left behind, the company can not be charged with any duty concerning it.[37]

§ 3566. Thefts by Fellow Passengers.—A passenger upon a sleeping car assumes the risk of such loss from fellow travelers as can not be prevented by the exercise of ordinary and reasonable care on the part of the company, and the company can only be made responsible by showing its neglect to exercise that degree of care.[38] But the company is liable for property stolen from a passenger while asleep, in the night time, though by a fellow passenger, where it does not keep a continuous and active watch to secure the safety of the property.[39]

§ 3567 Thefts by Employees.—A sleeping car company is liable for the theft of the necessary property of its passengers, by those in the employment of the company,[40] even though the passengers be negligent.[41] But the company is liable only for a passenger's baggage, and for such reasonable sum of money as may be necessary for the purposes of his journey, though the property was stolen by one of the company's servants.[42] Thus the company is liable for the theft of

34. Duty of ticket agent to remove thief.—Myers *v.* Pullman Co., 149 S. W. 1002, 149 Ky. 776, 41 L. R. A., N. S., 799.

35. Termination of liability.—Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010, 3 Am. & Eng. R. Cas., N. S., 427.

36. Property left in car by passenger.—Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

37. Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

38. Theft by fellow passengers.—Pullman's Palace Car Co. *v.* Harvey, 101 Ga. 733, 28 S. E. 989; Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

39. Failure to keep watch.—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53; Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.

40. Theft by employees.—Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 702, 29 L. R. A. 498; Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298.

41. Effect of contributory negligence.—See post, "Where Property Stolen by Employees," § 3573.

42. Nature and amount of property.—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

"The extent to which liability has been fixed in cases of this sort has not been held to include anything except the clothing, ornaments and such articles as are usually carried by travelers in their hands, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged." Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Where the porter of a sleeping car stole from a passenger $35 in money the company was held liable. Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498.

Money to pay debts due at destination.—If the employee of a sleeping car com-

its porter of jewelry carried for personal adornment,[43] but not for jewelry not carried for such purpose.[44]

§ 3568. Nature and Amount of Property as Affecting Liability.—As to the nature of the property, for the loss of which, through its negligence, a sleeping car company may be held liable, it is held, quite generally, that it must be property which such passenger might reasonably or properly carry with him,[45] taking into consideration his condition in life and the surrounding circumstances.[46] Its liability extends to such articles of baggage as would be considered baggage in an action against an ordinary carrier of passengers.[47] The rule as to the company's liability applies where the property is stolen by its employees.[48] The fact that the baggage lost by a sleeping car passenger consisted of articles not intended to be used on the train, but only in case he stopped over at a certain point, does not prevent the passenger from recovering for their loss.[49]

Amount of Money.—A sleeping car company is liable for no greater sum of money lost by a passenger through its negligence than such as is necessary to defray the expenses of the trip, taking into consideration his station in life, the length, duration, and purposes of the journey, and the probable emergencies that may be expected to arise on the route;[50] and it is not liable if a sum of money carried for another purpose is stolen from him through the negligence of its servants, provided no special circumstances exist which impose on it a peculiar duty with

pany steals money from a passenger, the company is liable only for an amount necessary for the reasonable expenses of the passenger's journey; not for a sum which he carried to pay debts due in the city to which he was going. Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

43. Jewelry constituting baggage.—Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

Where the porter of a sleeping car stole from a passenger therein $700 worth of jewelry used for the personal adornment of the passenger, the company was liable. Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498.

44. Jewelry not constituting baggage.—Bacon *v.* Pullman Co., 159 Fed. 1.

45. Nature and amount of property as affecting liability.—*United States.*—Blum *v.* Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574, 21 Am. & Eng. R. Cas. 447.

Georgia.—Pullman Co. *v.* Green, 128 Ga. 142, 57 S. E. 233, 10 Am. & Eng. Ann. Cas. 893; Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

Kentucky.—Myers *v.* Pullman Co., 149 Ky. 776, 149 S. W. 1002, 11 L. R. A., N. S., 799; Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Massachusetts.—Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

Missouri.—Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

Pennsylvania.—Pfaelzer *v.* Pullman Palace Car Co. (Pa.), 4 Wkly. Notes Cas. 240.

South Carolina.—Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

Texas.—Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31, 34 Am. & Eng. R. Cas. 217.

46. Myers *v.* Pullman Co., 149 Ky. 776, 149 S. W. 1002, 41 L. R. A., N. S., 799. See Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

47. Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134. See, generally, ante, "What Constitutes Baggage," §§ 3429-3445.

48. Theft by employees.—See ante, "Thefts by Employees," § 3567.

49. Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

50. Amount of money.—*United States.*—Barrott *v.* Pullman's Palace Car Co., 51 Fed. 796; Blum *v.* Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574, 21 Am. & Eng. R. Cas. 447.

Georgia.—Kates *v.* Pullman's Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

Iowa.—Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108.

Kentucky.—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Wilson *v.* Baltimore, etc., R. Co., 32 Mo. App. 682; Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

New York.—Williams *v.* Webb, 58 N. Y. S. 300, 27 Misc. Rep. 508, modifying 49 N. Y. S. 1111, 22 Misc. Rep. 513.

reference to such money.[51] This rule applies to money stolen by the employees of the company.[52] The fact that a passenger had a sum of money which he expected would be sufficient for the exigencies of the journey, in a separate purse from money that was stolen, does not conclusively show that he is not entitled to recover any part of the stolen money.[53]

Jewelry.—The personal effects which a passenger may carry on his journey so as to render a sleeping car company liable for their loss through its negligence may include jewelry.[54] So a sleeping car company is liable to a passenger for the loss of rings stolen from her fingers while she slept, where reasonable care was not used to prevent thefts.[55] If the jewelry was not actually being worn at the time of the theft, but was being carried by the passenger for the purpose of being worn during the journey, the company is liable as if the jewelry was actually being worn.[56] But a sleeping car company owes no duty with respect to valuable jewelry carried by a passenger in a hand bag for transportation merely, without any intention or purpose of using it during the journey.[57] The law places no limit upon the amount of jewelry that may be properly carried. This must be determined by the passenger's station in life, inclination and resources.[58] It has been held that a sleeping car company is not liable for negligently permitting a theft of a valuable diamond ring in the pocketbook of a sleeping passenger, who had refrained from wearing the ring because the setting had become loose, it being at the time no part of his personal attire.[59] But it has also been held that if a piece of jewelry becomes injured or broken during the journey so that the passenger can not use it in the usual way, the company will not be relieved of its duty to exercise reasonable diligence to protect the passenger in its possession.[60]

Mileage Tickets.—It has been held, that a passenger on a Pullman car, who is a general traveling agent for a commercial house, can recover for loss, through the carrier's negligence, of mileage tickets carried by him in his satchel; such tickets being usually carried by those doing much traveling.[61]

Pistol.—It has been held that a pistol is not such an article as is usually and properly carried by a traveling man, and that the Pullman company is not liable for its theft through its negligence, though it was being carried in his satchel.[62]

A watch is properly considered baggage for which the sleeping car company will be liable in case of loss through its negligence.[63]

Miscellaneous Articles.—Opera glasses, a brass compass, a razor and strap and accoutrements, and a nasal syringe, with accompaniments, being such articles as add and contribute to the comfort, pleasure, and enjoyment of the traveler, together with the satchel which contained them, constitute baggage for which the sleeping car company will be liable in case of loss by its negligence.[64]

51. Barrott *v.* Pullman's Palace Car Co., 51 Fed. 796; Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108.

52. See ante, "Thefts by Employees," § 3567.

53. Williams *v.* Webb, 58 N. Y. S. 300, 27 Misc. Rep. 508.

54. Liability for loss of jewelry.—Bacon *v.* Pullman Co., 159 Fed. 1; Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407.

55. Pullman Palace Car Co. *v.* Hunter, 54 S. W. 845, 47 L. R. A. 286, 107 Ky. 519, 21 Ky. L. Rep. 1248.

56. Bacon *v.* Pullman Co., 159 Fed. 1.

57. Jewelry not carried for use.—Bacon *v.* Pullman Co., 159 Fed. 1. See Pfaelzer *v.* Pullman Palace Car Co. (Pa.), 4 Wkly. Notes Cas. 240.

58. Value of jewelry.—Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

59. Jewelry not worn because injured.—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

60. Jewelry injured during journey.—Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407.

61. Mileage tickets.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

62. Pistol.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

63. Watch.—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

64. Opera glasses, etc.—Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

§ 3569. Custody of Property as Affecting Liability.—The baggage of a passenger in a sleeping car is not in the custody of the company so as to create the ordinary liability of common carriers of merchandise.[65] The custody of his baggage is, saying the most that can be said in his favor, a mixed custody, partly his custody and partly that of the sleeping car company.[66]

Baggage Placed in Vacant Berth.—It has been held that a sleeping car company is not liable for the loss of a passenger's wearing apparel placed by him in a vacant berth over that which he occupied, as it was not in the possession of the company.[67]

Baggage Left in Car Over Night.—Evidence that a sleeping car passenger on leaving the car for the night on account of a long delay was assured by the conductor that it would be safe to leave his baggage in the car and that when he applied for it the next morning it was not returned to him nor its loss explained makes out a prima facie case of negligence on the part of the company.[68]

Baggage Entrusted to Porter.—Where the porter of a sleeping car, in pursuance of his duties and custom, takes charge of a passenger's baggage, for the purpose of removing it from the car at the passenger's destination, the porter is not to be regarded as a mere gratuitous bailee, and the company becomes liable therefor if such baggage is lost or stolen through the negligence of its employees.[69] In one case it has been held that a sleeping car company is liable as an innkeeper for an article of wearing apparel belonging to a passenger which has been placed in the care of the porter.[70]

§ 3570. Limitation of Liability.—The duty of a sleeping car company to protect its passengers from thieves can not be evaded by words printed upon the passenger's ticket, or notices posted in the car,[71] especially where it appears that the passenger did not see or know of such notices.[72] And it will not be presumed that the laws of any foreign state permit a sleeping car company to contract against its own negligence.[73]

§§ 3571-3573. Contributory Negligence—§ 3571. In General.—A passenger on a sleeping car can not recover from the company for the loss of his property, where the loss was partly due to his negligence,[74] save in the case

65. **Custody of baggage.**—Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421.

66. Root *v.* New York Cent., etc., Co., 28 Mo. App. 199; Efron *v.* Wagner Palace Car Co., 59 Mo. App. 641; Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

67. **Baggage placed in vacant berth.**—Welch *v.* Pullman Palace Car Co. (N. Y.), 16 Abb. Prac., N. S., 352. But see Florida *v.* Pullman Palace Car Co., 37 Mo. App. 598.

68. **Baggage left in car over night.**—Croll *v.* Pullman Co., 113 N. Y. S. 542, 61 Misc. Rep. 265.

69. **Baggage entrusted to porter.** — Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010, 3 Am. & Eng. R. Cas., N. S., 427.

The porter of a sleeping car took charge of and placed together the plaintiff's baggage, including a seal-skin coat, for the purpose of taking it from the car on the arrival of the train at plaintiff's destination. When plaintiff alighted, the porter followed her, with her baggage, into the station. It was then discovered that the coat had disappeared, and, on returning to the car, it was not found. The car had been left in charge of the conductor. Held, that the facts show conclusively negligence on the part of the employees, for which the company was liable. Voss *v.* Wagner Palace Car Co., 44 N. E. 1010, 16 Ind. App. 271, affirming 43 N. E. 20, 3 Am. & Eng. R. Cas., N. S., 427.

70. Pullman Palace Car Co. *v.* Lowe, 38 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325, 40 Am. & Eng. R. Cas. 637.

71. **Limitation of liability.**—Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112.

72. Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

73. **Presumption as to foreign law.**—Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112.

74. **Contributory negligence.** — *United States.*—Barrott *v.* Pullman's Palace Car Co., 51 Fed. 796.

Georgia.—Kates *v.* Pullman's Palace Car

of theft by an employee of the company.[75] But where it appears that the acts of the passenger alleged to be negligent were caused by the wrongful conduct of the company itself, it is estopped from claiming immunity because of such acts.[76] And the act of the passenger, relied upon as contributory negligence, must in some way have been responsible for the loss of the property, in order to relieve the company from liability for its negligence.[77]

Negligence of Passenger's Companion.—The negligence of the sleeping companion of the owner of property stolen through the negligence of the sleeping car company does not preclude a recovery from the company.[78]

Contributory Negligence Must Be Pleaded.—See post, "Necessity for Pleading Contributory Negligence," § 3579.

§ 3572. What Constitutes Contributory Negligence.—A passenger in a sleeping car is guilty of contributory negligence in depositing his property in an improper place.[79] And a passenger, who, without notice to the company's servants, leaves in his berth in an exposed condition valuables which he could easily have carried on his person, is guilty of contributory negligence.[80] Where a passenger while the train was stopping at a station, left the car for ten minutes, leaving his satchel upon the sill of one of the car windows, which could be reached from the outside through an adjoining open window, it was held that he was guilty of negligence which contributed to his loss and that he could not recover.[81]

Acts Not Constituting Negligence.—Where a passenger in a sleeping car deposits clothing and other property in a vacant upper berth directly above him, the use of which berth he has not purchased or secured, it is not such contributory negligence on his part as bars recovery for the loss of the articles.[82] And the act of a passenger in putting a ring, that he was accustomed to wear, in his

Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

Iowa.—Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108.

Kentucky.—Myers *v.* Pullman Co., 149 Ky. 776, 149 S. W. 1002, 41 L. R. A., N. S., 799. See Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Massachusetts. — Whitney *v.* Pullman Palace Car Co., 143 Mass. 243, 9 N. E. 619, 28 Am. & Eng. R. Cas. 147.

Mississippi. — Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

Texas.—Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

75. **Thefts by employees.**—See post, "Where Property Stolen by Employees," § 3573.

76. Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

77. **Passenger's negligence must have caused loss.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281, holding that when the company, in an action against it for negligently permitting the theft of plaintiff's property, sets up as a defense that plaintiff was negligent in leaving his window up during the night, it must further show that the plaintiff was responsible for the window being left up and that the property was stolen through that window by a stranger from without.

78. **Negligence of passenger's companion.**—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

79. **Depositing property in improper place.**—Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

80. **Leaving property in berth unguarded.**—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

It is negligence for a passenger on a sleeping car to leave his watch in his berth while he is in the toilet room, unless he directs the porter to look after his effects in his absence. Chamberlain *v.* Pullman Palace Car Co., 55 Mo. App. 474.

A passenger occupying a sleeping car is guilty of gross negligence in leaving a pocketbook containing a large sum of money in his vest pocket under his pillow while he goes to the water closet. Wilson *v.* Baltimore, etc., R. Co., 32 Mo. App. 682.

81. Whitney *v.* Pullman Palace Car Co., 143 Mass. 243, 9 N. E. 619, 28 Am. & Eng. R. Cas. 147.

82. **Putting property in unoccupied berth.**—Florida *v.* Pullman Palace Car Co., 37 Mo. App. 598. But see Welch *v.* Pullman Palace Car Co. (N. Y.), 16 Abb. Prac., N. S., 352.

pocketbook while he slept, and his failure to put the pocketbook in the safest place in his berth is not contributory negligence, precluding a recovery against the sleeping car company for negligently permitting the theft thereof.[83] A passenger who occupies the smoking compartment of a sleeping car, under a special arrangement with the servant in charge of the car, and who retires for the night with knowledge that one of the windows of the compartment is open, is not guilty of contributory negligence which will preclude his recovery for the loss of his personal belongings, unless the window was left open at his request.[84] A companion of one sleeping in the berth of a sleeping car, whose pocketbook was stolen, was not negligent, where he left the berth, and walked up and down the aisle of the car, without watching for thieves.[85]

§ 3573. Where Property Stolen by Employees.—A sleeping car company is not released from liability for valuables stolen from passengers by its servants because the servants were tempted to steal, through the negligence of passenger in leaving the valuables exposed.[86] Where a sleeping car porter was charged with misappropriating a passenger's diamond ring, which it was claimed he found in the berth, it was no defense to the company's liability therefor that the passenger was negligent in losing it.[87]

Nature and Amount of Property.—A sleeping car company is liable for the thefts of its servants to the extent of the necessary baggage or money of the passenger, regard being had to the character, duration, and purposes of the journey, though the passenger was negligent.[88]

§ 3574. Liability of Railway Company.—All the duties to a passenger incident to a carrier's contract of transportation continue to rest on the railroad company, notwithstanding the passenger, by virtue of another contract with the sleeping car company, is entitled to special accommodations in the sleeping car; the sleeping car company having no control over the contract for transportation, and not being responsible for the manner in which it is performed.[89] And a railway can not escape liability for injuries inflicted on a passenger on the ground that they were sustained in a sleeping car, owned by another company and which furnished its own agents.[90] The railway company must exercise the utmost care for the safety of a passenger in a Pullman car, and when the passenger, while asleep in her berth, is assaulted and robbed the railway company is liable for a negligent failure to protect the passenger.[91] Where plaintiff, who had engaged a berth in a sleeper, was compelled to leave the same before reaching her destination, and complete

83. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

84. **Leaving window open.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

85. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

86. **When property stolen by employee.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

87. Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

88. **Nature and amount of property.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

89. **Liability of railway company.**—Calhoun *v.* Pullman Co., 86 C. C. A. 387, 159 Fed. 387, affirming 149 Fed. 546. See Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200; Nelson *v.* Illinois Cent. R. Co. (Miss.), 53 So. 619; Cleveland, etc., R. Co. *v.* Walrath, 38 O. St. 461, 8 Am. & Eng. R. Cas. 371, 43 Am. Rep. 433.

"The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company, whose cars are used by and constitute a part of the train of the railroad company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141, quoted in Nelson *v.* Illinois Cent. R. Co. (Miss.), 53 So. 619.

90. Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

91. Calder *v.* Southern R. Co., 89 S. C. 287, 71 S. E. 841.

her journey in a chair car, the railway company was not relieved of liability for the breach of plaintiff's contract for transportation in the sleeper by reason of the fact that the sleeper on one of defendant's trains running in the opposite direction had become disabled; that it was occupied by a large number of people, some of whom intended to make an all night trip, and some of whom were ill; and that the railway company desired for such passengers' accommodation the sleeper in which plaintiff was riding, and in which there was no one going beyond her place of destination.[92]

Negligence of Employees of Sleeping Car Company.—So far as a passenger is concerned the employees of the sleeping car company will be regarded as the employees of the railway company for whose negligent acts the latter company will be liable.[93] Thus, where a passenger, having a ticket for transportation and a sleeping car ticket, was injured while in the sleeping car by a table falling on her hand, through the negligence of the porter, the railroad company was liable for any neglect of duty by the porter causing the injuries.[94] And it is held that where a sleeping car passenger loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defense to an action against the railway company that the car was not owned by the defendant, but by a third person, who by a contract with the defendant, provided conductor and servants, in the absence of evidence that the plaintiff had knowledge of these facts.[95] It has been held, however, that a railway company is not liable for the act of the employee of the Pullman company when the act has no connection with the contractual duty the railway company owes the passenger, though the employee acted negligently or even willfully.[96] Where a Pullman car porter ejects a passenger of the railway company because of his refusal to pay fare, it has been held that he is acting as the servant of the railway company.[97] The rule that the

92. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

93. Negligence of employees of sleeping car company.—*Alabama.*—Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

Colorado.—Denver, etc., R. Co. *v.* Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A., N. S., 761.

Louisiana.—Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538.

Mississippi.—Nelson *v.* Illinois Cent. R. Co. (Miss.), 53 So. 619.

New York.—Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325, affirming 13 Hun 70.

Ohio.—Railroad Co. *v.* Walrath, 38 O. St. 461, 43 Am. Rep. 433, 8 Am. & Eng. R. Cas. 37, affirming 6 O. Dec. 718, 4 Wkly. L. Bull. 11.

South Carolina.—Campbell *v.* Seaboard, etc., Railway, 83 S. C. 448, 65 S. E. 628, 137 Am. St. Rep. 824; Taber *v.* Seaboard, etc., Railway, 84 S. C. 291, 66 S. E. 292, 19 Am. & Eng. Ann. Cas. 1132.

Tennessee.—Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947; Nashville, etc., R. Co. *v.* Price, 125 Tenn. 646, 148 S. W. 219.

Texas.—Missouri, etc., R. Co. *v.* Maxwell (Tex. Civ. App.), 130 S. W. 722; Pullman Co. *v.* Norton (Tex. Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

94. Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

95. Loss of baggage.—Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200. See Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232.

96. A passenger testified that she requested the Pullman car porter, at what she thought was 1 o'clock at night, to make up her berth, and he said she could have it made up for two hours, whereupon she declined to have it made up for so short a time. The train did not reach her destination till 6 o'clock in the morning. Held that, if the porter was negligent, or even willfully disregardful of the passenger's request, the carrier was not liable, in the absence of evidence connecting it with the special contract of the Pullman company, any defect being a breach of such company's duty. Taber *v.* Seaboard, etc., Railway, 62 S. E. 311, 81 S. C. 317.

97. Liability for ejection of Pullman passenger.—In an action against a railroad company to recover damages for an assault by a porter having charge of a drawing room car run by defendant, the evidence showed that the plaintiff, a passenger on one of the defendant's trains, took a seat in a drawing room car on account of the other cars being crowded,

negligence of employees of a sleeping car company, whereby a passenger is injured, is the negligence of the railway company, applies in some instances when the Pullman is not attached to the train.[98] Thus, where, with the knowledge of the railway company, a sleeping car company is accustomed to preparing its cars for the reception of passengers, before the arrival of the train, the railway company is liable for any injury to its passengers by the negligence of the servants of the sleeping car company.[99]

As to Discharge of Passengers.—A railroad company is responsible to a passenger for damages arising from the neglect of the sleeping car employees to awaken the passenger at his destination, though the sleeping car company be an entirely different company from the railroad company.[1] And it is liable for causing a passenger to alight at the wrong station, due to the negligence of the employees of the sleeping car company.[2] So far as concerns a passenger injured by being discharged beyond, instead of at, her station, the sleeping car company, on whose car she was a passenger, and its employees, were the servants of the railroad company operating the road, so as to make it responsible for their negligence.[3] Where, after a passenger had been caused to alight from a sleeping car attached to a train at a wrong station, the train operatives were notified of the mistake just after the train had started, but refused to stop and permit the passenger to again get aboard, there was a willful breach of duty on the part of the railroad company's servants, which rendered it liable independent of the liability of the sleeping car company.[4]

Selling Sleeping Car Ticket over Wrong Route.—A railroad company is liable in damages for the expulsion of a passenger from a sleeping car, due to its mistake while acting as agent for the sleeping car company, and while operating, in connection with other railroads, a line of through sleepers between two points, in selling him a sleeping car ticket good between those points, but not over the route covered by his railroad ticket.[5]

Effect of Contract with Sleeping Car Company.—A railway company will not be allowed to evade its liability to passengers through a contract with a sleep-

and refused to pay the extra charge demanded by the porter for a seat in that car, but consented to leave it when he could get a seat in one of the other cars, and upon his refusal to pay the porter attempted to eject him. It was also shown that the drawing room cars were not the property of the defendant, but were run by him under a contract with the owner; that the porter was in the employ of such owner, but was charged with the duty of assisting the train conductor in maintaining order on the train. Held, that as to his dealings with passengers the porter was the defendant's servant, and that it was liable for his acts as fully as though he were directly employed by it. Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325, affirming 13 Hun 70.

98. **When Pullman not attached to train.**—Denver, etc., R. Co. *v.* Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A., N. S., 761.

99. With the knowledge of a railroad company, it was customary for a sleeping car company to have its sleeper ready for passengers of the railroad company before the train to which it was to be attached arrived. A blind passenger, having a through ticket, changed cars at a station where a sleeping car was ready and having a berth therein, the porter of the train on which he had arrived took him over to the porter of the sleeping car who was informed of his blindness, and through his negligence the passenger was injured while attempting to go to his berth. Held, that the porter of the sleeping car was an employee, as to the passenger of the railroad company, and it was liable for the injury, though the sleeping car was not attached to any train. Denver, etc., R. Co. *v.* Derry, 108 Pac. 172, 47 Colo. 584, 27 L. R. A., N. S., 761.

1. **As to discharge of passengers.**—Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512.

2. Campbell *v.* Seaboard, etc., Railway, 83 S. C. 448, 65 S. E. 628, 137 Am. St. Rep. 824.

3. Missouri, etc., R. Co. *v.* Maxwell (Tex. Civ. App.), 130 S. W. 722.

4. Campbell *v.* Seaboard, etc., Railway, 83 S. C. 448, 65 S. E. 628, 137 Am. St. Rep. 824.

5. **Selling sleeping car ticket over wrong route.**—Nashville, etc., R. Co. *v.* Price, 125 Tenn. 646, 148 S. W. 219.

ing car company binding it to furnish sleeping cars and keep the same in repair.[6] A railroad company having placed its dining car at the rear of the train, and invited its passengers to go to and from it, is bound to provide them a safe passage from one car to another, and can not escape liability for its failure to do so by showing a contract with the Pullman car company to do it.[7]

Stipulations on Pullman Ticket.—A statement printed on a Pullman ticket that the Pullman car company will not be liable for the loss of baggage, does not relieve the railway company from liability.[8]

§ 3575. Joint Liability of Sleeping Car and Railway Companies.—The duty to protect the person and property of sleeping car passengers rests upon both the sleeping car and the railway companies, under their separate contracts, and their negligent failure to perform such duty, resulting in a single indivisible injury, makes them joint tort feasors.[9] Thus where a passenger on a Pullman car, while asleep in her berth, was assaulted and robbed the carrier and the sleeping car company were both liable for a negligent failure to protect the passenger.[10] And they are both liable for mental suffering to a passenger in a palace car attached to the railway company's train, caused by drunken persons permitted to enter and remain in the car.[11] Where a sleeping car company agreed to furnish plaintiff with sleeping car accommodations to a certain point, but before arriving there the sleeper was cut out of the train, and plaintiff was compelled to ride in a chair car for the balance of the distance, the sleeping car company's employees aiding the train employees in forcing plaintiff to leave the sleeper, both companies were liable jointly.[12]

§§ 3576-3587. Actions—§ 3576. Nature of Action.—A passenger wrongfully ejected from a sleeping car can bring an action either ex contractu or ex delicto. The fact that he is entitled to sue ex contractu does not prevent him from bringing an action ex delicto.[13] Where, in an action against a sleeping car company by a passenger, for loss of her hand bag containing medicine and stimulants which she had purchased for use during the journey, she being sick and in charge of a nurse, the complaint alleged a duty on the part of defendant's porter as its agent and servant to care for such bag as a part of plaintiff's effects, and that the duty was breached by the porter's wrongful act in taking and carrying away the hand bag, medicine, etc., while acting within the scope of his employment, the complaint stated a cause of action ex delicto, and not ex contractu.[14]

§ 3577. Parties.—A passenger who is intrusted with money to pay the traveling expenses of another in his care for the journey, has such a right in the money that he can recover from a sleeping car company by whose servant it is stolen.[15]

Joinder of Parties Defendant.—A railroad company and a sleeping car company may be joined in a suit for mental suffering to a passenger in a palace car

6. **Effect of contract with sleeping car company.**—Pullman Co. *v.* Norton (Tex. Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

7. Robinson *v.* Chicago, etc., R. Co., 97 N. W. 689, 135 Mich. 254.

8. **Effect of stipulation on Pullman ticket.**—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846; Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232.

9. **Joint liability of sleeping car and railway companies.**—Nelson *v.* Illinois Cent. R. Co. (Miss.), 53 So. 619.

10. Calder *v.* Southern R. Co., 89 S. C. 287, 71 S. E. 841.

11. Houston, etc., R. Co. *v.* Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

12. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009. See Taylor *v.* Wabash R. Co., 130 Mo. App. 582, 109 S. W. 1059.

13. **Nature of action.**—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 4 Ky. L. Rep. 926, 46 Am. Rep. 688. See Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719.

14. Bacon *v.* Pullman Co., 159 Fed. 1.

15. **Parties.**—Pullman Palace Car Co. *v.* Gavin, 93 Tenn. (9 Pickle) 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298.

attached to the railroad's train, caused by the language of drunken persons permitted to enter and remain in the car.[16] And they may be joined in an action for damages for inconvenience and humiliation inflicted upon a passenger by putting him out of a sleeping car berth.[17]

§§ 3578-3579. Pleading—§ 3578. Declaration or Complaint.—In an action against a sleeping car company there can be no recovery where the declaration does not state a cause of action against the defendant.[18]

Alleging Authority of Servant.—In an action for breach of a sleeping car company's contract to furnish accommodations in a particular car between certain places, an allegation that plaintiff was required to leave the car by defendant's servant in charge sufficiently alleges that such servant acted in the line of his employment.[19]

Alleging Negligence.—It is held that in an action against a sleeping car company to recover for property stolen from plaintiff while occupying a berth in defendant's sleeping car a declaration is defective which does not set forth any particular act or omission constituting negligence; yet where there is no special demurrer on that ground and the declaration is good in substance, there is no error in overruling a demurrer to the declaration upon other and general grounds.[20] Where plaintiff relies upon gross negligence as a ground of liability on the part of the defendant, upon the theory that there was a gratuitous bailment, he should aver gross negligence.[21] A complaint by a passenger suing to recover for property stolen in a sleeping car sufficiently shows that the sleeping car company was negligent by alleging that it failed to secure efficient employees to protect his property, without alleging that the company failed to have a watchman, or that its watchman failed to exercise proper care to protect plaintiff's property.[22] Allegations, in an action against a railway company and a sleeping car company that their employees, instead of stopping the train at a station, negligently caused a passenger to alight before the station was reached, and that the train moved away leaving her without assistance to reach the station, charges negligence of both companies.[23]

§ 3579. Necessity for Pleading Contributory Negligence.—Contributory negligence of a passenger in a sleeping car in losing a diamond ring sued for is not available as a defense to the sleeping car company's liability, where it is not pleaded.[24]

16. **Joinder of parties defendant.**—Houston, etc., R. Co. *v.* Perkins, 52 S. W. 124, 21 Tex. Civ. App. 508.

17. Taylor *v.* Wabash R. Co., 130 Mo. App. 582, 109 S. W. 1059.

18. **Declaration not stating cause of action.**—Plaintiff alleged that, being a holder of a railroad ticket which entitled him to be carried over the P. Railroad from New York to Washington, then to Chattanooga, Tennessee, he exhibited such ticket to the agent of defendant sleeping car company at Providence, R. I., who informed him that by purchasing a local ticket from Providence to Jersey City the agent could sell him sleeping car accommodations from Providence to Washington, where the railroad authorities would countersign his ticket so as to validate it for the balance of his journey; that, relying on such information, he purchased a ticket, but was refused permission to ride by the train conductor of the P. Railroad Company after leaving Jersey City, unless he paid fare, because the ticket had not been countersigned in New York; that he paid fare to the next nearest station, where he was ejected. Held, that the declaration did not state a cause of action against the sleeping car company. Calhoun *v.* Pullman Palace Car Co., 149 Fed. 546.

19. **Alleging authority of servant.**—Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

20. **Alleging negligence.**—Pullman Palace Car Co. *v.* Martin, 92 Ga. 161, 18 S. E. 364.

21. **Gross negligence.**—Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108.

22. Pullman Palace Car Co. *v.* Adams, 54 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

23. Pullman Co. *v.* Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315.

24. **Necessity for pleading contributory negligence.**—Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

§ 3580. Issues, Proof and Variance.—It seems that under a general allegation of negligence "of defendant, its servants, and employees in charge of the car," no inquiry can be made as to whether or not the construction of the car was adequate for the protection of the property of passengers.[25] In an action by a passenger against a sleeping car company for the loss of property alleged to be due to defendant's negligence, there must be proof of negligence or facts and circumstances pointing so clearly to negligence as to supply the place of more direct evidence.[26] One suing a sleeping car company for breach of its contract to provide plaintiff and her family with sleeping car accommodations from a designated point to her point of destination can not recover on proof that her reservation for sleeping car accommodations was from an intermediate point to the point of destination.[27] And where plaintiff charged a breach of contract in that she was not permitted to occupy Pullman accommodations in a particular sleeper, but the proof showed that she was only entitled to Pullman accommodations on a particular train, the variance was fatal.[28]

§ 3581. Presumptions and Burden of Proof.—Scope of Authority of Employee.—Where sleeping car passengers are improperly discharged before reaching their destination by employees of the defendant company, which offers no evidence of the duties of its servants and the usages and rules in force on its cars, it will be presumed that the employees were acting within the scope of their employment so as to render the company liable.[29]

Negligence of Defendant.—It is generally held that the burden of proving negligence on the part of the sleeping car company in failing to exercise proper care for the security of passengers' property is on plaintiff, and negligence on the part of a sleeping car company will not be inferred from the mere fact of a loss of property by a passenger in an action by him against it to recover for such loss.[30] But there may be cases, where the evidence that a theft took place will, when the surrounding circumstances are considered, carry with it a reasonable inference of negligence.[31] And it is held that evidence that a sleeping car passenger on leaving

25. **Issues, proof and variance.**—Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

26. Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712.

27. Smith *v.* Pullman Co., 138 Mo. App. 238, 119 S. W. 1072.

28. Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 So. 761.

29. **Scope of authority of employee.**—Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

30. **Negligence of defendant.**—*Illinois.*—McMurray *v.* Pullman's Palace Car Co., 86 Ill. App. 619.

Massachusetts.—Whicher *v.* Boston, etc., R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314.

Missouri.—Root *v.* New York Cent., etc., Co., 28 Mo. App. 199.

New York.—Tracy *v.* Pullman Palace Car Co., 67 How. Prac. 154; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 47 Am. & Eng. R. Cas. 421, 21 Am. St. Rep. 644, 11 L. R. A. 759; Cohen *v.* New York, etc., R. Co., 105 N. Y. S. 483, 121 App. Div. 5; Weingart *v.* Pullman Co., 108 N. Y. S. 972, 58 Misc. Rep. 187; Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712.

Ohio.—Falls River, etc., Mach. Co. *v.* Pullman Palace Car Co., 6 O. Dec. 85, 4 N. P. 26.

Texas.—Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 34 Am. & Eng. R. Cas. 217, 5 Am. St. Rep. 31; Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149; Pullman Palace Car Co. *v.* Arents, 28 Tex. Civ. App. 71, 66 S. W. 329.

Canada.—Stearn *v.* Pullman Car Co., 8 Ont. 171, 21 Am. & Eng. R. Cas. 443.

In an action to recover for money stolen from plaintiff while occupying a berth in a sleeping car, the presumption exists in favor of the defendant that it performed its duty toward its passengers. Carpenter *v.* New York, etc., R. Co., 15 N. Y. St. Rep. 345.

Gross negligence.—The law will not presume gross negligence; and, if the plaintiff relies upon it as a ground of liability on the part of the defendant, upon the theory that there was a gratuitous bailment, he should prove the gross negligence. Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108.

31. Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19. See Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

the car for the night on account of a long delay was assured by the conductor that it would be safe to leave his baggage in the car and that the baggage was not returned to him nor its loss explained makes out a prima facie case of negligence on the part of the company.[32] There are cases holding that the burden of proof is on the company of showing that it exercised the requisite degree of diligence and that the loss was not occasioned by a failure on the part of its employees to do so.[33] And it has been held that on proof of injury sustained by a passenger on a railroad train, by the fall of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable.[34]

Rebuttal of Presumption of Negligence.—Where the proof of the loss of property raises the presumption of negligence on the part of the sleeping car company the presumption is rebutted by the uncontradicted evidence of the car porter that he was on duty, and engaged in watching the car, through the night, till after the loss.[35]

Contributory Negligence.—The burden of proof as to contributory negligence is in all cases on the defendant, unless the plaintiff's own evidence established it.[36]

§§ 3582-3584. Admissibility of Evidence—§ 3582. In General.—In a suit against a sleeping car company for its neglect to put a passenger off at the proper station, in which injury to health was alleged as an item of damages, it is competent for the passenger to testify that she knew nothing else than the exposure to which she was subjected which could have caused the illness.[37] Where in an action against a railway company and a sleeping car company for injuries to a passenger by a defect in a sleeping car, the railway company pleaded a contract with the sleeping car company which stipulated that the sleeping car company should have authority to furnish its own conductor, and that the railway conductor should not interfere with the business of the sleeping cars except for the purpose of collecting the tickets of passengers, the admission of the testimony of the railway conductor that he had nothing to do with the sleeping cars, and that that duty devolved on the conductor of those cars, was not erroneous.[38]

The agency of a railroad ticket agent in contracting in behalf of a sleeping car company to reserve a berth in one of its cars may be established by his prior acts, and circumstances attending the same, showing that the company recognized similar contracts made under like circumstances.[39]

§ 3583. In Actions for Wrongful Ejection.—In an action against a sleeping car company which had contracted to furnish plaintiff a berth, her testimony that she left the car under the conductor's order, and finding no other seat took one in a negro car, is admissible.[40] In an action for ejection from a sleeping car, under the passenger's protest, it is not improper to ask the one who ordered the passenger to leave, if he intended to make him leave if he had not obeyed the

32. Croll *v.* Pullman Co., 113 N. Y. S. 542, 61 Misc. Rep. 265.

33. Pullman Palace Car Co. *v.* Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480; Pullman's Palace Car Co. *v.* Harvey, 101 Ga. 733, 28 S. E. 989; Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407.

34. Cleveland, etc., R. Co. *v.* Walrath, 38 O. St. 461, 8 Am. & Eng. R. Cas. 371, 43 Am. Rep. 433.

35. **Rebuttal of presumption of negligence.**—Pullman Palace Car Co. *v.* Freudenstein, 3 Colo. App. 540, 34 Pac. 578.

36. **Contributory negligence.**—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

37. **Admissibility of evidence.**—Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

38. Pullman Co. *v.* Norton (Tex. Civ. App.), 91 S. W. 841.

39. **Agency of railroad ticket agent.**—Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

40. **Actions for wrongful ejection.**—Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719, affirmed in 93 Tex. 693, no op.

order.[41] Where a sleeping car company breaks its contract in such a way as to constitute ejection, it is proper to admit evidence of inconvenience, annoyance, pain, and suffering incident to the ejection.[42] Under the allegations of a complaint that plaintiff was wrongfully, willfully, maliciously, and in violation of her contract rights, ejected from a sleeping car by the conductor, evidence of the conductor's rudeness in ordering her out of the car is admissible.[43]

§ 3584. In Actions for Loss of Property.—In an action against a sleeping car company for a valise and contents lost by a passenger on defendant's car, evidence is admissible of details of conversations between plaintiff and the porter and conductor of the car as to the place of putting the valise, and the conductor's statement, when putting it in an unoccupied seat opposite plaintiff, that it would be perfectly safe there, as the passenger is not responsible for the choice of modes of performing the defendant's duty to watch over the hand baggage of its passengers.[44]

Knowledge of Other Thefts.—In an action for loss of a sleeping car passenger's effects, evidence that defendant's servants knew that stealing from cars had been going on in the neighborhood was admissible, though such knowledge was not alleged.[45]

That other passengers were robbed may be shown by witnesses who are able to swear to the fact of their own knowledge, but the declarations of other passengers that they had been robbed is hearsay evidence merely and inadmissible.[46]

Circumstances Connecting Porter with Theft.—Where plaintiff claimed that defendant's sleeping car porter while searching for a ring lost by plaintiff's wife discovered it in the pillow box and appropriated it, plaintiff, having testified that he stated to the porter when he was making up the berth that they had lost something during the night and heard it drop into the pillow box, was entitled to state that he saw the porter in making up the berth stoop over and pick up something, and put it in his pocket.[47]

Declarations and Admissions of Servants.—The declarations, explanations and suggestions of the servant of a sleeping car company, whose duty it is to care for the passengers' baggage, made upon a passenger's inquiry while on the car, as to what had become of his baggage placed away by such servant, are admissible in evidence in an action against the company to recover for the lost baggage.[48] And where a sleeping car porter was the sole agent and representative of the sleeping car company and was in charge of the car in which plaintiff was riding at the time he was assaulted and robbed, the porter's declarations were admissible against the company.[49] But it is held that admissions made by the porter after the discovery of a loss by a passenger are inadmissible.[50] And the porter's declarations as to his suspicions of two men who had left the car during the night are not admissible against the company in an action by a passenger who had been robbed during the night.[51]

41. Pullman Palace Car Co. *v.* Cain, 40 S. W. 220, 15 Tex. Civ. App. 503.

42. **Inconvenience, annoyance, etc.**—Aplington *v.* Pullman Co., 97 N. Y. S. 329, 110 App. Div. 250, 17 N. Y. Ann. Cas. 455.

43. **Rudeness in ejection.**—Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719.

44. **Admissibility in actions for loss of property.**—Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

45. **Knowledge of other thefts.**—Pullman Co. *v.* Schober (Tex. Civ. App.), 149 S. W. 236.

46. **Evidence of other thefts—Declarations of third persons.**—Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19. See Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

47. **Circumstances connecting porter with theft.**—Pullman Co. *v.* Vanderhoeven, 107 S. W. 147, 48 Tex. Civ. App. 414.

48. **Declarations and admissions of servants.**—Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

49. Hill *v.* Pullman Co., 188 Fed. 497.

50. **Admissions inadmissible.**—Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. Rep. 712.

51. Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19.

Purpose of Carrying Property.—In an action against a sleeping car company for loss of a passenger's ring alleged to have been found and misappropriated by the porter the purpose for which she was carrying the ring on her journey was immaterial, so that the court did not err in permitting her to testify that she took the ring to wear at a dinner, or such other use as she might have for it.[52]

Evidence of Construction of Pillow Box.—Where plaintiff claimed that his wife's ring fell from defendant's sleeping car berth, which they had been occupying, into the pillow box, and that the porter found it there when searching for it at the wife's request, and appropriated it, evidence that the pillow box was so constructed at the time the wife examined it that a thing the size and shape of a ring could fall from the berth into the box, was admissible.[53]

§ 3585. Weight and Sufficiency of Evidence.—To Show Negligence in General.—The rules governing the weight and sufficiency of evidence to show negligence in civil actions generally apply in actions against palace and sleeping car companies.[54] As has been seen, it is generally held that the proof of the loss of the property of a passenger on a sleeping car is not sufficient to show the negligence of the company, though there are cases holding the contrary.[55] And it is held that the naked fact that a theft has been committed upon a passenger, while asleep in a sleeping car, is not evidence of negligence to charge the sleeping car company.[56] Evidence that when a passenger went to his berth he had money in his trousers pocket, and no porter or other employee was present, and that in the morning when he arose his money was gone, and no porter or other employee was present, is insufficient to show the loss was caused by the company's negligence.[57] And the mere unexplained disappearance from a Pullman day coach of an overcoat given by a passenger to the porter, with directions to put it on the seat he had engaged in the car, does not establish defendant's liability.[58] But where a passenger on a sleeping car gave his umbrella to a porter, who was alone in charge of the car, and it was never returned to him, the negligence of the company was sufficiently shown to sustain a judgment for its value.[59] And evidence that a passenger, upon leaving the

52. **Purpose of carrying property.**—Pullman Co. *v.* Vanderhoeven, 107 S. W. 147, 48 Tex. Civ. App. 414.

53. **Evidence of construction of pillow box.**—Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

54. **Weight and sufficiency of evidence—Illustrations.**—In an action against a sleeping car company for the value of a valise left by plaintiff, when he retired, by the side of his berth in the aisle, the evidence was that the car had two servants, whose duty it was to sit by turns at the end of the aisle to wait on passengers and see that nothing was stolen, and that during the first part of the night one of these kept watch; that when this one left the car to wake the other, the valise was in place; that during the latter part of the night, while the second servant was on watch, several persons came into the car; that the servant woke the passengers for A., and they got off, taking their valises; that the servant could not identify particular valises where there were a number of passengers each having one; that no passengers got off that night except at A. Held, that a finding that the valise was taken at A., and that its loss was not caused by the negligence of the defendant's servants, was sustained by the evidence. Belden *v.* Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22.

Evidence, in an action by a passenger against a sleeping car company to recover for valuables stolen, held to sustain a verdict for plaintiff. Pullman Palace Car Co. *v.* Woods, 76 Neb. 694, 107 N. W. 858.

Evidence insufficient to show that passenger contracted pneumonia through insufficient heat. Marcott *v.* Minneapolis, etc., R. Co. (Wis.), 133 N. W. 37.

To rebut presumption of negligence.—See ante, "Presumptions and Burden of Proof," § 3581.

Sufficiency of evidence to go to jury.—See post, "Questions for Court or Jury," § 3581.

55. **Mere proof of loss.**—See ante, "Presumptions and Burden of Proof," § 3581.

56. Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19.

57. Cohen *v.* New York, etc., R. Co., 121 App. Div. 5, 105 N. Y. S. 183.

58. Weingart *v.* Pullman Co., 108 N. Y. S. 972, 58 Misc. Rep. 187.

59. Irving *v.* Pullman Co., 84 N. Y. S. 248.

car to get his dinner, left his baggage in the car upon being told that it would be safe there, and upon his return found that the car had been switched off from the train and part of his baggage transferred to another car, and part of it lost, is sufficient to prove negligence.[60]

Personal Injury.—Evidence that the upper berth of a sleeping car fell on a passenger in a seat assigned to him by the conductor, and that no mechanical defect was found in the springs and catches, is sufficient to show negligence in not causing the berth to be properly fastened in the absence of evidence to the contrary.[61]

Failure to Properly Guard Car.—In an action against a sleeping car company for theft of a passenger's personal property while sleeping in a car, evidence that the car behind it was an empty baggage car which was not visited by the regular trainmen, and that the porter was not keeping watch, but was otherwise engaged at a place in the forward end of the car from which he could not see the aisle, sustains a finding that the company was negligent in failing to keep a sufficient watch to secure passengers against intrusion.[62] And where there is evidence that a lady passenger was subjected to indignities by men passing through the car, and that there was no one guarding the car, and that she tried in vain to summon the porter, a verdict against the defendant will not be disturbed.[63] The fact that the porter of a sleeping car blacked boots during the night when a theft occurred is not sufficient, standing alone, to make out a prima facie case of negligence against the company for failure to properly watch the car and guard the effects of passengers from theft.[64]

Leaving Window Open.—Where property was shown to have been stolen because the servants of the company failed to keep the windows closed while at a station, as required by a regulation of the company, it was held that negligence was sufficiently proved.[65]

To Show Theft by Employee.—In an action against a sleeping car company for loss of property alleged to have been found and misappropriated by the porter, plaintiff was not bound to prove such misappropriation beyond a reasonable doubt, but was only required to prove facts and circumstances reasonably tending to show that defendant's porter in the discharge of his duties found the property and appropriated.[66] Where it appeared that a sleeping car

60. Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

61. Cleveland, etc., R. Co. *v.* Walwrath, 6 O. Dec. 718, affirmed in 38 O. St. 461, 43 Am. Rep. 433.

62. **Failure to properly guard car.**—Hill *v.* Pullman Co., 188 Fed. 497.

63. St. Louis, etc., R. Co. *v.* Hatch, 94 S. W. 671, 116 Tenn. 580.

64. Carpenter *v.* New York, etc., R. Co., 13 N. Y. St. Rep. 718.

65. **Leaving window open.**—While plaintiff was a passenger on a sleeping car, his valise was stolen from the car at a station in Mexico. The rules of the company required the rear door and windows of the car to be closed while at such stations. The conductor and porter testified that they were so closed just before entering the station, and that while there they stood on the platform near the car. Plaintiff stepped out of the car, leaving the valise near an open window at which two passengers sat. They moved away while he was gone, without closing the window, and soon after the train started the loss was discovered. Held, that findings that the company's employees were negligent in not keeping the window closed, or in failing to see and prevent the theft, and that plaintiff was not negligent, were justified. Pullman Palace Car Co. *v.* Arents, 66 S. W. 329, 28 Tex. Civ. App. 71.

66. **To show theft by employee.**—Pullman Co. *v.* Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147.

Evidence insufficient to show theft by employee.—In an action against a sleeping car company to recover the value of property lost by a passenger, the evidence showed that the porter had faithfully watched over the occupants of the car. No passenger entered or left the car from the time the property was last seen until after the loss was discovered. The property was in a valise next to the aisle, on the end of the seat. The window was open at the passenger's request, and the valise was stolen while she was asleep. The porter, earlier in the evening, had seen her take money out of a similar valise, and, after the loss was discovered, he was twice sent

passenger, being told that he would have to change cars on account of a wreck, started forward with all the other passengers, but, upon missing his pocketbook, returned to his berth, where he had left it; that no one was in the car after the passenger left, except the conductor, porter, and a train brakeman who passed through without stopping; and that the conductor, porter, and passengers were searched, but the pocketbook could not be found, a verdict against the sleeping car company was held to be upon sufficient evidence.[67]

§ 3586. Instructions.—There should be some evidence upon which to base an instruction.[68] And it is proper to refuse a requested charge which does not conform to the evidence.[69] It is improper to give an instruction imposing a higher degree of care on defendant than the law requires.[70] In an action for

for by the conductor, but the porter reported that he was dressing and he did not come. The porter established a good character for honesty. Held, insufficient to show that the porter took the property, so as to render the company liable. Pullman Sleeping Car Co. *v.* Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771.

67. Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

68. **Instructions—Necessity for evidence.**—Plaintiff and his companion were in the berth of a sleeping car, over which was suspended a hammock, in which was the companion's coat and plaintiff's vest. The companion testified that he got up in the night and took his coat, leaving plaintiff's vest. Plaintiff testified that, when he awoke, his vest was on the berth, on the outer edge of the cover, and that a pocketbook which was in his vest pocket was missing. Held, in an action against the sleeping car company, that there was no evidence on which to predicate an instruction to find for the company if plaintiff's companion was so handling the vest as to cause the pocketbook to fall on the floor. Pullman Palace Car Co. *v.* Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

Evidence supporting instruction.—In an action against a sleeping car company and a railway company by a passenger compelled, before reaching her destination, to leave the sleeper in which she had engaged a berth, and to complete the journey in a chair car, a charge that neither of defendants had the right to tender to pay plaintiff back the amount paid by her for the privilege of being transported in the sleeping car, and then require her against her consent to transfer from the sleeper to the chair car, was not objectionable on the ground that there was no evidence that the sleeping car company ever tendered back the money; the evidence showing that such money was tendered back by the train conductor in the presence of the sleeping car conductor, and that the two conductors were acting in concert. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

69. Before reaching her destination, plaintiff was compelled to leave the sleeper in which she had engaged transportation, and complete the journey in a chair car. In an action against the railway company and the sleeping car company operating the sleeper, the evidence showed that the railway company desired the sleeper for the accommodation of passengers on one of its trains bound in the opposite direction, the sleeper on which had become disabled; that the train conductor and the sleeping car conductor insisted for three-quarters of an hour or more on plaintiff's leaving the sleeper and entering the chair car, using arguments and threats beyond the limit of persuasion, attracting the attention of others to plaintiff, who was thereby greatly mortified. Under the evidence, the refusal of a special charge requested by the railway company, that if, by the exigencies of the case, through no fault of its own, it approached plaintiff and undertook to get her to change from the sleeper to a chair car, and by reason of such efforts passengers and other persons looked at her, then plaintiff could not recover for mental suffering, was not error. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

70. **Degree of care required.**—In an action for loss of a sleeping car passenger's effects by larceny from the car window, a charge that defendant was not only bound to furnish plaintiff a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss, and if plaintiff's loss was occasioned by want of such care, and his own negligence did not contribute to it, he was entitled to recover, was improper as imposing an absolute duty on the sleeping car company to maintain a watch against theft from the outside; whether such watch was essential to the exercise of ordinary care being for the jury. Pullman Co. *v.* Schober (Tex. Civ. App.), 149 S. W. 236.

ejecting a passenger who attempted to take improper baggage into the car, an instruction which ignored his right to opportunity to check the baggage, and which was based on the theory that he must have shown himself to have been actually within the car instead of in the vestibule, was properly refused.[71] It is error to charge that plaintiff can not recover for property stolen in a sleeping car if the property was stolen while the porter was awake, as the porter might have been guilty of negligence other than that of sleeping.[72] And it is error to charge that plaintiff can not recover if he was guilty of contributory negligence, without hypothesizing that the loss of the property sued for was caused by such contributory negligence.[73]

Instruction Ignoring Evidence.—In an action against a sleeping car company for property stolen in the car, it is improper to charge that the company was not negligent after reaching a certain station, though such is the fact, and to ignore evidence of negligence before the station was reached.[74]

Use of the Word "Transportation" in Instructions.—In an action against a sleeping car company and a railway company by a passenger compelled to leave a sleeper, in which she had engaged a berth to her point of destination, and complete the journey in a chair car, the use of the term "transportation" in an instruction that it was the duty of the sleeping car company to furnish plaintiff transportation in the sleeper to the point of destination was not misleading; plaintiff's contract with the company being so conditioned, and there being no question raised that she was not transported to such destination.[75]

A charge that the jury must find according to the preponderance of the evidence is erroneous, for the reason that preponderance may not convince the minds of the jury.[76]

Presumption of Negligence.—An instruction in an action against a sleeping car company for loss of personal effects, that the action was based on negligence, that the burden was on plaintiff to prove his case by a preponderance of the evidence, and that it was the duty of the company to use reasonable care to guard its passengers from loss of personal effects from theft, and if, through a want of such care, plaintiff's personal effects were lost or stolen, and they were such as would reasonably be supposed to be carried by him, the company would be liable; otherwise, not, is not objectionable as authorizing the jury to infer negligence from mere proof of loss.[77]

Harmless Error.—A sleeping car company, sued as a codefendant with a railway company for injuries suffered through the negligence of defendant's employees, can not complain that an instruction correctly stating the diligence required of the sleeping car company imposed a lower burden upon the railway company than the law would exact.[78]

Improper Refusal to Charge.—Where plaintiff's effects were stolen out of a sleeping car berth through an open window it was improper to refuse an instruction requested by the defendant, which would have told the jury that if they believed from the evidence that a man stood upon the rods of the outside of the car, and reached through an open window into the berth and snatched plaintiff's property, and that at said time an employee of defendant was on

71. **Instruction ignoring right of plaintiff.**—Pullman Co. *v.* Custer (Tex. Civ. App.), 140 S. W. 847.

72. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

73. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

74. **Ignoring evidence of negligence.**—Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

75. **Use of the word "transportation" in instruction.**—Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

76. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

77. **Presumption of negligence.**—Godfrey *v.* Pullman Co., 87 S. C. 361, 69 S. E. 666.

78. **Harmless error.**—St. Louis, etc., R. Co. *v.* Hatch, 116 Tenn. 580, 94 S. W. 671.

watch inside of said car, and that under the circumstances this was reasonable care and diligence on the part of defendant for the protection of property of those riding in said car, to return a verdict for defendant.[79]

§ 3587. Questions for Court or Jury.—It is the province of the jury to determine the weight of evidence and the credibility of the witnesses, and where the evidence conduces in any degree to establish a right of recovery it is error to give a peremptory instruction for defendant,[80] grant a nonsuit,[81] or sustain a demurrer to the evidence.[82] So, in an action against a sleeping car company by a passenger for the recovery for the loss of his personal belongings while a passenger, it is for the jury to determine whether plaintiff's evidence, which tended to prove that the goods were stolen by the defendant's porter, was overcome by defendant's evidence.[83] But where, in an action against a sleeping car company for the value of a stolen diamond, it appeared that the plaintiff's acts gave opportunity for the theft, and there was no evidence of negligence by the defendant, the court properly instructed a verdict for defendant.[84] In the appended note will be found instances where the evidence was held sufficient for submission to the jury.[85]

79. **Improper refusal to charge.**—Pullman Co. *v.* Schober (Tex. Civ. App.), 149 S. W. 236.

80. **Questions for jury in general—Peremptory instruction for defendant.**—Jenkins *v.* Louisville, etc., R. Co., 104 Ky. 673, 20 Ky. L. Rep. 865, 47 S. W. 761.

"Such a charge should never be given where there is any testimony whatever upon which a verdict can be predicated. Stevenson *v.* Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112." Hatch *v.* Pullman Sleeping Car Co. (Tex. Civ. App.), 84 S. W. 246, wherein evidence examined, and whether baggage was purloined by defendant's servants held a question for the jury.

Where the evidence tended to show that plaintiff, while a passenger in a sleeping car, was injured by the falling of the partition plank which separated the berth in which he was sitting from that in front of his, it was error to give a peremptory instruction for defendants, railroad and sleeping car companies, though the porter testified, without contradiction, that he had securely fastened the plank, and the evidence showed that it could not fall when thus fastened, there being no explanation as to how it fell out of place. Jenkins *v.* Louisville, etc., R. Co., 47 S. W. 761, 20 Ky. L. Rep. 865, 104 Ky. 673.

81. **Nonsuit.**—In an action against a sleeping car company it appeared that plaintiff, on entering defendant's sleeping car, was told by the conductor that the car would go through to his destination, and that he might go to bed, that on retiring he deposited his money in an envelope, put the envelope in his vest pocket, and placed the vest under his pillow; that in the middle of the night, before reaching his destination, he was suddenly aroused and told to hurry to get into the next car, as the car which he was in was to be taken no further, whereupon he rose hurriedly and carried his clothes to the next car; and that he discovered the loss of the envelope an hour later, and duly notified the company. Held, that it was error to grant a nonsuit. Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186, 2 Am. & Eng. R. Cas., N. S., 480.

82. **Demurrer to evidence.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

83. Morrow *v.* Pullman Palace Car Co., 73 S. W. 281, 98 Mo. App. 351.

84. Myers *v.* Pullman Co., 149 S. W. 1002, 149 Ky. 776, 41 L. R. A., N. S., 799.

85. **Instances of evidence held sufficient to go to jury.**—In an action by a passenger against a sleeping car company for damages for being ejected from a sleeping car, there was evidence tending to show that defendant sold plaintiff accommodations between two points in a car over a route not wholly covered by her railroad tickets, and that the conductor put her off without her consent before reaching the point where the railway lines diverged. Held, that such evidence was sufficient to warrant the court in submitting the case to the jury. Pullman Co. *v.* Czintz, 157 Fed. 752.

Plaintiff, having purchased a ticket entitling him to a drawing room in a sleeping car, was informed by a porter in charge of the car that baggage could be safely left in the drawing room, to which the porter and conductor had keys. Plaintiff, on leaving the car, notified the porter that he had left his baggage there, and requested the porter to care for it. It was not shown that the porter locked the door of the drawing room, but it was shown that the front door of the car was unlocked at or before the train reached a certain station, prior to the return of plaintiff, when the property had disappeared. Held, in an action for the value of the property, that there was sufficient

Negligence and Contributory Negligence.—In an action against a sleeping car company the question of the defendant's negligence is generally for the jury to determine.[86] Unless the law has declared certain acts or omissions to be negligence per se, the existence or nonexistence of it is a question of fact for the jury to determine, and not a question of law for the court.[87] It is held for the jury to determine whether the defendant has been guilty of negligence in not properly watching or guarding its car,[88] in opening a car window at a

evidence of negligence on the part of the car company to raise a question of fact for the jury. Arthur *v.* Pullman Co., 88 N. Y. S. 981, 44 Misc. Rep. 229.

Where the undisputed evidence was that the entire force employed on a sleeper, which ran over an important thoroughfare, and made frequent stops, was one man, who acted as conductor, as porter, and was also engaged, for his own profit, in blackening the shoes of the passengers, and that this man's closet was at one end of the car from which a full view of the main aisle could not be had, the evidence was sufficient in the absence of any explanation on defendant's part, to require the question whether the loss was caused by its negligence to be submitted to the jury. Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

Plaintiff, having a railroad coupon ticket for passage from New Orleans to New York over connecting lines of road, on application to defendant's sleeping car company, and on showing his ticket, was sold a berth in a sleeping car from New Orleans to Jersey City. From Washington to Jersey City, such car was run over a line different from that named in plaintiff's ticket, and, on his refusing to pay fare, he was ejected by the employees of the railroad company. Held that, there being evidence to warrant a finding that plaintiff was not chargeable with notice, before leaving Washington, that the car would not go over the road named in his ticket, such question was properly submitted to the jury under an instruction which, in case of such finding, permitted a recovery, not only for the increased expense to which plaintiff was subjected, but also compensation for the inconvenience and loss of time, and for the indignity of a public expulsion from the car. Pullman's Palace Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

86. **Negligence.**—Morrow *v.* Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Arthur *v.* Pullman Co., 88 N. Y. S. 981, 44 Misc. Rep. 229.

Plaintiff, whose leg had been recently broken, was riding as a passenger in a sleeping car operated by defendant, and while sitting on the side of his berth early in the morning, when the car was standing at a station, some person, who was identified by plaintiff as the porter of the next car, in walking through the aisle, stepped upon or fell against plaintiff's leg, and it was rebroken. The porters denied knowledge of any such occurrence. Held, that the question of defendant's negligence was properly submitted to the jury. Pullman Co. *v.* Haight, 151 Fed. 1009, 81 C. C. A. 287.

Trial judge sitting without jury.—Where a tray was upset over the clothing of a passenger in a dining car by another passenger as he arose from his seat, and the waiter who was carrying the tray admitted that if he had carried the tray at a greater height than he did the passenger would not have collided with it, and the proof showed that the car was very crowded, whether the waiter was guilty of negligence was a question of fact for the trial judge sitting without a jury. Cassasa *v.* New York, etc., R. Co., 95 N. Y. S. 648, 109 App. Div. 170.

87. Dargan *v.* Pullman Palace Car Co., 2 Texas App. Civ. Cas., § 691, 26 Am. & Eng. R. Cas. 149.

88. **Failure to properly guard car.**—The fact that the porter of a sleeping car running from St. Louis to Louisville, who was the sole person charged with the duty of keeping a lookout in the car, had, on the morning of the day the car left St. Louis, arrived in that city after a long and fatiguing passage from El Paso, Tex., coupled with the fact that twice during the night he voluntarily absented himself from the car for at least 20 minutes each time, conduced to show negligence on the part of the carrier, and authorized the submission of that question to the jury. Pullman Palace Car Co. *v.* Hunter, 54 S. W. 845, 21 Ky. L. Rep. 1248, 107 Ky. 519, 47 L. R. A. 286.

In an action against a sleeping car company to recover money stolen from a passenger's berth while he was asleep, it appeared that the porter was found asleep in the morning, and that he had been on duty for 36 hours continuously, and that another passenger lost a sum of money in a similar manner, and at the same time. Held, that it was for the jury to determine whether the company was negligent in guarding its passengers. Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

In an action for money alleged to have been stolen from a berth in defendant's sleeping car, it appeared that the only

station,[89] or in failing to properly light the aisle and toilet room of a car.[90] Contributory negligence is a mixed question of law and fact, and is properly submitted to the jury, under proper instructions.[91] Thus whether or not a passenger is guilty of contributory negligence in entering a dark toilet room,[92] or in stumbling over a suitcase negligently left in the aisle of a dimly-lighted car,[93] is a question for the jury.

Reasonableness of Regulations.—Whether a rule of a sleeping car company excluding persons known to be afflicted with any contagious or infectious disease or to be insane is reasonable, is a question for the court.[94] And when the facts are undisputed, it is the province of the court to declare a regulation requiring passengers to pay extra for riding in chair cars reasonable.[95]

Whether an Article Was Baggage.—Where, in an action against a sleeping car company for loss of a diamond ring belonging to plaintiff's wife, by

person in charge of the car was the porter, who blacked boots during the night, the utensils for that purpose being kept in a closet remote from the aisle. It did not appear where the porter was stationed during the night. Held, that defendant's negligence in not properly watching the car was a question for the jury. Carpenter *v.* New York, etc., R. Co. (N. Y.), 14 Daly 457, affirmed in 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 11 L. R. A. 759, 47 Am. & Eng. R. Cas. 421.

Where the evidence is such as to permit the inference that but one man was employed by the defendant in the car where the theft was committed, and that he was charged with the performance of duties, which might interrupt his watching the passengers, it is for the jury to decide whether or not the defendant was guilty of negligence. Carpenter *v.* New York, etc., R. Co., 15 N. Y. St. Rep. 345.

In an action for loss of a passenger's effects from a sleeping car, evidence that while the train was stopping at a station at night both the conductor and porter were out on the platform at the same time, leaving both doors unlocked, and no one to keep watch, required submission of the issue of the negligence of the company's servants to the jury. Godfrey *v.* Pullman Co., 69 S. E. 666, 87 S. C. 361.

89. **Opening window.**—The porter of a sleeping car, half an hour before starting time, and after putting a passenger's traveling bag in the car on a seat opposite the side on which passengers were received, opened the window opposite the seat, without request, in violation of a rule of the company. The passenger was about to sit in the seat when the window was opened, and the porter had no reason to believe that he would leave it, but the passenger did so, and the baggage was stolen. Held a question for the jury whether the opening of the window was negligence. Dawley *v.* Wagner Palace Car Co., 47 N. E. 1024, 169 Mass. 315.

90. **Failure to properly light car.**—Valentine *v.* Northern Pac. R. Co. (Wash.), 126 Pac. 99.

91. **Contributory negligence.**—A passenger's baggage was placed by the porter on a seat of a sleeping car near an open window, while the car was standing in a depot. The passenger left the car, but his wife remained within, walked up and down the aisle, went out on the platform, and then sat down in the section forward of her own, and facing it. The baggage was stolen. Held, in an action for the loss, that it was a question for the jury whether either the passenger or his wife were negligent. Dawley *v.* Wagner Palace Car Co., 47 N. E. 1024, 169 Mass. 315. See Pullman Co. *v.* Schober (Tex. Civ. App.), 149 S. W. 236.

Plaintiff, whose leg had been recently broken, was riding as a passenger in a sleeping car operated by defendant, and while sitting on the side of his berth early in the morning, when the car was standing at a station, some person, who was identified by plaintiff as the porter of the next car, in walking through the aisle, stepped upon or fell against plaintiff's leg, and it was rebroken. The porters denied knowledge of any such occurrence. Held, that the question of plaintiff's contributory negligence was properly submitted to the jury. Pullman Co. *v.* Haight, 151 Fed. 1009, 81 C. C. A. 287.

Whether a passenger, in an action against a sleeping car company by him for the recovery for the loss of his personal belongings while a passenger, was guilty of contributory negligence, held under the evidence, a question for the jury. Morrow *v.* Pullman Palace Car Co., 73 S. W. 281, 98 Mo. App. 351.

92. **Entering dark toilet room.**—Valentine *v.* Northern Pac. R. Co. (Wash.), 126 Pac. 99.

93. **Stumbling over suit case.**—Levien *v.* Webb, 61 N. Y. S. 1113, 30 Misc. Rep. 196.

94. **Reasonableness of regulations.**—Pullman Co. *v.* Krauss, 40 So. 398, 145 Ala. 395, 4 L. R. A., N. S., 103.

95. St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711; Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

alleged theft from the car in which they were traveling, the wife testified that she always wore the ring, and had never had it off her hand but once to have it fixed, and plaintiff stated that before boarding the train his wife asked him to keep the ring in a pocketbook until they could get north and have it repaired, whether the ring was carried merely to have it repaired or with the ultimate intention of its being worn by the wife during the remainder of the trip after it was repaired, and whether it was reasonably necessary for the wife's pleasure, comfort, and convenience during the journey, was for the jury.[96]

Reasonableness of Refusal to Accept Substituted Berth.—Where plaintiff engaged a lower berth, but it was assigned to another passenger, and he was offered a lower berth which he refused because it would have to be vacated at an early hour, and an upper berth which he refused because he, being a somnambulist, was afraid to sleep in an upper berth, it was a question for the jury whether he acted reasonably in refusing to accept either substituted berth.[97]

§§ 3588-3595. Damages—§ 3588. Nominal Damages.—A sleeping car company is liable for at least nominal damages for its porter's wrongful act in knowingly causing a passenger to alight some distance from her station.[98]

§ 3589. Punitive Damages.—A sleeping car company is not liable for punitive damages because its agent refuses to sell a sleeping car berth to a passenger, on the ground that the latter has not a first-class ticket, unless the passenger is treated insultingly or with malice.[99] But where a carrier recklessly disregards the right of a passenger to a reservation of a sleeping compartment, the passenger is entitled to punitive damages.[1] The failure of the servants of a sleeping car company to keep watch while a passenger is asleep in her berth is a reckless disregard of her safety and where the passenger is assaulted and robbed, the company is liable for punitive damages.[2] A willful invasion of a passenger's rights is not necessary to justify punitive damages.[3] Where the servants of a sleeping car company failed to notify plaintiff of arrival at her destination, and the time, place, and manner in which plaintiff was put off the train thereafter were attended with circumstances of aggravation, the court properly permitted her to recover exemplary damages.[4]

§§ 3590-3594. Compensatory Damages—§ 3590. In General.—Breach of Contract in General.—In an action against a sleeping car company for breach of contract to furnish a berth, the plaintiff, if entitled to recover, is at least entitled to the amount paid for his ticket, which constitutes substantial damages.[5] For breach of a contract to allow a passenger to use a berth as a bed during the daytime, he can recover only such damages as naturally and directly flow from the breach of contract.[6] Where the sleeping car in which plain-

96. **Whether an article was baggage.**—Godfrey *v.* Pullman Co., 69 S. E. 666, 87 S. C. 361.

97. **Reasonableness of refusal to accept substituted berth.**—Aplington *v.* Pullman Co., 97 N. Y. S. 329, 110 App. Div. 250, 17 N. Y. Ann. Cas. 455.

98. **Nominal damages.**—Pullman Co. *v.* Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315.

99. **Punitive damages—Refusal to sell berth.**—Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

1. Speaks *v.* Southern R. Co., 73 S. E. 625, 90 S. C. 358, 38 L. R. A., N. S., 258.

2. **Failure to keep watch.**—Calder *v.* Southern R. Co., 71 S. E. 841, 89 S. C. 287.

3. **Willful invasion of rights unnecessary.**—An instruction authorizing the jury to award punitive damages against a sleeping car company for injuries to a passenger assaulted and robbed while asleep in her berth, if the jury believed that there was a conscious disregard by the company's servants to observe due care, and that a willful invasion of the passenger's rights was not essential to justify such damages, properly submitted the issue of punitive damages. Calder *v.* Southern R. Co., 71 S. E. 841, 89 S. C. 287.

4. Pullman Co. *v.* Lutz, 154 Ala. 517, 45 So. 675, 14 L. R. A., N. S., 907.

5. **Breach of contract to furnish berth.**—Pullman Co. *v.* Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A., N. S., 103.

6. Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268.

tiff was riding was ordered to be returned when only a short distance from the place to which passage had been paid, and plaintiff refused to complete the trip in a day coach, and returned in the sleeping car, he can recover only nominal damages for the breach of contract, and such additional damages as might have resulted from completing the trip in the day coach instead of the sleeping car.[7]

Ejection of Passenger.—Plaintiff having been ejected by the employees of the railroad company from a car in which, under his contract with the sleeping car company, he was entitled to remain without payment of further fare, the sleeping car company was liable, not only for the direct, but also for the consequential, damages, which should have been anticipated as the natural and probable result of its breach of the contract, subject to the limitation that the damages recoverable could not be enhanced by the negligence or willful conduct of the plaintiff.[8] And where plaintiff purchased a railroad ticket for transportation between certain points, over a certain route, and defendant's agent sold him a ticket on a sleeper, reciting that it was good between such points, but the sleeper was attached to the train of another railroad company, whose cars proceeded over a route not named in the railroad ticket, and plaintiff was required by the conductor of the sleeper to leave the train, not having any more money to pay the railroad fare, it was held that the measure of damage would be for such mental suffering or feeling of humiliation as attended the ejection, as a direct result therefrom, and such inconvenience, expense, and loss of time as might be shown to be the direct, natural, and proximate result of the breach of the contract to carry.[9] Where in an action for an alleged wrongful expulsion from a sleeping car it appeared that plaintiff had purchased a ticket for a particular berth in the car, but had lost it, and that, although he had given satisfactory assurance that he had purchased the ticket, he was expelled from the car, no abusive language or personal violence being used by the conductor in charge, and it was shown that the passenger might have kept his berth by paying the required fare, but that he refused to do so, it was held, that he was entitled to recover only the price he paid for his ticket, and a reasonable compensation for the trouble and inconvenience suffered by being deprived of his berth.[10]

Indecent Assault by Employee.—Where the porter placed in charge of a sleeping car makes an indecent assault on a female occupant thereof, she is entitled to recover from the company a fair pecuniary compensation for all injuries, temporary or permanent, directly caused to her in her person, health, and strength, including compensation for the pain and suffering, mental and physical, which has been, or may thereafter be, caused.[11]

Loss of Baggage.—A passenger is entitled to recover the value as testified to by him of baggage lost through the carrier's negligence, though such articles have no market value.[12]

§ 3591. Mental Suffering.—In the absence of malice, willfulness, or inhumanity on the part of a sleeping car company breaching its contract to provide a passenger with sleeping car accommodations, there can be no recovery for fright, alarm, anxiety, humiliation, or distress of mind unaccompanied by physical injury, nor for physical injury wholly caused by mental disquietude.[13] Where, however, plaintiff suffered physical inconvenience and discomfort, the consequent physical pain attending thereon was sufficient to support his claim for com-

7. Missouri Pac. R. Co. *v.* Groesbeck (Tex. Civ. App.), 24 S. W. 702.

8. **Ejection of passenger.**—Pullman's Palace Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

9. Pullman Palace Car Co. *v.* McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945.

10. Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232.

11. **Indecent assault by employee.**—Campbell *v.* Pullman Palace Car Co., 42 Fed. 484, 44 Am. & Eng. R. Cas. 391.

12. **Loss of baggage.**—Cooney *v.* Pullman Palace Car Co., 25 So. 712, 121 Ala. 368, 53 L. R. A. 690.

13. **Mental suffering.**—Smith *v.* Pullman Co., 138 Mo. App. 238, 119 S. W. 1072. See Calder *v.* Southern R. Co., 71 S. E. 841, 89 S. C. 287.

pensatory damages, including damages for mental suffering and humiliation.[14] And where a sick passenger was deprived of medicine and stimulants by the theft of her handbag by the sleeping car porter, and suffered, unrelieved, during the night, pain and distress incident to her diseased condition, which could have been prevented and relief afforded to her by the use of the medicine and stimulants, she was entitled to recover damages for her mental distress.[15] It has been held that where in an action against a railway company and a sleeping car company, for compelling plaintiff to leave a sleeper in which she had engaged transportation before reaching her destination and complete the journey in a chair car, the evidence showed that the railway company desiring the sleeper for the accommodation of passengers on one of its trains bound in the opposite direction, the sleeper on which had become disabled, the train conductor and the sleeping car conductor insisted for three-quarters of an hour or more on plaintiff's leaving the sleeper and entering the chair car, using arguments and threats beyond the limit of persuasion, attracting the attention of others to plaintiff, who was thereby greatly mortified, it was not error to authorize the jury to consider the question of mental suffering on plaintiff's part.[16] Where a passenger on a sleeping car through the fault of the company is ejected, whereby he was delayed, he may recover for such mental suffering directly resulting from the ejection, but he can not show that he suffered mental distress for fear that the delay would cause his discharge from his employment, and that he would not be able to remit to his employers as usual, since such damages were not within the contemplation of the parties when the sleeping car ticket was purchased.[17]

Indecent Assault by Employee.—Where the injury complained of is an indecent assault by an employee of the company, recovery can be had for the mental suffering.[18]

Refusal to Allow Use of Berth as a Bed in Daytime.—Where a person severely afflicted with rheumatism pays for a berth on a sleeping car between certain points, mental suffering is not an element of damage for breach of the contract in simply refusing to permit such person to occupy the berth as a bed in the daytime.[19]

§ 3592. Physical Suffering.—Where a sleeping car porter makes an indecent assault upon a female passenger, she may recover for physical suffering directly caused by such assault.[20] And where a sick passenger was deprived of medicine and stimulants by the theft of her handbag by the porter, and suffered, unrelieved, during the night, pain incident to her diseased condition, which could have been prevented and relief afforded to her by the use of the medicine and stimulants, she was entitled to recover damages for her physical suffering.[21]

§ 3593. Remote Damages.—A sleeping car company breaching its contract to provide a female passenger with sleeping car accommodations is not required to anticipate that a woman in good health will be injured in her health as a natural and probable consequence of its breach.[22] And where a sleeping car caught fire through the negligence of a carrier's employees, and a woman who was "unwell" was thereby compelled to leave the car half-clad, and caught cold, resulting in suppression of her menses, this was the remote and not the proximate result of the carrier's negligence, and should not be considered in reckoning the damages.[23] But in an action against a sleeping car company for

14. Pullman Co. *v.* Willett, 27 O. C. C. 649.

15. Bacon *v.* Pullman Co., 159 Fed. 1.

16. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

17. Pullman Palace Car Co. *v.* McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945.

18. **Indecent assault by employee.**—Campbell *v.* Pullman Palace Car Co., 42 Fed. 484, 44 Am. & Eng. R. Cas. 391.

19. **Refusal to allow use of berth as a bed in daytime.**—Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268.

20. **Physical suffering.**—Campbell *v.* Pullman Palace Car Co., 42 Fed. 484, 44 Am. & Eng. R. Cas. 391.

21. Bacon *v.* Pullman Co., 159 Fed. 1.

22. **Remote damages.**—Smith *v.* Pullman Co., 119 S. W. 1072, 138 Mo. App. 238.

23. Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89.

failure to discharge its duty to provide a properly warmed and comfortable car for its passengers, it can not be held, on demurrer, that damages alleged to have been caused by such failure, and consisting in suffering from the low temperature, contraction of a violent cold, and resulting in permanent injury to the passenger's eyes, are so remote as not to be recoverable.[24]

§ 3594. Damages in Contemplation of Parties.—Where a carrier sold a ticket for a drawing room on a sleeper, when there was no drawing room in that car, it appearing that drawing rooms were largely used by invalids, possible injury to health by reason of a breach of the contract might be presumed to have been within the contemplation of the parties.[25] Where a sleeping car company breaks its contract to reserve a berth for plaintiff and the conductor excludes him from the car, there is a tort, as well as breach of contract, for which plaintiff can recover damages, whether in contemplation of the parties when the contract was made or not.[26]

§ 3595. Excessiveness of Damages.—In the appended note will be found instances of excessive verdicts,[27] and verdicts held not excessive.[28]

24. Hughes *v.* Pullman's Palace Car Co., 74 Fed. 499.

25. Damages in contemplation of parties.—Ingraham *v.* Pullman Co., 76 N. E. 237, 190 Mass. 33, 2 L. R. A., N. S., 1087.

26. Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719.

27. Verdict held excessive.—Where a passenger had purchased a ticket for a particular berth in a sleeping car and had lost the same, but gave satisfactory assurance that he had purchased the same, was expelled from the sleeping car, there being no abusive language or personal violence used by the conductor in charge, in an honest purpose to execute a reasonable rule of the company, but through a mistaken judgment, it was held that a verdict, in a suit by the passenger against the company, for $3,000 damages was grossly excessive. Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232.

Plaintiff sued a sleeping car company for refusing him accommodations in one of its cars, because of a mistake made by defendant's agent in selling plaintiff a ticket and his inability to again pay for a berth. Plaintiff was compelled to sit up all night in a crowded day coach, but there was neither averment nor proof that he was treated with rudeness or discourtesy, or subjected to unnecessary humiliation. It was held that a verdict allowing plaintiff $500 was excessive. Pullman Co. *v.* Pennock, 102 S. W. 73, 118 Tenn. 565.

28. Verdicts not excessive.—Where a sleeping car company failed to notify a passenger of arrival at her destination, and the time, place, and manner in which she was subsequently ejected from the train was attended with circumstances of aggravation sufficient to entitle her to exemplary damages, she also having suffered mental anguish from fright because of her surroundings when ejected, a verdict allowing her $1,000 compensatory and $500 punitive damages was not excessive. Pullman Co. *v.* Lutz, 154 Ala. 517, 45 So. 675, 14 L. R. A., N. S., 907.

In an action against a sleeping car company for breach of contract in failing to furnish apartments which plaintiff had engaged for his wedding trip, evidence that he and his bride were compelled to occupy the porter's apartments and were subjected to inconvenience and discomfort is sufficient to sustain a verdict for $125 damages. Pullman Co. *v.* Willett, 27 O. C. C. 649.

For breach of contract to reserve a berth for a passenger who boarded a sleeping car, suffering from illness, and in consequence, owing to the negligence of the sleeping car company, was compelled to sleep in the waiting room, where her privacy was frequently intruded on by the porter and others, and she was kept awake, resulting in great physical pain, mental distress, and humiliation during the entire night, a judgment for $900 is not excessive. Pullman Palace Car Co. *v.* Nelson, 54 S. W. 624, 22 Tex. Civ. App. 223.

Where, before reaching her destination, plaintiff and her baby in arms were compelled to leave a sleeping car operated by defendant sleeping car company over defendant railroad's lines, and in which plaintiff had engaged a berth, and complete the balance of the journey, a distance of about 40 miles, in a chair car, plaintiff being subjected for some length of time to the gaze and comment of passengers and others, attracted to her by the efforts of defendant's employees to induce her to leave the sleeping car, suffering therefrom much humiliation and mortification, and great inconvenience and discomfort, a judgment for $400 against both defendants was not excessive. Pullman Palace Car Co. *v.* Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

PART V.

CONNECTING CARRIERS

CHAPTER XXXI.

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(a) For Loss or Injury on Its Own Line or before Delivery to Succeeding Carrier, § 3636.
(b) Liability of a Forwarder, § 3637.
(c) Liability for Loss Occasioned by Failure to Transmit Consignor's Instructions to Succeeding Carrier, § 3638.
(d) Effect of Failure to Give Name of Consignor to Connecting Carrier, § 3639.
(e) Liability for Loss Caused by Delay in Furnishing Cars, § 3640.
(f) Liability for Loss or Injury by the Succeeding or by a Subsequent Carrier, §§ 3641-3645.
aa. In General, § 3641.
bb. Statutory Exemption from Liability, § 3642.
cc. Liability Imposed by Statute, § 3643.
dd. Liability under Contract, § 3644.
ee. Diversion of Freight from Route Stipulated, § 3645.
(3) Liability of Intermediate or Last Carrier, §§ 3646-3659.
(a) In General, § 3646.
(b) Where Initial Carrier Contracts for Through Transportation, § 3647.
(c) When Liability Commences and Terminates, § 3648.
(d) Liability for Injury Occurring after Delivery by Intermediate Carrier to Shipper, § 3649.
(e) Liability for Loss of or Injury to Property Transported in Cars of a Preceding Carrier, § 3650.
(f) Liability for Failure to Give Live Stock Rest, Water, and Food, § 3651.
(g) Liability of a Carrier Diverting Shipment from Route Stipulated, § 3652.
(h) Liability for Loss or Injury by a Preceding or Subsequent Carrier, §§ 3653-3657.
aa. In General, § 3653.
bb. Liability Imposed by Statute, § 3654.
cc. Liability under Contract, § 3655.
dd. Effect of Failure to Examine Goods or to Inspect Manner of Loading, § 2756.
ee. Effect of Refusal to Deliver Goods until the Whole Freight Is Paid, § 3657.
(i) Recovery Over by Initial Carrier from a Subsequent Carrier, § 3658.
(j) Facts Not Relieving Carrier from Liability, § 3659.
(4) Effect of Agreements between Connecting Carriers and Joint Liability, §§ 3660-3672.
(a) In General, § 3660.

(b) Agreement by Carriers, under a Certain Name, to Carry between Distant Points, § 3661.
(c) Carriers under One Management or Holding Themselves Out as a Line for Through Transportation, § 3662.
(d) Joint Association for Transmission of Through Freight, § 3663.
(e) Establishment of Joint or Through Tariffs of Rates, § 3664.
(f) Arrangement as to Payment and Collection of Freight Charges, § 3665.
(g) Contracts of Shipment Made with Joint Agent of Carriers, § 3666.
(h) Liability for Negligence of Joint Agent, § 3667.
(i) Damages to Freight Resulting from Violation of Traffic Agreement, § 3668.
(j) Agreements Not Exempting Carrier from Liability to Owner of Goods, § 3669.
(k) Contract Making Payment of Freight Charges or Indorsement of Guarantee on Waybill Essential to Delivery, § 3670.
(l) Diversion by First Two Carriers and Receipt by Third without Sufficient Shipping Instructions, § 3671.
(m) Injuries to Live Stock from Failure to Properly Feed Them, § 3672.
IV. Carriers of Passengers, §§ 3673-3690.
A. Traffic Arrangements between Carriers, § 3673.
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C. Transportation beyond Carrier's Line, §§ 3675-3678.
a. Duty to Transport, § 3675.
b. Contracts for Through Transportation, §§ 3676-3678.
(1) Power to Contract, § 3676.
(2) What Constitutes a Contract for Through Transportation—Effect of Contract, § 3677.
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D. Obligation of Carrier to Honor Tickets Issued by Another Carrier, § 3679.
E. On What Trains Passengers Received from a Connecting Carrier Must Be Transported, § 3680.
F. Through Tickets Limited as to Time, § 3681.
G. Injuries to Passengers, §§ 3682-3690.
a. In General, § 3682.
b. Liability of Initial Carrier, §§ 3683-3689.
(1) Injury on Wharf Connecting Carrier's Line with Steamboat, § 3683.
(2) Injuries on the Line of the Succeeding or a Subsequent Carrier, §§ 3684-3689.
(a) Injuries Resulting from Misrepresentation of Initial Carrier's Agent as to the Best Route, § 3684.
(b) Injuries Resulting from Negligence of a Subordinate Carrier, § 3685.
(c) Liability under Contract, §§ 3686-3689.
aa. In General, § 3686.
bb. Effect of Sale of Coupon Ticket, § 3687.
cc. Liability for Accident Happening on a Special Excursion Train, § 3688.
dd. Liability for Assault by Employee of a Connecting Carrier, § 3689.
c. Effect of Agreements between Connecting Carriers and Joint Liability, § 3690.

§ 3596. Who Are Connecting Carriers.—Whether railroads having a physical connection are independent, connecting carriers, or merely branches of a system of roads controlled and operated by a single company, is a question to be determined upon the facts of the particular case.[1] A con-

1. **Intermediate carrier held to control and operate initial carrier.**—A contract of shipment over the O. road was headed, "Union Pacific System." The O. road connected with the Union Pacific, which connected with another road, which carried the goods to their destination. The Union Pacific owns the most of the stock

tract between a railroad company and a lumber company whereby the latter agrees to build a road from a connection with the railroad to its mill, the lumber company's road being intended to be used solely for its private business, is not a contract between connecting carriers.[2] If on the arrival of goods at their destination, where they were carried by connecting carriers under a through bill of lading, the consignee was notified, and the goods were then delivered by a transfer company, acting at the request of the consignee, the transfer company was not a connecting carrier.[3] There are statutes in some states defining connecting carriers, and some of these statutory definitions have been construed by the courts.[4]

§ 3597. Rights, Duties and Liabilities in General.—In some states where a railroad is adjacent to another and capable of being joined to it by a switch, the right is given to make such connection, whether it be voluntarily granted or not.[5] A common carrier is as much bound to carry for another common carrier as for other persons.[6] Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void, as against public policy.[7] In the absence of a special contract, a common carrier is not responsible beyond the terminus of its own line.[8] Thus, in the absence of such a contract it is not liable for the negligence of the em-

of the O. road. The three lines mentioned are all operated under the name of the "Union Pacific System." The general offices of the roads are the same, though separate books are kept, and the officers occupy corresponding offices for each road. In 1893, all three lines passed under the control of the same receiver in a single action. Held to show that the Union Pacific controlled and operated the O. road, so as to be the contracting carrier. Union Pac. R. Co. *v.* Vincent, 78 N. W. 457, 58 Neb. 171.

2. Contract between railroad and lumber company not a contract between connecting carriers.—Taenzer & Co. *v.* Chicago, etc., R. Co., 170 Fed. 240, 95 C. C. A. 436.

3. Transfer company to whom goods are delivered at consignee's request.—Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

4. Statutory definitions construed. — **Under the Georgia statutes,** Civ. Code, §§ 2212, 2213 (Code of 1882, §§ 719(q), 719(r)) connecting railroad lines are adjacent roads, capable of being joined by switch at the terminus of either road or anywhere where the two roads meet or converge or connect, at village or depot or city. Logan & Co. *v.* Central Railroad, 74 Ga. 684; Georgia R. Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

In Texas a series of railway switches belonging jointly to several railroads, and on which it is possible to run cars from the tracks of one road having no interest therein to those of another road about three-quarters of a mile away, in the same city, is not a connecting line between the two roads under Rev. St. arts. 4535, 4536, defining connecting lines to be whenever two or more railroads doing business in the state shall connect with each other, by crossing each other's tracks or otherwise, so as to form a continuous line from one point in the state to another point in the state. Texas, etc., R. Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, judgment affirmed in 56 S. W. 328, 93 Tex. 482.

5. Right to make connection where roads are adjacent.—This is the rule under the Georgia statute, Civ. Code, §§ 2212, 2213 (Code 1882, §§ 719(q) 719(r)). Where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or any where along its line where they meet or converge. Logan & Co. *v.* Central Railroad, 74 Ga. 684; Georgia R. Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

6. Duty of carrier to carry for other carriers.—Louisville, etc., R. Co. *v.* Central Stockyards Co., 97 S. W. 778, 30 Ky. L. Rep. 18. See post, "Duty to Receive and Transport Cars and Freight Delivered by a Connecting Carrier," § 3614.

7. Railroad company can not discriminate in favor of connecting line.—Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291, 16 Am. & Eng. R. Cas. 57.

Under the Texas statutes, Rev. St. arts. 4535, 4536, a railroad company is required to receive and transport freight from connecting lines without discrimination. Texas, etc., R. Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, affirmed 93 Tex. 482, 56 S. W. 328.

8. No liability beyond terminus in absence of special contract.—Chesapeake, etc., R. Co. *v.* O'Gara, etc., Co., 139 S. W. 803, 144 Ky. 561.

ployees of a connecting carrier.[9] But where a shipment and undertaking of connecting carriers to transport is a joint one, every carrier is liable for the negligence of each.[10]

§§ 3598-3672. Carriers of Goods and Live Stock—§ 3598. Who Is the Initial Carrier.—The initial carrier of goods is not necessarily the one who first receives the goods from the shipper, but is the one who first receives the goods with an undertaking to transport and safely deliver them to the consignee at the place of destination.[11]

§§ 3599-3600. Traffic Arrangements between Carriers—§ 3599. Validity.—Where a contract is made between a railroad company and a connecting lake transportation company, with the bona fide purpose of regulating through traffic in a reasonable and just manner, to their mutual advantage, the receipts to be divided between them in a fixed proportion, each engaging to use its best endeavors to throw its through traffic into the hands of the other, and agreeing to pay a fixed sum for each passenger and each ton of freight carried over its line and not delivered to the other, the questions whether such contract is ultra vires as to the railroad company, and whether it creates a monopoly, depend upon the reasonableness of the regulation, which can only be determined by its practical working.[12] The right of one carrier to enter into arrangements with another carrier to forward its goods, and to refuse to do so with others, or to permit such others to avail themselves of the facilities constructed by the original carrier for that purpose, is not altered because the facility so constructed by it happens to be a wharf in the harbor of a city instead of some structure on land.[13] A contract by one carrier with another that it will not receive goods destined to a point beyond its own line is illegal, and furnishes no excuse for its refusal to receive goods so destined.[14]

§ 3600. Construction.—Judicial interpretations of some of the peculiar provisions of traffic arrangements or contracts between connecting carriers will be found in the appended note.[15]

9. Liability for negligence.—Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88.

10. Chicago, etc., R. Co. *v.* Halsell, 80 S. W. 140, 35 Tex. Civ. App. 126, judgment affirmed in 83 S. W. 15, 98 Tex. 244.

11. Who is the initial carrier.—Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

12. Mode of determining validity of traffic agreement.—Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372, Gil. 348.

13. Right to enter into arrangements with one carrier and refuse to do so with others.—Louisville, etc., R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 S. Ct. 745; Dutton *v.* Strong (U. S.), 1 Black 23, 17 L. Ed. 29.

14. Contract not to receive goods destined to point beyond line.—Seasongood *v.* Tennessee, etc., Transp. Co., 54 S. W. 193, 21 Ky. L. Rep. 1142, 49 L. R. A. 270.

15. Agreements not creating a partnership.—A mere traffic agreement between railroad companies providing for a proportionate division of freight charges does not constitute a partnership. Post *v.* Southern R. Co., 52 S. W. 301, 103 Tenn. 184, 55 L. R. A. 481.

Each of several companies, having connecting railroads, arranged to carry cars of the others, named "Green Line" cars, over its own road without breakage of bulk; each road, desirous of making a through rate thereby, was to ascertain the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, the same to be termed "Green Line Rates." There was no joint expense or loss or profit, except that where a loss could not be located on any particular road, a pro rata share of the loss was borne by all that carried the freight. Held, that no partnership was created thereby. Irvin *v.* Nashville, etc., R. Co., 92 Ill. 103, 34 Am. Rep. 116.

Where there was an arrangement between different connecting railroads whereby each road was to carry the cars of the other having the name "Green Line" painted thereon, the fact that a wharfboat belonging to one of such roads had the words "Green Line" painted thereon did not indicate a partnership between the roads, or a joint responsibility. Irvin *v.* Nashville, etc., R. Co., 92 Ill. 103, 34 Am. Rep. 116.

Agreement not creating a partnership or agency.—A traffic agreement between

§§ 3601-3613. Transportation beyond Carrier's Line—§ 3601. Duty to Receive and Transport.—A carrier has no right to refuse to receive freight because it is destined to a point beyond its own line; it being its duty to carry the freight to the end of its line, and there deliver it to a connecting carrier, to be forwarded.[16] It must receive and forward articles on the usual terms.[17]

two railroad companies which confers a license on the one to use the track of the other, and limits their right to make certain charges for freight and passengers, does not constitute a partnership between them, or make the one road the agent of the other. St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Contract to interchange business upon certain terms.—Where a railroad company, for value, contracted with another railroad company to "interchange business, both through and local," with the latter and its connecting lines, for a specified term, "upon terms as favorable to" the latter "and its connecting lines as those given to any other railroad entering" a designated city, it was bound thereby, not only as to freights shipped from or to points upon its own line, but also as to freights destined to or coming from points beyond the same, and hence could not, so long as it pursued a different and more favorable course as to other roads entering said city, enter into contracts or maintain business relations with transportation companies beyond its own line, with the intention of depriving the road with which it contracted of the benefits of the contract, nor with such intention refuse to receive from the transportation companies shipments of freight routed over said road on bills of lading giving it the benefits of "through rates and through proportions of rates" on such shipments. Seaboard, etc., R. Co. *v.* Western, etc., R. Co., 97 Ga. 289, 23 S. E. 848.

Arrangement not raising implication of an agreement to carry beyond terminus.—No arrangement between a dispatch company undertaking to forward goods and sundry carriers of merchandise whose lines terminate at a given point, whereby the latter separately agree to carry all goods for transportation of which the former shall contract at established tariff rates arranged by the carriers, will raise an implication of an agreement to carry beyond the terminus of their respective routes. St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679.

Agreement and usage not making carrier liable beyond end of its line.—Defendants, a joint-stock corporation, organized to conduct the business of a common carrier by water, contracted with a railroad company to run their boats daily, so as to connect with certain trains, and that through freight received for transportation over the lines of both companies should be carried at reduced rates; that the receipts should be divided between them; and that the railroad company should build a wharf, where both companies could transact their business. Held, that the liability of defendants for goods shipped for transportation as through freight ceased at the end of its line, though there was a usage between the companies, known to the owner of the goods, that, in such cases, a single bill for the amount of the freight between the extreme terminal points should be made out by defendants and collected and receipted by the agent of the railroad company on delivery of the goods. Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

A contract binding each of two stage companies to operate its own part of line, contemplates that such operation shall reasonably accommodate passengers throughout the whole line. Compton *v.* Western Stage Co., 25 Tex. Supp. 67.

Contract as to charges limited as to time.—Where a railroad company agreed with a connecting line to ship iron over the two roads during the summer and autumn at a fixed rate, and the first company contracted with the consignor for such shipment, with no limit as to time, it can not recover from the connecting line for additional freight charged by it on shipments made after the time limited by the contract between the roads. Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235.

Contract not relieving parties thereto from individual responsibility for mistakes of employees.—Where several railroad companies are operating parts of a continuous line for their joint benefit, each for itself as well as for the others, as carriers of freight, under a contract providing that what they do for each other is to be done under the contract, and not as agents or servants, each company is responsible for the mistakes of its own employees in billing consignments of freight. Illinois Cent. R. Co. *v.* Foulks, 92 Ill. App. 391, judgment affirmed in 191 Ill. 57, 60 N. E. 890.

16. **Duty to receive freight and deliver it to connecting carrier.**—Seasongood *v.* Tennessee, etc., Transp. Co., 54 S. W. 193, 21 Ky. L. Rep. 1142, 49 L. R. A. 270. See post, "Duty to Deliver to or Notify Succeeding Carrier," § 3606.

17. **Articles must be received and forwarded on usual terms.**—Marquette, etc., R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

And where a carrier receives goods for a point beyond its line, a failure to carry to the end of its line and deliver or offer to deliver to the next carrier is not excused merely by the fact that there is a block of freights on the next carrier's line and no room for the goods in the initial carrier's depot at the end of its line, which facts were known to its agent at the time of the reception of such goods.[18] At common law a carrier can only be compelled to receive and carry goods to the end of its line,[19] and is not bound to issue a bill of lading for transportation beyond its terminus.[20] A statute which prescribes a penalty for the refusal of a railroad company to receive and transport to any point on its own line cars containing freight offered to it by a connecting road of the same guage, does not require such company to issue through bills of lading to points on a connecting line, and to deliver its own cars containing freight to such connecting line.[21] The fact that a company has issued through bills of lading to shippers at a certain point gives no right to shippers at another point to demand that they be likewise issued to them.[22] Where goods are tendered for shipment to a point beyond the initial carrier's line, and there are several routes equally safe, prompt, reliable, and cheap, such carrier can not be compelled to accept the goods to be carried over one route in preference to another, at the shipper's option, unless some reason appears therefor; especially where the use of one route may be advantageous to the carrier, without injury or sacrifice to the shipper.[23] But the carrier's right to select the route for through shipments does not extend to the selection of insolvent lines, or uncertain or unreliable agencies.[24] An initial carrier can not be compelled to make a through shipment to a point beyond its line over a particular route, merely to enable the shipper or consignee to get a rebate under a secret agreement with a certain line.[25] The fact that an initial carrier contracts for the shipment and delivery of goods beyond its own terminus to a designated point and issues bills of lading accordingly, when the same are routed over a particular one of its connecting lines, does not show an unjust discrimination against another connecting line because such initial carrier refuses to issue through bills of lading for the shipment over the latter line of goods consigned to the same point of destination.[26]

§§ 3602-3605. Contracts for Through Transportation.—As to special contracts as affecting liability for loss of or injury to goods or live stock, see post, "Loss of or Injury to Goods or Live Stock," §§ 3635-3672.

18. Facts not excusing carrier from duty to receive and deliver.—McLaren *v.* Detroit, etc., R. Co., 23 Wis. 138.

19. Carrier only compelled to receive and carry to end of line.—Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749; Coats *v.* Chicago, etc., R. Co., 239 Ill. 154, 87 N. E. 929; Post *v.* Southern R. Co., 103 Tenn. 184, 203, 52 S. W. 301, 55 L. R. A. 481.

20. Not bound to issue bill of lading for transportation beyond terminus. — Lotspeich *v.* Central R., etc., Co., 73 Ala. 306; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265.

A railroad company is not compelled under the Georgia statutes to make a contract to forward goods beyond its own line. Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265; Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228; Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749. See, also, State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891.

And there is no law which confers upon the railroad commission of that state the power to compel a railroad company to make a contract for the shipment of goods beyond the terminus of its own line or to issue a through bill of lading binding such company so to do. State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891.

21. Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749, so holding as to the Act of Sept. 28, 1883 (Acts 1882, 83, p. 145).

22. Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749.

23. Carrier not compelled to make through shipment over a particular route. —Post *v.* Southern R. Co., 52 S. W. 301, 103 Tenn. 184, 55 L. R. A. 481.

24. Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

25. Post *v.* Southern R. Co., 52 S. W. 301, 103 Tenn. 184, 55 L. R. A. 481.

26. State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891.

§ 3602. In General.—Whether a railroad company is bound to carry or transport goods to a point of destination beyond the terminus of its road depends upon the contract between the parties. This contract may be expressed or implied, but it is always necessary to ascertain what the contract is.[27]

§ 3603. Power to Contract.—In the absence of statutory or charter disability, a common carrier may contract for the safe carriage and delivery of property at a destination beyond its own line,[28] and renders itself liable for loss, injury, or delay on the line of another carrier, over which a part of the transportation is performed;[29] and where such a contract is not, on its face, necessarily beyond the scope of the powers of the corporation, it will, in the absence of proof to the contrary, be presumed to be valid.[30] Such a contract may be made by a general agent of the company.[31] A local agent is presumed not to have authority to make such a contract, but his authority to do so is susceptible of proof.[32] A

27. Duty to carry beyond terminus depends upon contract.—Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416.

28. Power to contract.—*United States.*—Railway Co. *v.* McCarthy, 96 U. S. 258, 24 L. Ed. 693; Railroad Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325; Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. Ed. 413.

Indiana.—Chicago, etc., R. Co. *v.* Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

New York. — Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583.

Pennsylvania.—Pennsylvania R. Co. *v.* Berry, 68 Pa. 272.

Tennessee.—Western, etc., Railroad *v.* McElwee, 53 Tenn. (6 Heisk.) 208.

Texas.—Houston, etc., R. Co. *v.* Hill, 63 Tex. 381, 51 Am. Rep. 642.

A carrier may so contract to carry to some point beyond the end of its route as to be liable for delivery at such point. Schwartz *v.* Panama R. Co., 155 Cal. 742, 103 Pac. 196.

Carriers may issue through bills of lading and make contracts for through shipments or interchange of freight between each other. Graham *v.* Macon, etc., R. Co., 49 S. E. 75, 120 Ga. 757.

A railroad company may make a valid contract of transportation extending beyond the limits of their own road, whether as carriers or as forwarders. Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152; Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391; Steamboat Jonas Powell *v.* Thompson, 16 O. St. 98; Stevens *v.* Lake Shore, etc., R. Co., 20 O. C. C. 41, 11 O. C. D. 168.

A railroad company chartered by and having its termini within the state of Ohio has the power to contract to ship goods by all rail to New York; the power to enter into such contract not being derived from its charter, but as incidental to its charter duties. Harshman *v.* Little Miami R. Co. (O.), Dayton 171.

The Rome Railroad Company had a right under the powers granted in its charter to contract to deliver produce at a point which could be reached only by passing it over connecting roads. Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228.

Plaintiff delivered to defendant, a forwarder, certain goods to be forwarded to S., to an express company, by them to be delivered to M. on receipt from M. of $64.75. Held, such a contract was not beyond the scope of a forwarder's ordinary business. Hutchings *v.* Ladd, 16 Mich. 493.

29. Chicago, etc., R. Co. *v.* Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

A railroad corporation possessed of the powers given to railroad corporations generally and subject to corresponding liabilities, such railroad corporations, for example, as those incorporated under the general railroad law of New York, may subject themselves by special contract to liability over the whole course of transit. Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

30. Presumption of validity of contract.—Railway Co. *v.* McCarthy, 96 U. S. 258, 24 L. Ed. 693.

31. Powers of agents.—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269. (General eastern agent of Northern Pacific Railroad Company held to have such power.)

32. McManus *v.* Chicago, etc., R. Co. (Iowa), 136 N. W. 769.

A local freight agent of a railroad company ordinarily has no authority to bind the company to carry freight beyond its line, unless it is shown that the company has engaged in the business of carrying freight beyond its line. Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47, distinguished in St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

railroad company in the hands of, and being operated by, receivers, may, by its proper agents, contract for through carriage, and such contract will be binding upon the receivers.[33] It seems that a drayman may, by contract, undertake with a shipper to become liable for the safe transportation of goods over the lines of railroads to the point to which the goods are destined.[34]

§ 3604. What Constitutes a Contract for Through Transportation.—A special contract by a common carrier, making it liable for loss of goods on a connecting line, may be shown by the recitals in the receipt for the goods, and the manner in which the way list is made up, and also from the facts that a through freight is charged, and that the connecting carriers have a contract with each other by which to carry freight through for a single price, to be divided between them.[35] But a special agreement for through carriage will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.[36] If a carrier undertakes, for a specified compensation, to transport over its own route, and to deliver at the terminus thereof, goods marked to a consignee beyond such terminus, a through contract will not be implied from the fact that in the description of the goods in the contract the marks showing the ultimate destination are given.[37] A receipt which simply shows that goods were received by the carrier in good order, indicates the consignees and the destination, without showing any undertaking by the carrier to ship the goods to the point of destination, can not be construed to be a contract for the through shipment of the freight.[38] The peculiar provisions of a number of contracts between carriers and shippers have been construed by the courts to determine whether they constitute contracts for through transportation.[38]

33. Railroad company in hands of receivers.—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269.

"Under the modern methods of foreclosing railroad mortgages, it has been the custom to appoint receivers to take charge and conduct the business of the railroad mortgagor, during the pendency of the suit. The possession of such receivers frequently last for years. It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run that road in substance as a going concern, so far as these kinds of contracts are concerned. Such contracts are not of the character spoken of by Mr. Justice Jackson in Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 38 L. Ed. 819, 14 S. Ct. 915, as to extraordinary or unusual as not to be included in the authority to carry on the business of the company. On the contrary, this contract is one of that class which we regard as so included." Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269.

34. Drayman.—Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

35. How special contract for through transportation may be shown.—Berg *v.* Narragansett Steamship Co. (N. Y.), 5 Daly 394.

36. Agreement for through carriage inferred only from clear and satisfactory evidence.—Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; Roy *v.* Chesapeake, etc., R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A., N. S., 1.

A carrier may bind himself to transport goods beyond his own route, and thus become responsible for the default of those he employs to carry the remainder of the distance, but the proof of the contract should be clear, especially when it would contradict the papers accompanying the transaction. Pennsylvania R. Co. *v.* Berry, 68 Pa. 272.

37. Marks showing ultimate destination given in description of goods in contract.—Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491.

38. Receipt held not a contract for through shipment.—Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

39. Contract for through carriage.—In an action against a carrier to recover for the loss of plaintiff's horses by fire while on the line of a connecting carrier, it was claimed that defendant only contracted for carriage to the end of its line, but it appeared that plaintiff had, for a number of years, made like contracts with defendant, on which stock had been carried through to the destination; that

Agreement to Transport to Point beyond Line and Receipt of Freight Charges.—An agreement by a carrier to transport goods to a point beyond its

the contract in question recited that the stock was received for shipment to the point of final destination, and the charges fixed by defendant were for through carriage. Held sufficient to show a contract of through carriage. Ogdensburg, etc., R. Co. v. Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Bill of lading a contract for through shipment.—A bill of lading acknowledging receipt of goods from a shipper to be transported by the receiving carrier to the end of its line, and thence by connecting lines to Louisville, Ky., is, construing it most strongly against the carrier, a contract for through shipment by the initial carrier, the connecting line being merely its agent to carry out the undertaking. Ireland v. Mobile, etc., R. Co., 49 S. W. 188, 453, 20 Ky. L. Rep. 1586, 105 Ky. 400.

A bill of lading acknowledged the receipt of cotton "which said carrier agrees to carry to said destination, if on its own road, or otherwise, to deliver to another carrier on the route to said destination," stipulated for an integral sum, a special price, for the service of transportation to the ultimate destination of the cotton, which was beyond the carrier's own route and known to be so when it issued the bill of lading, and also stipulated that it signed the bill for the different carriers who might engage in the transportation, each of which was to be bound by and have the benefits of the provisions thereof. Held, that the stipulation "which said carrier agrees to carry to said destination," etc., must be considered in connection with the other stipulations of the bill, and that, when so considered, the bill was a through contract of carriage so as to make inapplicable the Georgia statute, Civ. Code 1895, § 2317, requiring a carrier, on application, to trace freight where, under the contract of shipment or by law, the responsibility of each connecting carrier shall cease on delivery to the next "in good order." Atlantic, etc., R. Co. v. Henderson, 61 S. E. 1111, 131 Ga. 75.

A railway company, whose southern terminus was Chicago, Ill., received flour at its depot at Neenah, Wis., directed to the care of J. H. & Co., New York, and of C. S. T., general agent, Chicago, and gave the following bill of lading: "Chicago, Jan. 16, 1862. Received (as agents and forwarders) from E. W. P. the following packages: * * * One hundred barrels flour. * * * Contract from Neenah to New York at $1.25 per barrel, J. H. S., Agent." The words in italics were written, and the rest printed. Held, that the contract was to deliver the flour at New York for a fixed compensation, and the company was liable as a common carrier for the whole route. Peet v. Chicago, etc., R. Co., 19 Wis. 118.

A bill of lading entitled, "Through Freight Contract," was issued by defendant carrier in receipt for goods delivered to it, addressed to a city beyond the terminus of its road. The bill recited that defendant promised "to transport over the line of this railway to the company's freight station at its terminus, and deliver to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway) whose line may be considered a part of the route to the place of destination of said goods, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier;" and, further, that "the responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of the goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery." There was evidence that freight received under such circumstances was shipped to its destination in the cars in which it was packed. Held, that defendant's liability as a common carrier extended beyond the limits of its own road. Toledo, etc., R. Co. v. Merriman, 52 Ill. 123, 4 Am. Rep. 590.

Bill of lading held to be a contract for through transportation to a point beyond the carrier's line. Evansville, etc., R. Co. v. Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724.

Contract prima facie a through contract.—A railroad company having received goods for shipment, consigned to a point beyond its terminus, and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same amongst three carriers, itself included, to an intermediate point beyond its terminus, and assessing the balance for the transportation beyond that point, the contract was, prima facie, a "through contract," and bound the initial company for performance to the point of destination. This was so notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route which would affect these shipments. Atlanta, etc., R. Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. 600.

A special agreement by a carrier to

line, and the receipt by it of the freight charges for the whole distance, constitute a contract for through shipment to such point, for the performance of which the

transport a through shipment by the vessel of a connecting carrier sailing on a designated date results from the acceptance of a through rate for a shipment "to be forwarded" via such steamer, which rate was quoted with notice that it was of vital importance that the shipment should be transported promptly, and should go forward by the earliest possible steamer without delay, in order to enable the shipper to fulfill a proposed agreement which it was about to make for the sale of the goods at the final destination, and which would require delivery there at a fixed date. Decree, Farmer's Loan, etc., Co. *v.* Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

Contract only binding carrier to carry goods to its own terminus.—A railroad company receiving goods, and signing a bill of lading therefor, stating that they are "to be transported to the terminus of its road, and there delivered to agents" of connecting roads, and that in case of loss or damage, the company shall be held answerable therefor in whose custody the goods may be at the happening thereof, is bound to carry them to the terminus of its own road only, and is not liable for damage thereto, while they are in the hands of other companies. Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391.

Facts not evidencing contract for through transportation.—In an action against a railroad corporation, to recover for the loss of goods, directed to a place situated beyond the line of their road, neither a receipt given by the corporation stating that the goods were received for transportation, nor an advertisement by such corporation of the general facilities of transportation, is evidence of a special contract to carry such goods to the place to which they were directed, but only to deliver them at the end of said road, thence to be forwarded in the usual course of business. Elmore *v.* Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143.

In an action against a common carrier to recover for the loss of goods occurring beyond the terminus of its road, the plaintiff gave in evidence the defendant's charter, containing permission to make lawful contracts with other carriers; also an advertisement stating that freight would be billed through by the defendants, and evidence that the plaintiff had been in the practice of sending freight to the same place over the defendant's road from the time it went into operation; and that the defendants had made no demands of the plaintiff for the freight. Held, that the evidence did not show a through contract. Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468.

The fact that a company doing business as common carriers between particular points have intrusted blank envelopes, having their name printed upon them, to a customer, for convenience in sending money, does not enable him to charge them as common carriers for losses beyond their route, by addressing the envelope containing money to a place beyond the end of the route, and delivering it to them to be transmitted. So held when the receipt given by the carriers for the package expressly excluded liability beyond the terminus. Pendergast *v.* Adams Exp. Co., 101 Mass. 120.

Agent of a railroad company received goods for transportation to a point beyond its terminus, and gave therefor a bill of lading: "Received from L., to be laden on the freight cars, 1 bale bedding, J. F. Phillips, Monroe, La., marks," etc., "as per margin (condition of contents unknown), to——— or assigns, at ——— station," signed by the agent of defendant. At the time of receiving, the agent said to the shipper that the goods would reach Monroe in good condition, and in a few days, etc. Held, that these facts were not evidence of a special contract on the part of the company to convey the goods to the point of destination, and deliver them to plaintiff there, making it liable for loss by a connecting carrier. Phillips *v.* North Carolina R. Co., 78 N. C. 294.

In an action against a railroad company to recover the value of merchandise shipped, but not delivered, it was shown that plaintiff called upon the local agent of the defendant for information as to shipping rates, etc., and was instructed by the agent how to mark the goods and where to deliver them; that 18 days afterwards plaintiff caused the merchandise to be marked and delivered at the depot. The carman delivered the goods, and received a bill of lading containing a provision that no connecting carrier should be held liable for any loss or damage to the goods, except such as occurred on its own route. It was shown that merchandise was delivered by defendant at a point of connection to a steamboat line, to be carried to the point of destination. Held that, as there was no through contract established, the defendant was not liable. Ricketts *v.* Baltimore, etc., R. Co., 59 N. Y. 637, affirming 61 Barb. 18, 4 Lans. 446.

carrier is responsible.[40] So a bill of lading, receipting for the full freight for carrying between two points, is a contract to carry between those points, making the first carrier liable for nondelivery of the goods by the last carrier.[41]

Agreement for Delivery within Certain Time for Through Rates.—A contract for carriage over connecting lines may be inferred, where the initial carrier agrees for a certain rate to deliver at the end of the route of the connecting carrier within a certain time.[42]

Receipt or Bill of Lading Stating Goods Are to Be Delivered at Point beyond Terminus.—Where a railroad company gives a receipt for goods, or a bill of lading, stating that the goods are to be delivered at a point beyond its terminus, it constitutes a contract to carry to such point.[43]

40. Agreement to transport to point beyond line and receipt of freight charges.—When a common carrier gives the shipper a bill of lading which states that the goods received are to be transported by itself and connecting carriers to a certain point beyond the terminus of its line and there delivered to a particular person, and the shipper at the same time pays such carrier, or agrees with it to pay, the freight charges for the whole route, this constitutes a contract for the through shipment, for the performance of which, beyond as well as to the terminus of its own line, the contracting carrier is responsible. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

A contract by the initial carrier to carry freight to its usual place of delivery at destination if on its road, otherwise to deliver to another carrier on the route to the destination, binds the initial carrier to carry beyond its own line and deliver the goods, and, where its undertakes to transport to the destination and receives pay for the whole distance, the liability attaching on it to deliver continues throughout the whole transit, and connecting carriers are its agents in carrying out the contract. Pittsburg, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735.

Where defendant accepted a car load of fruit for transportation, and gave a receipt, stating it was consigned to a designated point, and containing the figures "62.20," the point named being beyond the defendant's line, and there was evidence that the "62.20" was the freight for the entire distance, and was prorated among all the connecting companies, it constituted a through contract of shipment, making defendant liable for delay in transportation of the goods by the connecting carrier. Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 964.

41. Bill of lading receipting for full freight.—Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. 77.

42. Special agreement for through shipment and rates and delivery at certain time.—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

43. Receipt or bill of lading stating goods are to be delivered at point beyond terminus.—Bryan *v.* Memphis, etc., R. Co. (Ky.), 11 Bush 597; Kyle *v.* Laurens R. Co. (S. C.), 10 Rich. L. 382, 70 Am. Dec. 231.

A bill of lading recited that the goods were to be delivered as addressed on the margin, or to his consignees, upon paying freight and charges as noted below. On the margin was written, "G. F. W., Providence, R. I., care A. T. Co., Buffalo. * * * Rate to Providence, per 100 bls., 45 cents." Held that, in the absence of any stipulation limiting the carrier's liability to its own route, the instrument must be construed as a contract to carry the goods through to Providence, and making it liable for loss occuring beyond the terminus of its line. Wahl *v.* Holt, 26 Wis. 703.

By the terms of a bill of lading goods shipped at Milwaukee by defendant railroad company were receipted for as follows: "Shipped by R. P. & Co. the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay." "Consigned to H. & K., Onekama, Mich." (Signed by defendant's agent.) Held, that this was a contract to carry the goods to Onekama, there being nothing in the instrument limiting defendant's liability to its own route, and makes the initial carrier liable for goods destroyed in the hands of a succeeding carrier. Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

A railroad company received a box for transportation, addressed to a place beyond the terminus of their road, and gave a receipt for it, describing it by the address, and saying: "Which the company promise to forward by its railroad, and deliver to ———, at its depot in ———." The receipt was a printed form, with blanks apparently intended to be filled so as to restrict the duty of the company to a transportation to some place on their road, but in this case the receipt was given without filling the blanks. Held, that it therefore operated as a contract to carry to the place named in the address, and would make them liable for a loss occurring beyond the ter-

Contract to Deliver to Connecting Carrier at Most Convenient Point.—A common carrier, on performing a contract "to deliver to the connecting express, stage, or other means of conveyance, at the most convenient point," becomes responsible as a forwarder only.[44]

Agreement to "Forward" Goods to Place on Connecting Line.—An agreement by a carrier to "forward" goods to a place on the line of a connecting carrier does not ordinarily obligate the carrier to carry the goods to such place, but its obligation is complied with when it delivers them to the connecting carrier.[45] But the rule is otherwise when, from the whole contract, it appears that the word "forward" was used in the sense of "carry."[46]

minus of their line. Cutts *v.* Brainard, 42 Vt. 566, 1 Am. Rep. 353.

Receipt not containing implied agreement to transport to point of destination.—The defendants, who were common carriers between Lewiston and Niagara Falls, received from the plaintiffs two casks of brandy at the former place, to be forwarded to different points on the Michigan Central Railroad. Goods destined for such points were, in the usual course of the business, shipped at Buffalo for Detroit, and this usage, as well as the fact that the defendants had no interest in or connection with any of the carrying business or companies beyond the Falls, was known to the plaintiffs. The defendants gave a receipt as follows:

"Received, Lewiston, etc., the following packages of goods on board the L. & B. R. line, in good order, to be delivered in like good condition:

Israel Kellogg, Kalamazoo, Mich. M. C. R. R. } 1 Qr. Cask Brandy.

"Also for

McCrea & Morton, Battle Creek, Mich. M. C. R. R. } 1 Qr. Cask Brandy.

"R. H. Boughton."

The plaintiffs delivered to the defendants shipping bills as follows:

"Shipped, Lewiston, etc., one qr. cask brandy, marked 'Israel Kellogg, Kalamazoo,'" etc.

"Shipped, Lewiston, etc., one qr. cask brandy, marked 'McCrea & Morton, Battle Creek, Michigan,'" etc.

The brandy was lost on the lake between Buffalo and Detroit. Held, that the receipt did not contain any implied agreement to transport the brandy to Kalamazoo or Battle Creek, the address being only incorporated in the instrument for the purpose of identification; and that this construction of the contract was further fortified by the use of the word "marked" in the shipping bills. Wright *v.* Boughton (N. Y.), 22 Barb. 561.

44. **Contract to deliver to connecting carrier at most convenient point.**—Plantation No. 4 *v.* Hall, 61 Me. 517.

45. **Agreement to "forward" goods to place on connecting line.**—A contract to carry goods beyond its own line will not be implied from a receipt for the goods given by the carrier, specifying that the goods were "to be forwarded" to a place beyond its line. Crawford *v.* Southern R. Ass'n, 51 Miss. 222, 24 Am. Rep. 626.

A carrier, undertaking to convey goods to a certain point, and forward them thence to the place of destination, is a carrier to that point, and beyond it merely a forwarder, who is only liable for ordinary care in procuring a proper conveyance. Devillers *v.* The John Bell, 6 La. Ann. 544.

A transportation company took goods "to be forwarded" to points beyond their own route. Held, that they were not liable for loss of the goods after duly delivering them to a carrier on a connecting line. Weil *v.* Merchants', etc., Transp. Co. (N. Y.), 7 Daly 456.

Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to any further points, but merely engaging to forward them to their destination through the established lines of transportation beyond, are not liable upon their receipt for a bill of goods "for collection" from a person beyond the termination of their route, in the absence of any special contract creating an additional obligation for the failure of other carriers, to whom in the ordinary course of their business the bill was intrusted for collection, to pay over the amount received by them upon the same. Lowell Wire Fence Co. *v.* Sargent (Mass.), 8 Allen 189.

46. By a contract of shipment of goods consigned to New York, "passenger train service," made upon a printed form apparently used in all shipments, irrespective of destination, the carrier agreed to "forward" the freight to Ogden station, there to be delivered to a connecting carrier, and agreed to "forward" subject to the conditions indorsed on the contract. By such conditions the carrier agreed to "forward" the freight to its place of destination, but provided that its "responsibility as a common carrier should cease at the station where the property was to be delivered to connecting carriers." Held, that the word "forward," being used in the first two clauses in the sense of "carry," the same meaning would be given it when used in the third clause, and that the contract

Liability "as Forwarders Only."—An express company, giving the consignor, on receipt of goods, notice of liability "as forwarders only," are liable as carriers only to the end of their route, and afterwards, as forwarders, are responsible only for reasonable care and diligence in selecting proper carriers.[47]

Offer to "Take" Carload Lots of Goods from One Point to Another at Specified Rate.—An offer by a carrier to "take" carload lots of goods from one point to another at a specified rate is not an offer to "carry" the entire distance, but only to take the goods for carriage to the end of the carrier's route, and then deliver to the next carrier to forward, and the first carrier is not liable for non-delivery by the final carrier.[48]

Receiving Goods Destined to Point beyond Line.—In some jurisdictions it has been held that, in the absence of an express agreement to the contrary,[49] or a contrary custom or usage known to the shipper at the time of shipment,[50] if a carrier receives goods delivered to it for transportation, marked and destined to a point beyond its own line, the law implies an agreement to carry to and deliver at destination,[51] and to be responsible for loss or injury occurring on the

was, hence, for passenger train service through to destination, and therefore mere delivery to a connecting carrier with request for such service was not sufficient. Colfax Mountain Fruit Co. *v.* Southern Pac. Co., 50 Pac. 775, 118 Cal. 648, 40 L. R. A. 78. See, also, St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505.

Though a through bill of lading for the carriage of goods from San Francisco to New York provided for shipment to Panama, "thence to be forwarded across the Isthmus and reshipped to New York," the carrier was liable as carrier for the loss of the goods while crossing the Isthmus. Simmons *v.* Law, 4 Abb. Dec. 241, 42 N. Y. 217, affirming 21 N. Y. Super. Ct. 213.

47. **Liability "as forwarders only."**—American Exp. Co. *v.* Second Nat. Bank, 69 Pa. 394, 8 Am. Rep. 268.

48. **Offer to "take" car load lots of goods from one point to another at specified rate.**—Harris *v.* Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305.

49. **Effect of carrier receiving goods destined to a point beyond its line.**—Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742; East Tennessee, etc., R. Co. *v.* Rogers, 53 Tenn. (6 Heisk.) 143, 19 Am. Rep. 589; Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654; Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253; Western, etc., Railroad *v.* McElwee, 53 Tenn. (6 Heisk.) 208; Memphis, etc., R. Co. *v.* Stockard, 58 Tenn. (11 Heisk.) 568.

50. Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 511.

51. *Arkansas.*—Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742.

Georgia.—Rome R. Co. *v.* Sullivan, etc., Co., 32 Ga. 400; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37; Southern Exp. Co. *v.* Shea, 38 Ga. 519; Cohen *v.* Southern Exp. Co., 45 Ga. 148; Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749; Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891; Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265.

Illinois.—Judgment 122 Ill. App. 569, affirmed in Wabash R. Co. *v.* Thomas, 78 N. E. 777, 222 Ill. 337, 7 L. R. A., N. S., 1041; Chicago, etc., R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596; Coats *v.* Chicago, etc., R. Co., 239 Ill. 154, 87 N. E. 929.

Iowa.—Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

New York.—Foy *v.* Troy, etc., R. Co., 24 Barb. 382.

Tennessee.—East Tennessee, etc., R. Co. *v.* Rogers, 53 Tenn. (6 Heisk.) 143, 19 Am. Rep. 589; Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654; Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253; Western, etc., Railroad *v.* McElwee, 53 Tenn. (6 Heisk.) 208; Memphis, etc., R. Co. *v.* Stockard, 58 Tenn. (11 Heisk.) 568.

The acceptance by a common carrier for transportation of freight to a place beyond the terminus of its own line, and its receipt given for the same, constitute a prima facie contract to carry and deliver such freight to the place of its destination. Elgin, etc., R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311, affirmed in 66 N. E. 326, 200 Ill. 636, 93 Am. St. Rep. 218; Lehigh Valley Transp. Co. *v.* Pillsbury-Washburn Flour Mills Co., 92 Ill. App. 628.

Where a carrier received coal for transportation beyond its own line, it was bound to carry the coal without unreasonable delay to the terminus of its

line of the connecting carrier;[52] and it is no excuse for not doing so, that the connecting road refuses to receive the freight and advance the charges due and paid by the initial carrier.[53] But in other jurisdiction it has been held that such receipt of goods by a carrier does not raise an implied contract to convey them beyond its line, but only binds it to carry them over its own line and deliver them safely to the next carrier.[54]

own line, and there deliver it to a connecting carrier, within a reasonable time. Chesapeake, etc., R. Co. *v.* O'Gara, etc., Co., 139 S. W. 803, 144 Ky. 561.

In pursuance of an inquiry from a shipper, a railroad company informed him of the through rates of transportation for certain goods to a point beyond its own line. The goods were subsequently delivered to the company, and received by it addressed to such point, which the company could reach by means of connecting railroads. Held, in an action for the nondelivery of some of the goods and delay in delivering others, that these facts were sufficient to sustain a finding that the company had agreed to transport the goods beyond its own line to the place which they were consigned. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, affirming 52 Hun 227, 5 N. Y. S. 140, 23 N. Y. St. Rep. 15.

52. Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742. See post, "In General," § 3641.

The acceptance by a carrier of a car load of freight for delivery beyond its own line constitutes a prima facie contract to carry and deliver to the point of destination with the liabilities of a carrier. Illinois Match Co. *v.* Chicago, etc., R. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment 153 Ill. App. 568.

The acceptance by a railroad company in Illinois of goods marked for transportation to a point beyond its terminus establishes, prima facie, under the law of that state, a contract to transport such goods to their destination, and renders it liable for injury to the goods by connecting lines. Beard *v.* St. Louis, etc., R. Co., 79 Iowa 527, 44 N. W. 803.

53. Memphis, etc., R. Co. *v.* Stockard, 58 Tenn. (11 Heisk.) 568.

54. *United States.*—Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297; Insurance Co. *v.* Railroad Co., 104 U. S. 146, 26 L. Ed. 679; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Railroad Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136; Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253; Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185; Louisville, etc., R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 S. Ct. 745; Powhatan Steamboat Co. *v.* Appomattox R. Co., 24 How. 247, 16 L. Ed. 682.

Connecticut.—Elmore *v.* Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143.

Michigan.—Detroit, etc., R. Co. *v.* McKenzie, 43 Mich. 609, 5 N. W. 1031.

Minnesota.—Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Mississippi.—Crawford *v.* Southern R. Ass'n, 51 Miss. 222, 24 Am. Rep. 626.

West Virginia.—Roy *v.* Chesapeake, etc., R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A., N. S., 1.

The implied obligation of a common carrier, arising from its relation to the public, is limited by the termini of its own route; and the fact that it has connections with other routes, extending beyond its own termini, which it does not operate, control, or own, does not, in the absence of a special contract so to do, make it liable as a common carrier for a failure to carry, or to furnish means to carry, merchandise over such other routes. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682; Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

In the absence of a special contract, where it is necessary for a carrier to deliver the shipment to another carrier before the point of destination is reached, the liability of the first carrier ceases when it has safely carried and delivered the shipment to the second without unreasonable delay. Chicago, etc., R. Co. *v.* Woodward, 72 N. E. 558, 73 N. E. 810, 164 Ind. 360.

In the absence of a special contract to the contrary, a carrier's duty is completely discharged by a safe carriage to the end of its own line, where a connecting carrier may be ready to continue the transportation on the designated route. Howard *v.* Chesapeake, etc., R. Co., 11 App. D. C. 300.

Where a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases on such delivery. St. Louis,

Designation in Bill of Lading of Point of Destination.—In absence of statute or act of congress, the mere designation in the bill of lading of a point in another state as the point of destination does not make the contract one for through transportation, where the other provisions indicate limitation of the initial carrier's liability to damages occurring on its own line.[55]

Taking of Through Fare on Receipt of Goods.—In some states it has been held that a contract whereby liability of a carrier is sought to be sustained beyond carriage and delivery to a connecting line will not be inferred from the taking of through fare on receipt of the goods.[56] But in New York it has been held that a carrier who receives goods for transportation, addressed to a point on the line of a connecting carrier, and charges and receives a price for the entire distance, contracts that the goods shall be carried through for the price paid, and is bound for the risks of a common carrier to the place of destination.[57]

etc., R. Co. *v.* McGivney, 91 Pac. 693, 19 Okla. 361.

The law is well settled in Massachusetts that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability. Nutting *v.* Connecticut River R. Co. (Mass.), 1 Gray 502; Judson *v.* Western R. Corp. (Mass.), 4 Allen 520, 81 Am. Dec. 718; Darling *v.* Boston, etc., R. Corp. (Mass.), 11 Allen 295; Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78.

A railroad corporation, receiving goods for transportation to a place, situated beyond the line of their road, on another railroad, which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for the transportation over their own road only, are not liable, in the absence of any special contract, for the loss of the goods, after their delivery to the proprietors of the other railroad. Nutting *v.* Connecticut River R. Co. (Mass.), 1 Gray 502.

Where goods are delivered to a railroad company for transportation, though marked to a place beyond its terminus, it discharged its duty by safely conveying over its own road, and delivering to the next connecting road, in the usual line of carriage, towards the point of destination; there having been no special contract binding it to deliver the goods to such destination, nor transportation agreement between the two connecting carriers. Phillips *v.* North Carolina R. Co., 78 N. C. 294.

The liability of an intermediate common carrier for the safety of goods delivered to him for carriage is discharged by their delivery to and acceptance by a succeeding carrier or his authorized agent. Pratt *v.* Railway Co., 95 U. S. 43, 24 L. Ed. 336; Hunting Elevator Co. *v.* Bosworth, 179 U. S. 415, 45 L. Ed. 256, 21 S. Ct. 183; Chicago, etc., R. Co. *v.* Bosworth, 179 U. S. 442, 45 L. Ed. 267, 21 S. Ct. 183; Rau *v.* Bosworth, 179 U. S. 443, 45 L. Ed. 268, 21 S. Ct. 194; Bosworth *v.* Carr, etc., Co., 179 U. S. 444, 45 L. Ed. 268, 21 S. Ct. 194.

An intermediate connecting carrier is bound to safely carry, with reasonable dispatch, the shipment over its own road, and to safely and promptly deliver it to the next connecting carrier, and the acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implicaton of a contract extending its liability beyond its terminals. Shockley *v.* Pennsylvania R. Co., 109 Md. 123, 71 Atl. 437.

55. Designation in bill of lading of point of destination.—Reid *v.* Southern R. Co., 69 S. E. 618, 153 N. C. 490.

56. Taking of through fare on receipt of goods.—Washburn, etc., Mfg. Co. *v.* Providence, etc., R. Co., 113 Mass. 490; Roy *v.* Chesapeake, etc., R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A., N. S., 1.

A railroad company, liable as a common carrier within the termini of its own line, is not liable as such beyond its own line, unless it has assumed such liability by special contract, notwithstanding the payment to it of through freight. Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353.

In case for money delivered to an express company to be sent beyond its route, it appeared plaintiff paid charges through and received a receipt for the money to be sent and for the payment. The express agent told plaintiff he could not bill beyond a certain point, and, when plaintiff insisted on paying through, the agent estimated the cost for carriage on the connecting line, and told him if it should be more he would have to pay it. Held, that there was not a special contract to carry to destination. Hadd *v.* United States, etc., Exp. Co., 52 Vt. 335, 36 Am. Rep. 757.

57. Condict *v.* Grand Trunk R. Co. (N. Y.), 4 Lans. 106, affirmed in 54 N. Y. 500.

In such case the carrier in the absence of proof of its authority to contract as agent for the connecting lines, must be presumed to contract for the whole distance on its own account. Condict *v.* Grand Trunk R. Co. (N. Y.), 4 Lans. 106, affirmed in 54 N. Y. 500.

Requiring Guaranty of Payment of Through Freight.—In Georgia it has been held that where goods are shipped under a through bill of lading, the initial line taking from the shippers a guaranty of the freight charges for the entire route, the contract constitutes a through contract of shipment.[58] But in Mississippi it has been held that the fact that a carrier requires from the shipper a guaranty of payment of through freight is not conclusive that it undertakes the responsibility of delivering the goods at the point of destination.[59]

Notice of Through Rates Posted in Station of Initial Carrier.—A contract for through carriage is not to be inferred from the fact that the charges for through transportation are posted in the station of the initial carrier.[60]

Provision in Shipping Receipt for Exchange for Through Bill of Lading.—A contract for through carriage is not to be inferred from a notice on the margin of a shipping receipt that it may be exchanged for a through bill of lading.[61]

Waybill.—Where a waybill speaks of goods as to be transported over the whole route by the initial carrier, this is evidence, whether looked upon as a contract or a declaration or admission, from which the jury may infer a contract for through carriage.[62] But an undertaking by a carrier to transport beyond the terminus of its line can not be implied from the mere fact that a waybill on its face indicates that the goods were consigned to parties beyond the carrier's terminus.[63] The fact that a car is waybilled to a particular place is no evidence of a contract of through transportation, but merely shows the destination of the car.[64] Waybills issued to a shipper which contain separately entered charges for transportation from the point of shipment to the terminus of the carrier, and from such terminus, over a connecting line, to the place of destination of the shipment, do not constitute an express contract on the part of the carrier to carry the property from the point of shipment to the place of destination, which will render it liable for losses occurring beyond its line.[65]

Traffic Arrangements between Carriers.—See ante, "Construction," § 3600.

§ 3605. Effect of Contract and Liability for Breach Thereof.—Liability for Default of Connecting Carriers.—Where a carrier contracts to carry to some point beyond the end of its route, all connecting lines are its agents, for whose default it is responsible.[66]

58. **Requiring guaranty of payment of through freight.**—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

59. Illinois Cent. R. Co. *v.* Kerr, 68 Miss. 14, 8 So. 330.

60. **Notice of through rates posted in station of initial carrier.**—Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425.

"Such notices are usually found in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route." Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425.

61. **Provision in shipping receipt for exchange for through bill of lading.**—Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425.

62. **Waybill.**—Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Defendant received a car load of stock destined to a point beyond its lines. The waybill recited that the stock was received for transportation to that point, and plaintiff received a free drover's pass thereto. Held, that there was an implied contract to deliver the property at such point, making defendant liable for losses occurring on a connecting line. Morse *v.* Brainerd, 41 Vt. 550.

63. St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679.

64. Herring *v.* Chesapeake, etc., R. Co., 45 S. E. 322, 101 Va. 778.

65. Taylor *v.* Maine Cent. R. Co., 87 Me. 299, 32 Atl. 905.

66. **Liability for default of connecting carriers.**—Schwartz *v.* Panama R. Co., 155 Cal. 742, 103 Pac. 196.

Acceptance of Goods for Through Transportation without Prepayment of Charges.—A carrier, by accepting goods for through transportation without prepayment of charges, agrees that no demand for charges will be made before the point of destination is reached; and an intermediate carrier, by receiving the freight under the contract, impliedly makes the same representation, and both carriers are bound to see that no damages result to the shipper from a demand for prepayment of charges made by a third carrier.[67]

Duty to Unload, Feed and Water Live Stock.—Where a railroad company undertakes to transport live stock to a point beyond its own line, on the line of another company, and on arrival of the train at the junction it is found that they can not be forwarded immediately, and that they need to be unloaded, fed, and watered, the duty of the initial carrier to see that this is done can not be imposed on the owner; and this, although he is accompanying the stock under a contract that he shall take care of them while in transit.[68]

Liability for Failure to Deliver at Point of Destination.—Where a railroad company accepts goods marked to a destination beyond the terminus of its road, it is liable for failure to deliver at that point, unless there was a contrary custom or usage known to the shipper at the time the goods were shipped.[69]

Liability for Misdelivery.—If a carrier makes itself responsible by contract to transport freight beyond the terminus of its own route, or if an agreement to do so can be fairly inferred from the bill of lading, it will be liable for a misdelivery of the goods by another carrier, to whom it has delivered them to be carried to their ultimate destination.[70]

Liability for Delivery without Presentation of Bill of Lading.—Where the terms of a contract for the shipment of goods by a railroad company, to a point not upon the line of its road, specify that the property shall not be delivered except upon a bill of lading, the delivery of the goods by such company to one of its connecting lines, to be forwarded, accompanied by the necessary information regarding the delivery, relieves the company of any liability for its delivery without the presentation of the bill of lading.[71]

Liability for Overcharge.—Where a railroad company quotes to a shipper a freight rate to a point beyond its line, and by mistake the rate quoted is less than the usual rate, and such mistake causes the shipper to change his status to his injury, the company will be liable for the overcharge paid by the shipper.[72] A through billing contract for the transportation of cattle, exempting the carrier from liability "for anything beyond" its line, "excepting to protect the through rate of freight named therein," does not make the initial carrier liable for conversion, on the refusal of a connecting line to deliver the cattle, except on payment of a greater rate of freight.[73]

67. Acceptance of goods for through transportation without prepayment of charges.—Bird *v.* Southern R. Co., 42 S. W. 451, 99 Tenn. 719, 63 Am. St. Rep. 856.

68. Duty to unload, feed and water live stock.—Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268.

69. Liability for failure to deliver at point of destination.—Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

70. Liability for misdelivery.—Clyde *v.* Hebbard, 88 Pa. 358.

71. Delivery without presentation of bill of lading.—Rickerson Roller-Mill Co. *v.* Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269.

72. Liability for overcharge.—Missouri Pac. R. Co. *v.* Crowell Lumber, etc., Co., 51 Neb. 293, 70 N. W. 964.

A railroad quoted to a shipper a rate on grain from Nebraska to Colorado, but by mistake the rate quoted was less than the usual rate. The shipper, relying thereon, sold grain to parties in Colorado, basing the price on such freight rate; the purchasers to pay such freight on its delivery, and the shipper guarantying that the rate should not exceed the one quoted. The grain was shipped to the purchasers in Colorado. The last carrier, before it would deliver the grain, compelled the purchasers to pay a higher freight rate than that quoted. The shipper then paid to the purchasers this excessive freight. Held, that the railway company was liable for the overcharge paid by the shipper. Missouri Pac. R. Co. *v.* Crowell Lumber, etc., Co., 70 N. W. 964, 51 Neb. 293.

73. Little Rock, etc., R. Co. *v.* Odom, 63 Ark. 326, 38 S. W. 339.

No Liability for Live Stock Loaded at Point beyond Terminus.—Where a carrier contracted to ship live stock beyond its own line on a connecting line, it is not liable to the consignor for stock loaded at a point beyond its terminus, and for which the consignor accepted a bill of lading from the carrier operating the road at such place.[74]

That Connecting Carrier Will Not Receive Goods Will Not Excuse Performance of Contract.—Where a railroad company by special contract, agrees to deliver goods at a particular place on the line of a connecting carrier, it is not excused from performing the contract by the fact that the connecting carrier will not receive the goods from it because of a lack of cars in which to forward them.[75]

§§ 3606-3612. Delivery to Succeeding Carrier—§ 3606. Duty to Deliver to or Notify Succeeding Carrier.—As between connecting carriers, the duty of the one in possession at the end of its route is to deliver the goods to the succeeding carrier or notify it of their arrival, and until this is done, the former remains liable as common carrier.[76] The duty to deliver to the connecting

74. **No liability for live stock loaded at point beyond terminus.**—Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88.

75. **That connecting carrier will not receive goods will not excuse performance of contract.**—East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

76. **Duty to deliver to or notify succeeding carrier.**—*United States.*—Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253; Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297; Railroad Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Minnesota.—Wehman *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

New York.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of forwarded by the connecting line—that is, to deliver safely the goods to the next carrier on the route beyond. Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253; Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Railroad Co. *v.* Manufacturing Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; Seasongood *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Louisville, etc., R. Co. *v.* Central Stockyards Co., 30 Ky. L. Rep. 18, 97 S. W. 778; Fremont, etc., R. Co. *v.* Waters, 50 Neb. 592, 70 N. W. 225; Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265.

It is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond. Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

A carrier who has received goods for transportation over his line, and which are then to be delivered to another carrier for transportation, can not relieve himself of the common-law liability of insurer until he has actually delivered them to such other carrier. Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

One carrier of a connecting line which has finished its part of the transportation by carrying the goods to the terminus of its line, is still bound to turn it over to the next carrier or to take care of it a reasonable time for the purpose of so turning it over. Union Dray Line Co. *v.* Hurt, 30 Ga. 798.

An initial carrier must give notice to connecting lines of the arrival of cattle at the terminus of its line for transshipment over the connecting line. Louisville, etc., R. Co. *v.* Bourne, 16 Ky. L. Rep. 825, 29 S. W. 975.

A railroad company which accepted a shipment, to be forwarded beyond its terminus, must, in order to devest its liability as carrier, either deliver the goods to the succeeding carrier, or give him notice that they are ready for delivery, and afford a reasonable time to remove them, and, in the event of their nonremoval, provide storage or do some act indicating a renunciation of relation of carrier. Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

Where goods shipped must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each is to deliver them safely, at the end of his route, to the next carrier on the route beyond; and until he has made this delivery, ei-

carrier is in some states enforced by express statutory enactment.[77] Where a railroad company transports horses beyond its own line, it assumes the duty of delivering them at the terminus if its road to the connecting carrier in a car suitable to transport them to their final destination.[78]

When Delivery to Succeeding Carrier Not Required.—Where the line of the succeeding carrier is not connected with the road of the initial carrier for the purpose of shipping freight, and there is no agent at the junction of the two roads, whose business it is to receive and forward freight, there is no obligation upon the initial carrier to deliver freight received by it to such succeeding carrier.[79] Where a railroad company has, by building stock yards, or by contract with a stock yards company, made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery at other stock yards therein.[80]

Effect of Requiring of Shipper an Advance Deposit Equal to Freight Charges for Entire Distance.—Where a railroad, receiving goods marked to a place beyond its terminus, requires of the shipper an advance deposit equal to the amount to be earned by the several carriers over the entire distance, it is bound to so deliver the goods in the possession of the carrier connecting with it as to place the latter under the same obligation as if the goods had been received from the consignor with advance payment of freight.[81]

ther actually or by notice to the next carrier or to the owner or consignee of their arrival, and a reasonable opportunity afterwards to remove them, he will be held liable for damages in case of their loss or injury. McDonald *v.* Western R. Corp., 34 N. Y. 497.

77. **The Georgia act** of 1874 as amended by the acts of 1882-83, p. 145, which requires that the railroad company shall, at its terminus or any intermediate point, switch off and deliver to a connecting road having the same gauge, all cars passing over the line of the former or any portion of the same containing goods or freights consigned to any point over or beyond such connecting roads, merely requires that if the initial company receive cars from another line consigned to a point beyond its terminus it shall deliver them to the connecting road running to that point, and is not intended to compel one carrier to furnish its own cars to another without compensation for their use. The fact that the initial carrier did, in other instances, ship cars to its terminal point and thence over the connecting line, does not affect the case. Therefore, where cotton was delivered to a railroad company for shipment to its own terminus and thence to another point over a connecting line of the same gauge of track, but the initial company refused to issue through bills of lading on full carload lots, though the shippers offered to pay commission rates for doing so, and upon this refusal the shippers took local bills of lading to the terminus of the initial company and then notified its agents to deliver the cotton to the connecting line all in carload lots, and this not being done, they were compelled to haul it on drays to the warehouse of the connecting line, there was no liability on the part of the initial company for damages or the penalty prescribed in the act of 1874 as amended by the act of 1883. Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749.

Under Georgia act of 1874, as incorporated in the Code of 1882, § 719(q) et seq. (Ga. Code of 1895, § 2212 et seq.), and the amendatory act of September 28, 1883, requiring railroad companies, at their termini or any intermediate point, to switch off and deliver to a connecting road having the same gauge all cars passing over their lines or any portion of the same containing goods or freight consigned to any point over or beyond such connecting road, it is required that a railroad company which receives cars from another line consigned to a point beyond its terminus shall deliver them to the connecting road which runs to the point to which the goods are consigned. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

78. **Duty to deliver horses in suitable car.**—Eckert *v.* Pennsylvania R. Co., 60 Atl. 781, 211 Pa. 267, 107 Am. St. Rep. 571.

79. **When delivery to succeeding carrier not required.**—St. Louis, etc., R. Co. *v.* Marrs, 60 Ark. 637, 31 S. W. 42.

80. Central Stock Yards Co. *v.* Louisville, etc., R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed in 24 S. Ct. 339, 192 U. S. 568, 48 L. Ed. 565.

81. **Effect of requiring of shipper an advance deposit equal to freight charges for entire distance.**—Palmer *v.* Chicago, etc., R. Co., 56 Conn. 137, 13 Atl. 818.

Storing Goods in Its Warehouse Will Not Relieve Carrier of Responsibility.—The initial or intermediate carrier is not relieved of responsibility by unloading the goods at the end of its route and storing them in its warehouse without delivery or notice to or any attempt to deliver to its successor,[82] although it has, by contract, exempted itself from liability for property or goods awaiting further conveyance.[83] But it has been held that where the initial carrier gives notice to the succeeding carrier to take the goods, and the latter fails to do so within a reasonable time, the former may place them in a warehouse, and that from that time his liability is only that of a warehouseman.[84]

§ 3607. Mode and Sufficiency of Delivery.—Goods Must Be Placed Where Easily Accessible to Succeeding Carrier.—What constitutes a good delivery from one carrier to another so as to discharge the former is measured by what is needful to be done in putting the latter in full possession of the goods, and no delivery accomplishes this unless it places the goods where they are easily accessible to the latter.[85]

Car Placed on Transfer Track of Connecting Carrier.—A carload of freight is delivered to a connecting carrier when the car is placed on its transfer track, and it is notified of that fact.[86] But the better opinion seems to be that

82. **Unloading and storing not sufficient to terminate liability.**—*United States.*—Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253; Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297.

Iowa.—Bancroft & Co. *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

Michigan.—Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367.

Minnesota.—Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130; Wehman *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

New York.—McDonald *v.* Western R. Corp., 34 N. Y. 497.

83. **Exemption from liability where property awaits further conveyance.**—It can not reasonably be said that goods await further conveyance within the meaning of a clause in a bill of lading exempting the initial carrier from liability for goods awaiting further conveyance the moment they have been unloaded from the cars. Property does not await further conveyance until it has become the duty of the succeeding carrier to take it further, after notification that it has arrived and awaits delivery to it. After that time it may be said to await further conveyance, but up to that time it awaits the further action of the railway company. Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253.

84. **Placing goods in warehouse after notice to succeeding carrier.**—Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

Defendant railroad company received cotton from a connecting carrier, to be transported over its line, and delivered to a steamship company for further shipment. Before it was tendered, fire broke out in two of the cars, and on a subsequent tender the steamship company refused to receive it, deeming it in unsafe condition, and the steamer on which it was to be shipped sailed without it. Notice was promptly given to the shipper, and instructions asked for, but none were given. Defendant again offered the cotton to the steamship company to be taken on a later vessel, but, another fire having occurred before the time for sailing, the company definitely refused to take it. The owner was again notified, and, no instructions being received, defendant stored the cotton subject to the owner's order, having held it over a month. Defendant was in no way responsible for the fires nor for the condition of the cotton. Held, that it had discharged its duty by tendering the cotton to the connecting carrier, and notifying the owner of its refusal, and was not required to put it in condition and again tender it, but was justified in storing it to await the owner's orders. Judgment 116 Fed. 235, affirmed in Buston *v.* Pennsylvania R. Co., 119 Fed. 808, 56 C. C. A. 320.

85. **Goods must be placed where easily accessible to succeeding carrier.**—Union Dray Line Co. *v.* Hurt, 30 Ga. 798.

86. **Delivery complete when car placed on transfer track and notice given.**—McMillan *v.* Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069, 35 R. R. R. 396, 58 Am. & Eng. R. Cas., N. S., 396.

But in a Georgia case, where the evidence showed a prevailing custom of the placing of a car by a railroad on the transfer track in a certain town maintained by such company, it was held that it was not a delivery of the car to the succeeding carrier under such custom until the car was actually accepted by the

the mere placing of the car on the transfer track without notice does not constitute a delivery.[87]

Delivery at Warehouse Used by Both Carriers in Common.—Where there is an agreement between two common carriers operating connecting lines for the carriage of freight over both routes at an agreed price to be divided between them, and where they have at the point of connection a warehouse used in common for the transfer of freight from one line to the other, the expense of handling being paid in common, a delivery of freight at the warehouse by one carrier destined to pass over the line of the other, with notice to the latter of its arrival and ultimate destination, places it in the possession of the latter, and imposes upon it the duties and liabilities of a common carrier in reference thereto.[88]

Deposit of Goods on Carrier's Wharf or Float.—Deposit of goods by a carrier on its wharf or float, and notice thereof to the succeeding carrier, accompanied by a request to remove the goods, does not constitute a delivery of the goods to the succeeding carrier.[89]

Delivery at Place Agreed on.—If there is an agreement between connecting carriers that property intended for through transportation may be deposited by the initial carrier at a particular place without express notice to the succeeding carrier, such deposit amounts to notice, and is a delivery.[90]

train crew of such carrier, whose duty it was to carry it to the place to which the car was destined. Seaboard, etc., Railway *v.* Friedman, 128 Ga. 316, 57 S. E. 778.

87. **Necessity of notice.**—A railroad company received goods, which it carried to a certain point, and there placed the cars on a side track known as the "Y," which belonged to a connecting carrier, but was constructed for and used by all the railroads terminating there in transferring freight and turning engines. While standing there, before notice had been given to the connecting carrier, the goods were destroyed by fire. Several witnesses testified that it was a custom among the roads to regard such circumstances as a delivery, but others testified that the freight was not considered as delivered until hauled to the transfer platform of the receiving road, examined, and checked off and received by the clerk of such road. Held, that there was no delivery to the second carrier, and the first one was liable. Kentucky, etc., Fire Ins. Co. *v.* Western, etc., R. Co., 67 Tenn. (8 Bast.) 268.

In Alabama it has been held that if, by custom or course of dealing between the receiving and the next connecting carrier, loaded cars are switched off by the former on a side track of the latter's road, for immediate transportation, this amounts to delivery to the latter without further notice, but if they are to remain on such side track until a waybill is furnished, or shipping directions are given, there is no delivery to such connecting carrier until this is done. Mt. Vernon Co. *v.* Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687.

But in Delaware it has been held that the delivery of cars loaded with peaches by one railroad company to a connecting company is complete the moment such cars, which belong to the first company, reach the point of connection between the two companies and the engine is cut loose from the cars. Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

88. **Delivery at warehouse used in common.**—Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616, 3 Am. R. Rep. 390, affirming 5 Lans. 480.

89. **Deposit of goods on carrier's wharf or float.**—The fact that a railroad company, which had delivered cotton on a wharf, to be loaded on a steamer, had notified the steamship line that the cotton was ready, and asked them to take it away, did not make the custody of the railroad company that of a warehouseman, instead of a common carrier. Texas, etc., R. Co. *v.* Clayton, 19 S. Ct. 421, 173 U. S. 348, 43 L. Ed. 725, affirming 84 Fed. 305, 28 C. C. A. 142.

Goods had been discharged from the barge of a North river carrier to his "float" in the Albany basin, and notice repeatedly given to the forwarders to whom they were directed to take them, when they were destroyed by fire. Held, that the transfer to the float was not a delivery, but merely preparatory to delivery, and that by the delays the carrier did not become a depositary, but was responsible for the loss. Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

90. **Delivery at place agreed on.**—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

The railroad company and steamboat company had a covered wharf in common at their common terminus used both as a depot and wharf, and it was the established usage for the steamboat company to land goods for the railroad on

Delivery on Sunday.—A delivery of the goods by the initial carrier at the warehouse of the connecting carrier on Sunday discharges the former from liability, even under a Sunday law prohibiting work on Sunday, except works of necessity or charity, as the duty of caring for the goods after the delivery to the warehouse of the connecting carrier is a work of necessity, and excepted by the statute.[91]

Failure of Initial Carrier to Exercise Option as to Choice of Connecting Carrier.—A delivery at a place where a connecting carrier usually receives its freight is not sufficient to discharge the initial carrier from liability, where, under the terms of the contract, if it has a choice as to the selection of routes or carriers, and has not finally and irrevocably exercised such option or choice, although it has notified a certain carrier of the delivery.[92]

Notice as Dispensing with Delivery.—Whatever may generally be the effect of a notice to a connecting carrier, upon the question of terminating or altering the liability of a preceding carrier for the goods, it is quite clear that it has no effect in diminishing the liability until actual delivery in a case where the preceding carrier still continues to have full control over the goods and has a choice as between connecting carriers, and may, notwithstanding such general notice, deliver the goods under certain circumstances to another carrier for further transportation. Until actual delivery in such case, the preceding carrier is not divested of his liability.[93]

Sufficiency of Notice of Delivery or Readiness for Delivery.—Notice by the initial carrier to the succeeding carrier, within a few minutes after the arrival of a shipment at the place where the two roads connect, that the cars in which the shipment was made have been placed on the receiving tracks of the succeeding carrier, is a sufficient notice of delivery, it not being essential to notify the succeeding carrier in advance as to when the shipment will arrive

the arrival of its boats in the night, upon a particular place in the depot, where they were taken by the railroad company the next morning, both companies having equal possession of the depot. Freight received by the steamboat company for delivery to the railroad company was landed in the depot and at the place in question during the night of Saturday, and was burned with the depot in the afternoon of Sunday following, the railroad company having done no act in the meantime accepting delivery. Held, that the steamboat company had delivered the goods, and was not liable for the loss of them. Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

91. Delivery on Sunday.—Powhatan Steamboat Co. *v.* Appomattox R. Co. (U. S.), 24 How. 247, 16 L. Ed. 682; United States *v.* Powell (U. S.), 14 Wall. 493, 20 L. Ed. 726.

92. Failure of initial carrier to finally exercise option as to connecting carrier.—A clause in a bill of lading by which cotton was to be shipped over the line of a railroad company to be by it delivered to a steamship company gave the railroad company the right to ship by any steamer they might select, provided they deemed it necessary to ship by some steamer or line other than that named in the bill of lading. Another clause provided that the liability of the railroad company should determine on a delivery to the steamship, the steamship company, or on the steamship pier. The property was delivered at the end of the carrier's line, on a pier belonging to it, and from which no freight could be taken by the steamship company except with a permit or order from the railroad company, and the custom was that the property had to be delivered within the reach of the ship's tackle before the ship was called upon to take it. The steamship company was not a regular connecting carrier with the railroad company but carried goods only under special contract, and under an agreement between them the steamship company was not to take the property until they sent a ship to the pier for that purpose. It was held that a delivery by the railroad company on the pier was not a delivery to the steamship company so as to relieve it from liability for loss by fire, although the railroad company had notified the steamship company that the property was at the pier awaiting or ready for delivery, since, even after such notification, the railroad company might select another steamer by which to send the property. Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257. See also, Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253.

93. Notice as dispensing with delivery.—Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257.

or that the train is late.[94] The notice of the arrival of goods and readiness for delivery need not actually be brought home to the knowledge of the succeeding carrier; but where the uniform custom of doing business between the carriers is for the initial carrier to deposit such notice in a special box in its own depot, to which the succeeding carrier has constant access and is accustomed to look for such notices, such deposit is sufficient.[95]

§ 3608. Time of Delivery.—Where a carrier receives goods for transportation beyond its own line, it is bound to deliver them to a connecting carrier within a reasonable time;[96] and what is a reasonable time must be determined from the length of the journey, the usual time, the weather, the nature of goods transported, etc.[97]

§ 3609. Capacity in Which Carrier Acts in Making Delivery.—A carrier of goods acts as agent of the shipper or consignee in transferring them to another carrier, and not as the latter's agent.[98]

§ 3610. Right to Determine to What Connecting Line Delivery Shall Be Made.—The weight of authority supports the rule that if a carrier agrees to carry beyond its own line, it may, in the absence of a contract to transport the shipment over a specified line or lines,[99] deliver the goods for carriage by such line or lines as it may choose to select.[1] But in Missouri it has been held that a

94. Sufficiency of notice of delivery.—Louisville, etc., R. Co. *v.* Bourne, 15 Ky. L. Rep. 445.

95. Sufficiency of notice of arrival and readiness for delivery.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

96. Delivery must be made within a reasonable time.—St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A. 555; Chesapeake, etc., R. Co. *v.* O'Gara, etc., R. Co., 144 Ky. 561, 139 S. W. 803, so holding as to a through shipment of coal.

97. Mode of determining what is a reasonable time.—St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21.

98. Capacity in which carrier acts in making delivery.—Seaboard, etc., Railway *v.* Friedman, 128 Ga. 316, 57 S. E. 778; Marquette, etc., R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

Where a shipper shipped cattle to V., at which point the first carrier connected with defendant's line of road, and defendant received such cattle in good order from the first road, the first road was the agent of the shipper for the purpose of delivering to defendant carrier the property to be transported from V. Seaboard, etc., Railway *v.* Friedman, 57 S. E. 778, 128 Ga. 316.

Where plaintiff gave a local express company certain household goods for delivery to a carrier, to be delivered to a named consignee in another state, the local express company was plaintiff's agent for delivering the box for shipment and for the giving of information necessary to the shipment. Harrington *v.* Wabash R. Co., 122 N. W. 14, 108 Minn. 257, 23 L. R. A., N. S., 745.

99. Contract of transportation over a specified line or lines.—A connecting carrier, in receiving a car load of freight under a contract of transportation over several specified lines, owed a contract duty to the shipper not to divert the car without her consent. Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

Where a carrier receives goods with an express understanding that they are not to be forwarded from a certain point on its line unless by a specified line of steamers it is not justified in forwarding them by another line. Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416, reversing 31 Barb. 196.

An express company receipted for goods left with them to be forwarded by a particular vessel, and, that vessel being withdrawn, sent them by another, which was lost. Held, that the company was liable for the loss. Goodrich *v.* Thompson, 44 N. Y. 324.

Where the initial carrier failed to deliver the shipment to the connecting carrier agreed on, but delivered the same to another carrier, the initial carrier continued liable as though the shipment remained in its possession, and it was responsible for the act of the connecting carrier selected by it. Cincinnati, etc., R. Co. *v.* Pendleton, 96 S. W. 434, 29 Ky. L. Rep. 721.

1. Selection of routes by initial carrier where it contracts for through carriage.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28

shipper of goods has the right to designate over what connecting lines his goods shall be shipped, and the first carrier is bound to obey the directions of the shipper in this respect.[2] In Massachusetts it has been held that if it be the general custom of a carrier to forward by sailing vessels all goods destined beyond the end of its line, it is not liable for not forwarding a particular article by a steam vessel, unless the direction to do so be clear and unambiguous.[3] An initial carrier is liable to the shipper for loss from its selection of an insolvent company as the connecting line in a through shipment.[4]

§ 3611. Duty of Initial Carrier Where Succeeding Carrier Refuses to Receive Goods, or Delivery to It Is Impracticable.—If the connecting carrier designated in the contract of shipment refuses to receive the goods, or delivery to it is impracticable, it is the duty of the initial carrier to notify the consignor so as to enable him to give further shipping directions,[5] unless the property is of such a perishable nature that the taking of time necessary to give notice would probably injure it.[6] Where a carrier has transported goods over its

L. Ed. 291, 4 S. Ct. 185; Louisville, etc., R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 S. Ct. 745; Steidl *v.* Minneapolis, etc., R. Co., 94 Minn. 233, 102 N. W. 701. See, also, Van Santvoord *v.* St. John (N. Y.), 6 Hill 157, reversing 25 Wend. 660.

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work." Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185; Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

Where a bill of lading for the shipment of goods to a point beyond the terminus of the line of the initial carrier is accepted before shipment by a shipper, the law imports into the contract, where it is silent, the provision that the carrier may select any customary and reasonably safe and direct route by which to forward the goods from the terminus of its line. Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702. See, also, Chicago, etc., R. Co. *v.* Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

2. Right of shipper to designate route.—Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

If the initial carrier disobeys the shipper's directions as to the connecting lines over which his goods shall be shipped it will be liable as for a conversion. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

3. General custom to forward by sailing vessels.—Simkins *v.* Norwich, etc., Steamboat Co. (Mass.), 11 Cush. 102.

4. Liability of initial carrier for selecting insolvent company as connecting line.—Post *v.* Southern R. Co., 52 S. W. 301, 103 Tenn. 184, 55 L. R. A. 481.

5. Duty of initial carrier where succeeding carrier refuses to receive goods or delivery to it is impracticable.—Southern R. Co. *v.* Wallace, 175 Ala. 72, 56 So. 714; Fisher *v.* Boston, etc., R. Co., 99 Me. 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. Rep. 283.

A carrier whose directions were to forward goods by a certain steamboat line should, when that line refused them, have held the goods until communication was had with the shipper, who was conveniently within reach, by mail or telegraph. Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416, reversing 31 Barb. 196.

Where the second carrier, under a contract for shipment of freight over several lines, refuses to carry it over the route specified, it is the initial carrier's duty to receive the freight back and call upon the shipper for further instructions, in the absence of which the freight should be returned. Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

An intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee without unreasonable delay, and store or otherwise care for the goods while awaiting instructions. Having done this, its liability as a carrier will

own lines to a point of intersection with the connecting carrier, and is unable to deliver them to such carrier without fault on its part, it has the duty as a forwarder to exercise reasonable care to save loss of the goods or unnecessary costs to the owner.[7] Where goods can be properly cared for by the carrier until the shipper can be communicated with, it is not justified in forwarding them by another route than that designated in the contract of shipment, even though there is a stipulation in the contract that every carrier in case of necessity may forward the goods by any railroad between the place of shipment and the place of destination.[8] Where, by common consent of the railroad companies whose lines centered in a city, it was customary, when live stock had to be changed from one route to another, or from one car to another, to deliver it to a certain stockyards company for this purpose, a delivery by the initial carrier to such company was not a delivery to the connecting line, so as to relieve the initial carrier from its duty to notify the shipper of the inability of the connecting line to forward the stock without delay.[9]

§ 3612. Waiver of Delivery by Succeeding Carrier.—A complete delivery by the initial carrier may be waived by the succeeding carrier, but such waiver while binding on the latter will not bind the shipper or owner of the goods.[10]

§ 3613. Transmission to Succeeding Carrier of Consignor's Instructions.—A common carrier who receives goods under an agreement to transport them over the whole or any part of his own route, and then to forward them to a destination beyond, acts in the twofold capacity of carrier and forwarder. In the latter capacity, he acts as agent of the consignor, and as such is bound to transmit with reasonable exactness, to the next succeeding carrier, the instructions of his principal.[11] If these instructions be without restriction as

cease, and liability as a warehouseman be substituted. Judgment 116 Fed. 235, affirmed in Buston *v.* Pennsylvania R. Co., 119 Fed. 808, 56 C. C. A. 320.

6. Southern R. Co. *v.* Wallace, 175 Ala. 72, 56 So. 714.

7. Fisher *v.* Boston, etc., R. Co., 59 Atl. 532, 99 Me. 338, 68 L. R. A. 390, 105 Am. St. Rep. 283.

8. Fisher *v.* Boston, etc., R. Co., 59 Atl. 532, 99 Me. 338, 68 L. R. A. 390, 105 Am. St. Rep. 283.

9. **Facts not relieving carrier from duty to notify shipper of succeeding carrier's inability to forward stock.**—Louisville, etc., R. Co. *v.* Farmers', etc., Comm. Firm, 107 Ky. 53, 52 S. W. 972, 21 Ky. L. Rep. 708.

10. **Waiver of delivery by succeeding carrier.**—While no acceptance by a connecting carrier of a delivery by the initial carrier, which does not put the connecting carrier in full possession of the goods, can release the initial carrier from the full duty which he owes the shipper of placing the goods in the actual control of the succeeding carrier, the latter may bind himself by accepting a less delivery than this. Union Dray Line Co. *v.* Hurt, 30 Ga. 798.

It was the custom of a steamboat transportation company to place freight, carried by it to a certain point, in a warehouse there owned by a railroad, and then to give the latter a waybill, which the railroad accepted as a correct statement. Held, that it was competent for the railroad to thus waive its usual requirement for a count of the freight as it was loaded on its cars. Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

An understanding or custom between connecting railroads, that when the cars of one road are switched off upon the track of the other, the said other road is responsible for the freight, although receipts are not given till the freight has been examined, checked, and found all right, or the deficiency noted, is a good and valid custom as between the roads, but under § 2058 of the Georgia Code, does not bind the owner of the goods. The last company receipting for the goods "in good order," is responsible to the owner if they are lost or damaged before examination and transfer to the connecting road. Wallace *v.* Rosenthal, 40 Ga. 419.

11. **Transmission to succeeding carrier of consignor's instructions.**—Briggs *v.* Boston, etc., R. Co. (Mass.), 6 Allen 246, 83 Am. Dec. 626; Little Miami R. Co. *v.* Washburn, 22 O. St. 324.

A railroad company first receiving goods, which takes charge of them to be carried over its own road and to be forwarded to a person beyond its own means of transportation, the goods being directed to a particular consignee, at the place where the goods are first to be de-

to the subsequent route, intermediate consignment, or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent, by accompanying their delivery in good order to the carrier of the next usual route, of transit, with the like general instructions, in terms sufficiently explicit and unambiguous to inform him of their ultimate destination. But if the instructions of the consignee be special and restrictive, the carrier will not have performed his duty as forwarding agent if he shall have neglected or omitted to transmit, with the delivery of the goods to the next carrier, any material or substantive part of such special instructions. Whence it follows, as a necessary consequence, that he shall stand responsible for, and make good, any loss to which such negligence or omission shall have contributed.[12] Marks or labels on the packages will not supply the omission of such instructions from the accompanying shipping bills, where they are shown not to have come to the actual knowledge of the next succeeding carrier, or his agent, charged with the duty of receiving and forwarding such bills.[13] Where a shipper delivers to a carrier, with the goods shipped, written instructions to accompany the goods with the statement of the shipper's charges, the carrier is bound by the instructions and liable for his failure to conform to them.[14] A carrier who acts as the forwarding agent of the owner of goods, in giving directions by waybills or otherwise to the successive lines of transportation over which they are to be carried beyond the termination of his own route, is responsible as such forwarding agent only for the want of reasonable diligence and care.[15]

§ 3614. Duty to Receive and Transport Cars and Freight Delivered by a Connecting Carrier.—A carrier is bound to receive and transport cars and freight delivered to it by a connecting carrier,[16] if such cars are not defective, or from construction unreasonably hazardous;[17] and this it must do

livered and transshipped, must deliver the goods to such consignee with notice of the instructions of the consignor to have them forwarded to the place of their ultimate destination. This notice should be given in a reasonable time after the arrival of the goods at the point of reshipment, and by some agent and servant of the company particularly charged with the performance of this duty. Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694.

12. Little Miami R. Co. *v.* Washburn, 22 O. St. 324.

13. Little Miami R. Co. *v.* Washburn, 22 O. St. 324.

14. Hutchings *v.* Ladd, 16 Mich. 493.

A forwarder who receives goods under agreement to ship them to an express company, with instructions for such company that it should not deliver the goods to the consignee until he had paid the price, does not comply with the contract by sending the instructions in a sealed envelope separate from the bill of lading. Hutchings *v.* Ladd, 16 Mich. 493.

15. Northern R. Co. *v.* Fitchburg R. Co. (Mass.), 6 Allen 254.

16. Duty to receive and transport cars and freight delivered by a connecting carrier.—Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022; McMillan *v.* Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069, 35 R. R. R. 396, 58 Am. & Eng. R. Cas., N. S., 396; Chicago, etc., R. Co. *v.* Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Andrus *v.* Columbia, etc., Steamboat Co., 47 Wash. 333, 92 Pac. 128.

A carrier is bound to receive cars of other carriers for transportation over its line when requested, and occupies the same relation to such cars as to ordinary freight, and is liable to the owner in the same manner as to any other shipper. Judgment 144 Ill. App. 293, affirmed in Pittsburg, etc., R. Co. *v.* Chicago, 89 N. E. 1022, 242 Ill. 178.

A merchant ordered goods shipped to him over certain connecting lines. When the goods arrived at the last connecting point, the last connecting line had sold out its business to its sole competitor, which received the goods. Held, that the fact that the company had gone out of business did not render the shipment completed when it arrived at the last connecting point, but its successor had authority, and it was its duty to forward the goods to their destination; there being no other company that could carry them. Andrus *v.* Columbia, etc., Steamboat Co., 47 Wash. 333, 92 Pac. 128.

17. Chicago, etc., R. Co. *v.* Curtis, 71 N. W. 42, 51 Neb. 442, 66 Am. St. Rep. 456.

without waiting for the making of a new contract, especially where it did not advise the agent of the shipper that it would not transport the cars until a new contract was made.[18] The duty of a railroad company to receive and transport cars and freight delivered to it by a connecting carrier is in many of the states enforced by constitutional enactment or statute.[19] A carrier's statutory duty to receive the cars of other owners does not oblige it to move them except in their own routine and in the ordinary course of business.[20] Under a statute requiring every railroad company doing business in the state to receive all freight and passengers coming to it from a connecting line, and going to points on its line or beyond, and to transport the same to destination or the next connecting line, and authorizing the collection of damages against a company which fails so to do, a railroad company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city, and is not required to respond in damages for a failure so to do.[21]

Carrier Not Required to Keep Cars of a Special Kind for Forwarding Fruit.—A connecting carrier is not required to keep on hand, at the connecting point, cars of a special kind, for forwarding fruit, to meet a possible contingency arising from the defective condition of the car in which the fruit was originally shipped.[22]

Tender of Cars or Freight and Waiver Thereof.—There can not be a refusal by a carrier to receive cars or freight from a connecting carrier until such cars or freight have been tendered to it, and therefore a tender is a prerequisite to its liability for refusal to receive, unless a tender has been waived.[23]

18. McMillan v. Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069, 35 R. R. R. 396, 58 Am. & Eng. R. Cas., N. S., 396.

19. **Constitutional enactments and statutes enforcing duty to receive and transport cars and freight.**—Under the constitution of Illinois any railroad company is bound to haul the cars of any other. Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506.

Under the Texas statute, Rev. St. 1895, art. 4535, all railway companies are required to receive freight from connecting lines, and to transport it to destination or to the next connecting line. Ft. Worth, etc., R. Co. v. Masterson, 95 Tex. 262, 66 S. W. 833.

A rule of a carrier whereby shipments of a certain character coming from a designated point are refused in the cars of connecting roads, but are required to be unloaded and reshipped is in direct contravention of the Georgia statute, Code of 1882, § 719(q), and the following subsections. Logan & Co. v. Central Railroad, 74 Ga. 684.

20. **Extent of carrier's duty.**—Coup v. Wabash, etc., R. Co., 22 N. W. 215, 56 Mich. 111, 56 Am. Rep. 374.

21. Judgment, Texas, etc., R. Co. v. Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, affirming in 56 S. W. 328, 93 Tex. 482, construing Rev. St., art. 4535.

Since mere switch connections between several railroads in the same city are not connecting lines under Rev. St., arts. 4535, 4536, requiring railroads to receive and transport freight from connecting lines without discrimination, the owners of such switch connections were not obliged to make transfers thereon to and from roads not their own, and by performing such service for some roads did not subject themselves to the performance of a like service for all roads tendering similar business and offering like compensation. Texas, etc., R. Co. v. Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, judgment affirmed in 56 S. W. 328, 93 Tex. 482.

22. **Carrier not required to keep cars of special kind for forwarding fruit.**—Corso v. New Orleans, etc., R. Co., 48 La. Ann. 1286, 20 So. 752.

23. **Waiver of tender.**—The publication of an order by a connecting carrier refusing to receive goods shipped over another line, its refusal under such order to accept a tender of freight and its specific notification to the delivering company, that the order was still in force, amounts to a waiver of tender, and one acting under this order and notification will be protected in the same degree as if he had made actual tender. So where a railroad company passed an order to the effect that after that date no shipment of salt or other merchandise from Brunswick in competition with Savannah would be received for local stations on its line, or for passing over another road operated by it under lease, or for points beyond, unless charges were prepaid and shipments were delivered at the company's warehouse by drays as local business, and that local rates from that point would be assessed; if a firm who shipped salt from Brunswick by a road connect-

What Will Justify Refusal to Receive Freight.—In an action for damages for refusal to receive from a connecting line without prepayment freight billed to a certain flag station, defendant may show that it had a fixed regulation requiring prepayment on all freight consigned to that station, and that both plaintiff and the connecting line knew of that fact.[24] The existence of a void state quarantine line against infected cattle will not justify a railroad company in violating the provisions of a statute requiring all railway companies to receive freight from connecting lines, and to transport it to destination or to the next connecting line, by refusing to receive and transport cattle consigned on a through bill of lading issued by another company to a point within such void quarantine line, but which defendant company would only have had to carry to a connecting point not within such line.[25]

§ 3615. Duty of a Forwarding Consignee.—There is an implied engagement by a forwarding consignee with the public that he will be vigilant and careful in receiving and forwarding goods intrusted to his care, and, upon his refusal to receive goods consigned to him, he will be liable to an action by the owner for any loss which such refusal occasions.[26]

§ 3616. Capacity in Which Connecting Carrier Acts and How It Is Affected by Initial Carrier's Contract with Shipper.—When a contract exists between a consignor and a carrier to transport goods to a point beyond its line, the carrier, receiving the goods at the end of the line for the purpose of transporting them to their destination and delivering them there, becomes the agent of the carrier receiving the goods from the consignor for shipment, for the purposes of further transportation and delivery.[27] An initial carrier can not by its contract with the shipper bind a connecting carrier without the latter's consent or acquiescence.[28] But a carrier which accepts goods from a connecting carrier with notice that they were shipped under a through bill of

ing with the first mentioned road made a tender to it of one or more cars loaded with salt, and it was refused, and, when more cars arrived, the agent of the road bringing them inquired of the agent of the other road whether the order above stated was still in force and operative and was informed that it was still in force there was no necessity for further tender of the cars to the refusing road before bringing suit for such refusal. Central R. Co. *v.* Logan & Co., 77 Ga. 804, 2 S. E. 465.

24. Regulation requiring prepayment on all freight consigned to certain station.—Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137.

25. Void state quarantine line.—Ft. Worth, etc., R. Co. *v.* Masterson, 95 Tex. 262, 66 S. W. 833, construing Rev. St. 1895, art. 4535.

26. Duty and liability of a forwarding consignee.—Hemphill *v.* Chenie (Pa.), 6 Watts & S. 62.

Goods were shipped from New York to Charleston, for the plaintiffs, doing business in Columbia, S. C., to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed. Held, that the company were not liable as common carriers until the goods were received by them for carriage; that, considering them as forwarding agents, the rule as to their liability was not the same as that which applied to them as common carriers; that, considering them as forwarding agents, they would be liable for refusing to receive, unless they showed good excuse for not receiving; and after receiving, they would be liable for not taking all the care which a prudent man would take about his own business. Maybin *v.* South Carolina R. Co. (S. C.), 8 Rich. L. 240, 64 Am. Dec. 753.

27. Connecting carrier agent of initial carrier.—St. Louis, etc., R. Co. *v.* Gramling, 97 Ark. 353, 133 S. W. 1129; St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619, affirmed in 51 N. E. 911, 175 Ill. 557, 67 Am. St. Rep. 238.

28. Initial carrier can not bind connecting carrier without its consent or acquiescence.—Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228.

A shipper's contract with one railroad to transport goods—as here, 836 bales of cotton by the Atlantic Coast Line from Georgia to New York—does not render another railroad in the line liable for a refusal to forward the goods from the point of connection. Wilmington, etc., R. Co. *v.* Greenville, etc., R. Co., 9 S. C. 325, 30 Am. Rep. 23.

lading is bound by its terms so far at least as they are usual and customary,[29] and can not change the contract by issuing its own bill of lading to the connecting carrier containing different terms to which the owner of the goods has not assented.[30] Where a traffic agreement between initial and connecting carriers makes them partners in the carriage of freight or agents of each other, the connecting carrier is estopped from denying the recitals in a bill of lading in any case the initial carrier is estopped.[31] But a connecting carrier which has no traffic arrangement with an initial carrier so as to make the carriers partners or agents of each other, is not estopped by the recitals of a bill of lading issued by the initial carrier and it may show that the bill of lading erroneously states the quantity of freight received for transportation, the common law not imposing on the connecting carrier any liability for mistakes of the initial carrier in issuing bills of lading.[32]

§ 3617. Delivery to Consignee.—The last carrier of several connecting lines is bound to deliver the goods at the place of destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company.[33] Where a connecting carrier receives a carload of freight, consigned to a designated consignee for transportation to a point on its road where it has neither freight agent nor depot building, and the bill of lading issued by the initial carrier shows that the freight charges were paid, and provides that delivery of freight destined to switches or side tracks having no agent shall be complete upon switching the car at such side track, the delivery is complete when the connecting carrier carries the car to the point indicated, and sidetracks it on a switch in front of the office of a lumber company, for whom the freight is really intended, though consigned to another.[34] While the authorities are not in entire harmony upon the subject, the most reasonable and better opinion seems to be that in case of a through shipment of goods, the last carrier is not authorized to deliver them to the consignee without a production of the bill of lading.[35] A carrier of goods must

29. **Effect of acceptance of goods from connecting carrier.**—Cobb *v.* Brown, 113 C. C. A. 586, 193 Fed. 958.

Where a bill of lading issued by an initial carrier showed that it was a contract for a through shipment, when the goods were delivered to the connecting carrier and carried by it under the bill of lading, such carrier became a party to the original contract by adoption and ratification. Chicago, etc., R. Co. *v.* Chestnut Bros., 89 S. W. 298, 28 Ky. L. Rep. 404.

Where live stock is shipped to a point within or without the state, the contract of shipment made with the initial carrier is binding on all connecting carriers who receive the live stock. Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513; Baltimore, etc., R. Co. *v.* Clift, 142 Ky. 573, 134 S. W. 917, 919.

30. Cobb *v.* Brown, 113 C. C. A. 586, 193 Fed. 958.

31. **When connecting carrier is estopped from denying recitals in bill of lading.**—Smith *v.* Southern Railway, 71 S. E. 989, 89 S. C. 415.

32. Smith *v.* Southern Railway, 89 S. C. 415, 71 S. E. 989.

33. **Duty of last of several connecting carriers.**—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266. See, also, Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425.

34. **Delivery complete under terms of bill of lading.**—Hill *v.* St. Louis, etc., R. Co., 67 Ark. 402, 55 S. W. 216. In this case the manager of the lumber company, without consent of the connecting carrier or the consignors, broke open the car, which was sealed and locked, unloaded its contents, carried the same away, and failed to pay a draft made upon him for its value. It was held that the defendant (the connecting carrier) was not liable to the consignor for the loss of the contents of the car.

35. **Necessity for production of bill of lading.**—Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530. In delivering the opinion of the court in this case Canty, J., said: "It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railway company delivers the goods at its peril, without a production of the bill of lading; and, if it so delivers them to some one other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods. What limitations or exceptions there may be to this rule we need not now consider.

deliver them in the condition in which he received them. He has ordinarily no means of opening packages and examining their contents, and has nothing to do with previous dealings with the property by independent carriers.[36] An action by the consignee of a shipment of goods against the terminal carrier for the conversion of the goods lies, where, on weighing the goods, their weight was found to be less than that given in the waybill, and the consignee made a tender of the legal charge, based upon the correct weight, which tender was refused until the matter of the freight charges could be adjusted with a connecting line, and the carrier did not offer to deliver the goods until ten days after the tender was made, when the consignee declined to accept them.[37] In case of a through shipment the last carrier is liable in damages to the person injured if it delivers the goods to a person not authorized to receive them,[38] or

The following authorities show the universality of the rule as applied to transportation both on land and by water. See The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; North *v.* Merchants', etc., Transp. Co., 146 Mass. 315, 15 N. E. 779; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; City Bank *v.* Rome, etc., R. Co., 44 N. Y. 136; Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756; Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125; National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216; Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583; Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761; Tindall *v.* Taylor (Eng.), 4 El. & Bl. 219. See, also, as bearing on the question: Halsey *v.* Warden, 25 Kan. 128; Meyerstein *v.* Barber (Eng.), L. R. 2 C. P. 38; Lee *v.* Bowen, 5 Biss. 154, Fed. Cas. No. 8,183; Hieskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745; Bass *v.* Glover, 63 Ga. 745; First Nat. Bank *v.* Dearborn, 115 Mass. 219; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189; Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 9 Am. St. Rep. 504, 1 L. R. A. 650, 39 N. W. 899."

Grain was delivered to a carrier for shipment to a destination beyond its own line under a through bill of lading. A sight draft, with the bill of lading attached, was forwarded through certain banks for collection from the consignee, who refused to accept the same because of the nonarrival of the grain. The draft was protected and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond, without presentation of the bill of lading, and without payment of the draft. Held, that such delivery constituted a conversion of the grain by the connecting carrier. Marshall, etc., Grain Co. *v.* Kansas, etc., R. Co., 75 S. W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

But in Texas it has been held that in case of a through shipment of freight the last carrier may deliver the goods to the consignee without requiring the production of the bill of lading, unless it contains a stipulation to the contrary. Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 100 Tex. 17, 93 S. W. 431.

36. Condition in which goods must be delivered.—Marquette, etc., R. Co. *v.* Kirkwood, 7 N. W. 209, 45 Mich. 51, 40 Am. Rep. 453.

37. Liability for wrongful refusal to deliver.—Brown *v.* Philadelphia, etc., R. Co., 36 App. D. C. 221.

38. Delivery of goods to person not authorized to receive them.—Where goods consigned on commission are received by a railroad company to be carried beyond its own route, under an agreement between the connecting companies by which each company is entitled to a proportion of the freight, the company which carries the goods to their destination is liable to the consignor for a delivery to a person not authorized to receive them. Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

A carrier, the last of several connecting carriers, who delivers the goods at their destination to one other than the consignee, by reason of erroneous directions given him by an intermediate connecting carrier, without authority of either consignor or consignee, and without surrender of the bill of lading issued by the initial carrier, is liable for conversion. Foy *v.* Chicago, etc., R. Co., 63 Minn. 255, 65 N. W. 627.

A. forged a telegram in the name of B., requesting a national bank at Charleston, Ill., to forward $500 to B., at Gainesville, Fla. Upon the receipt of this telegram, B.'s agent gave his note for the money, which B. subsequently paid, and the bank forwarded the money by express, the package being addressed to B. at the Arlington House, Gainesville. The agent of the express company at Gainesville delivered the package to a stranger, without any further identification than that an hotel keeper, known to said agent as a reliable person, accompanied

if it delivers them to the consignee without the surrender or cancellation of the bill of lading.[39]

§ 3618. Use by Carrier of Connecting Carrier's Cars.—Where a carrier delivers its cars to a connecting carrier for transportation of stock to a stockyard, it is entitled to charge a reasonable amount for the use of its cars, and, if they are not returned within a reasonable time, it may sue the connecting carrier for damages or obtain a mandatory injunction to compel a return of the cars.[40]

§§ 3619-3633. Delay in Transportation or Delivery—§ 3619. Liability in General.—Where property is transported over several railroads constituting a connecting line, neither company is agent of the owner, but each exercises an independent employment as a contractor with the owner, and is responsible for its own negligence, and can not make the owner responsible for the negligence of a connecting road.[41] In an action against a railroad company where unreasonable delay is complained of, and the loss of a market, it is not sufficient for the plaintiff to prove delay merely on the part of the defendant, where it appears that there was delay also on the part of connecting lines, and that, had it not been for such delay, no loss would have occurred.[42]

§§ 3620-3628. Liability of Initial Carrier—§ 3620. In General.—If there be no special contract, a carrier is bound, if goods are directed to a place beyond its line, to deliver them over to the custody proper to insure due transport, and if it is guilty of improper delay it is liable in damages.[43] A railroad company, under a special contract to furnish cars for the transportation of goods over its own and connecting lines to a city where the consignor intends to sell them, and to transport them over its own line within a specified time, will be liable, if it fails to furnish the cars and deliver them, with their freight, to the connecting lines within the time specified, for any loss the consignor may sustain from a fall in the market price after the date fixed for delivery, though the connecting line would not have transported the cars if duly delivered to it as required by the contract.[44] Under a special contract to deliver a car load of apples to a connecting line within a given time, so as to avoid the danger of cold weather, the first carrier is liable for damage to the apples by freezing, while

the stranger, and treated him as B. Held, that the company, though the last carrier, was liable to B. for the loss of the money. Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

39. **Delivery to consignee without surrender or cancellation of bill of lading.**—The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them, with a proper waybill, to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if the transit had continued, pledged, in the usual course of business, to an innocent pledgee, for value. Held, the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper. Ratzer v. Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530.

40. **Use by carrier of connecting carrier's cars.**—Louisville, etc., R. Co. v. Central Stockyards Co., 97 S. W. 778, 30 Ky. L. Rep. 18.

41. **Liability for delay on railroads constituting a connecting line.**—Sherman v. Hudson, etc., R. Co., 64 N. Y. 254, affirming 5 Daly 521.

42. Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031.

43. **Duty and liability of initial carrier in general.**—Rome R. Co. v. Sullivan, etc., Co., 25 Ga. 228.

A carrier is liable for injury to horses shipped, resulting from an unreasonable delay in delivering them to a connecting line. Felton v. McCreary-McClellan Live Stock Co., 59 S. W. 714, 22 Ky. L. Rep. 1058.

44. **Liability under special contracts.**—East Tennessee, etc., R. Co. v. Nelson, 41 Tenn. (1 Coldw.) 272.

being transported over the connecting line, caused by the former's delay in delivering them.[45]

§ 3621. Delay Resulting from Failure to Conform to Shipper's Directions or to Give Proper Notice to Succeeding Carrier.—Where a railroad company is accustomed to receive directions from shippers as to forwarding goods at the end of its line, and the company does not conform to the directions given by the shipper, it is liable for delay in the transportation of the goods.[46] Where a railroad company receives freight for shipment under an agreement to forward it to its destination, and a stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," the duty of the company, as forwarding agent, continues till the goods arrive at their ultimate destination, and it is therefore liable for any delay caused by its failure to notify each successive connecting road of the conditions of the contract in respect to the manner of transportation.[47] If a railroad company, outside of its regular contract, and without an additional consideration, undertakes to deliver a car on the line of another road, and it is the custom in such cases to notify the other road of the delivery of the car, its destination, and name of the consignee, and it fails to give such notice, the company is liable for delay in transportation resulting from failure to give the notice.[48] But where, in an action against an initial carrier for damages to a car load of potatoes by delay in transportation, the evidence indicated that by far the greater part of the loss occurred through the unexplained delays of the carriers other than defendant, it could not be made liable as an insurer for the total loss, because its agent, on transferring the potatoes to the next connecting carrier, neglected to add to the waybill a direction to notify a particular person of the arrival of the car at its destination, whereby the delay was extended three days, before such person received notice of the arrival of the car, when on inspection he found them so badly decayed that he was compelled to refuse them.[49]

§ 3622. Delay Caused by Carrier's Failure to Feed and Water Stock.—In the absence of any custom to the contrary, the carrier last receiving a through shipment of live stock during the prescribed period for feeding and watering must feed and water the stock; but, where by custom such duty is undertaken by the initial carrier before delivery to the connecting carrier, and it fails to perform the duty, whereby the stock is delayed in shipment, resulting in loss, the initial carrier is responsible therefor, even though the injury does not develop until the stock has passed into the possession of the connecting carrier, or until the stock has arrived at destination.[50]

§§ 3623-3628. Delay of the Succeeding, or of a Subsequent, Carrier—§ 3623. Liability in Absence of Statute, Contract, or Traffic Agreement.—The initial carrier is not liable for the negligence of the succeeding, or of a subsequent, carrier in delaying a shipment of freight,[51] in the ab-

45. Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. Compare Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

46. **Failure to conform to shipper's directions.**—Michigan, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

47. **Agreement to forward shipment to destination.**—Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

48. **Failure to give customary notice to succeeding carrier.**—Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762.

49. Starks Co. *v.* Manistee, etc., R. Co., 131 N. W. 99, 165 Mich. 518.

50. **Failure to feed and water stock.**—Wisecarver *v.* Chicago, etc., R. Co., 141 Iowa 121, 119 N. W. 532.

51. **Rule as to liability of initial carrier for delay of the succeeding, or of a subsequent, carrier.**—Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Carter *v.* Chicago, etc., R. Co., 146 Iowa 201, 125 N. W. 94, so holding as to a shipment of live stock; Meredith *v.* Seaboard, etc., R. Co., 137 N. C. 478, 50 S. E. 1.

Where one carrier receives goods for

sence of a statute imposing such liability,[52] or of a contract, express or implied,[53] or of a partnership or traffic agreement which makes the two lines practically one.[54] Where an initial carrier delivers freight to the connecting carrier within a reasonable time, such initial carrier is not liable for a delay subsequently occurring.[55] Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible, by reason of his delay, for injury to fruit by freezing while in custody of such subsequent carrier.[56] But it has been held that recovery may be had of the initial carrier for injury to perishable goods, shipped over connecting lines, caused by negligent delay in transportation, though each carrier was guilty of such delay; there being no evidence that the damages were caused solely by the delay of the subsequent carriers.[57] An agent of an initial carrier of live stock has no authority to assure a shipper that his check will be accepted by the last carrier at the place of destination, and therefore such initial carrier is not liable for delay in getting the stock from its cars, occasioned by refusal of the last carrier to accept the check.[58] Where goods are routed over a particular railroad, and by mistake the initial carrier routes them over another which delays them in transit, the initial carrier is liable with the latter jointly for the delay.[59] The initial carrier in such a case is alone liable for expenses incurred by the consignee in removing the goods where the expenses would not have been incurred if the goods were rightly routed.[60]

transportation part of the way to destination, and delivers the goods at the end of its carriage to another carrier for carriage to destination, the contract is several; and there may be a suit only against the carrier that is liable for delay of transportation. Delaney *v.* United States Exp. Co., 70 W. Pa. 502, 74 S. E. 512.

52. See post, "Liability Imposed by Statute," § 3624.

53. Carter *v.* Chicago, etc., R. Co., 146 Iowa 201, 125 N. W. 94; Meredith *v.* Seaboard, etc., R. Co., 137 N. C. 478, 50 S. E. 1.

In an action against a carrier for damages for failure to deliver peaches in time, whereby they were damaged, plaintiffs alleged that defendant contracted to deliver the peaches in New York, which was denied by defendant, which claimed that its agreement was to deliver to a connecting line, and the evidence was conflicting. The court instructed that if there was no contract defendant's liability would depend on the common law, and it would be liable if, by reason of unreasonable delay in forwarding the peaches, they reached New York in a damaged condition. Held, that the instruction was erroneous, since, in the absence of a contract to deliver in New York, defendant would only be liable for failure to deliver in good condition and within a reasonable time to the connecting carrier. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

54. Carter *v.* Chicago, etc., R. Co., 146 Iowa 201, 125 N. W. 94; Rocky Mount Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 689; Meredith *v.* Seaboard, etc., R. Co., 137 N. C. 478, 50 S. E. 1. See post, "Effect of Traffic Arrangements between Carriers," § 3633.

55. Watson *v.* Atlantic, etc., R. Co., 59 S. E. 55, 145 N. C. 236.

Where no association exists, and no special contract is made, and goods are delivered to a railroad for transportation to a place beyond its terminus, the railroad discharges its duty by safely conveying the goods over its own road and delivering them to the connecting road within a reasonable time. Meredith *v.* Seaboard, etc., R. Co., 50 S. E. 1, 137 N. C. 478.

In the absence of a through contract for the shipment of goods destined beyond the carrier's line, it is the carrier's duty to deliver the goods at its terminus to the connecting carrier in good order and in due time and thereupon its liability ceases. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228.

56. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

57. St. Louis, etc., R. Co. *v.* Coolidge, 83 S. W. 333, 73 Ark. 112, 67 L. R. A. 555, 108 Am. St. Rep. 21.

58. Louisville, etc., R. Co. *v.* Bennett, 76 S. W. 408, 25 Ky. L. Rep. 834.

59. Liability where initial carrier routes goods over wrong road.—Illinois Cent. R. Co. *v.* Hopkinsville Canning Co. (Ky.), 116 S. W. 758.

60. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co. (Ky.), 116 S. W. 758.

§ 3624. Liability Imposed by Statute.—Under a statute making connecting carriers agents of each other, and making either liable for all damages for delay in delivery, caused by any of them, the fact that a part of a delay in delivering freight occurred while it was in the possession of a terminal company at destination, will not relieve the delivering carrier from liability though such carrier charged and collected for delivery at the place of delivery and actually delivered it there.[61]

§ 3625. Liability under Contract.—A carrier contracting to deliver freight at a point beyond its own line is liable for unreasonable delay in transportation or delivery caused by the fault of a connecting carrier.[62] A railroad company issuing a bill of lading marked, "Prompt shipment required," assumes responsibility for delay of a connecting carrier.[63]

What Constitutes a Contract for Through Transportation.—Certain contracts between carriers and shippers which have been construed by the courts to determine whether they constitute contracts for through transportation beyond the carrier's line will be found in the appended note.[64] The marks on

61. **Liability of initial carrier under South Carolina statute.**—Farmers', etc., Cotton Co. *v.* Atlantic, etc., R. Co., 89 S. C. 398, 71 S. E. 991, construing Act May 13, 1903 (24 St. at Large, p. 1).

62. **Liability of carrier under contract for through transportation.**—Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228; S. C., 32 Ga. 400; Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92; Central R. Co. *v.* Dwight Mfg. Co., 75 Ga. 609; Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Aultman Engine, etc., Co. *v.* Chicago, etc., R. Co., 143 Iowa 561, 121 N. W. 22.

Where a carrier issues a bill of lading for the transportation of goods to a destination beyond its own line, it binds itself to deliver at the point of destination, and is liable for delays of a connecting carrier, unless there be some limitation in liability in the bill of lading. Carter *v.* Chicago, etc., R. Co., 146 Iowa 201, 125 N. W. 94.

Where the defendant carrier has received freight under a special through contract of shipment, to be transported to destination over other lines, and not having in any manner limited its legal liability, it is bound, by itself or competent agents, to deliver the goods at destination within a reasonable time, and is liable for damages resulting from the negligence of such agents in failing to so deliver as it would be for such negligence upon its own line. Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

Where a carrier has undertaken to transport goods of a shipper from one point to another, the fact that a delay in their delivery was caused by the fault of another carrier, by whom a part of the transportation was performed, but who has no contractual relation with the shipper, is no defense to an action against the first carrier for damages for the delay. St. Louis, etc., R. Co. *v.* Edwards, 78 Fed. 745, 24 C. C. A. 300.

Where a railroad company contracts to convey goods over its own and connecting lines, and to deliver them at their destination, at a place beyond its terminus, within a certain time, it is liable to the shipper for losses caused by delays in transportation over the connecting roads. Pereira *v.* Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988.

When a railroad company contracts to ship stock to a given point, it is bound to forward and deliver it at that point within a reasonable time. It will not be released by a delivery to another connecting road, but will still be liable for any unreasonable delay, although the same is caused by the crowded condition of such road. Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627.

Where a railroad company contracts to carry freight from St. Paul to Chicago, its obligation as a common carrier does not cease at St. Paul, merely because that is the eastern terminus of its line, so as to relieve it from responsibility for unreasonably delaying the transportation of the freight. Baldwin *v.* Great Northern R. Co., 83 N. W. 986, 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370.

63. **Liability under bill of lading marked "prompt shipment required."**—Salley *v.* Seaboard, etc., Railway, 76 S. C. 173, 56 S. E. 782.

64. **Agreement held a contract for through transportation.**—A railroad extending from Atlanta to West Point, Ga., received at Atlanta goods consigned to Dallas Tex., and fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among the carriers, itself included, to New Orleans, and assessing the balance for transportation beyond New Orleans. Held, that the contract was a through contract, and bound the initial company for performance to Dal-

goods shipped by a carrier to be delivered beyond the terminus of its line refer to their ultimate destination, but are not evidence of a contract to carry beyond its line which will make it liable for delay caused by a succeeding carrier.[65]

§ 3626. Delay Resulting from Succeeding Carrier's Inability to Receive or Forward Goods.—Failure of a carrier contracting to transport goods to a designated point to forward and deliver them at such point within a reasonable time will render it liable, irrespective of its knowledge or ignorance that a connecting carrier could not forward the goods without unreasonable delay.[66] Where, while goods received by the first carrier are in transit, the connecting line notifies it that it can not receive the goods and transport them to their destination because of a block in freight, this will not relieve the first from liability for damages caused by the delay, where it fails to notify the shipper and give him an opportunity to dispose of the property or take measures for its preservation.[67] The initial carrier of live stock is bound to know whether the connecting line is prepared to continue the transportation at the point of connection

las, the point of destination, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments. Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600.

Agreements held not to be contracts for through transportation.—A contract for the shipment of live stock was made by using a printed blank. Following an acknowledgment of the receipt of the stock by the carrier were the printed words, "To be delivered at * * *," and here was inserted in writing the words, "Consigned to T., B. & Co., Chicago, Ill." The further agreement was expressed that, where stock should pass over more than one road to reach its destination, the company upon whose road any damage should occur should alone be liable therefor. Held, that this was not an agreement on the part of the carrier to transport the stock to Chicago, if in fact its line of transportation did not extend to that point, and the first carrier is not liable for damage caused by delay occurring on the line of a succeeding carrier. Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Where a contract of shipment between plaintiff and defendant railway company provided, "Whereas, the said R. has this day shipped car of hogs, to be carried by the R., N., I. & B. R. R. from Irvine, Ky. to Richmond(both points on its own line of road), and by it, as agent of shipper, to be forwarded to C. & E., at Cincinnati, Ohio, on same terms as this contract," an instruction authorizing the jury to find against the defendant for any delay, or damage to the hogs, after the delivery of the car containing the hogs to the connecting line of another railroad company at Richmond, is error. Richmond, etc., R. Co. *v.* Richardson, 43 S. W. 465, 19 Ky. L. Rep. 1495.

65. **Marks on goods not evidence of contract for through transportation.**—Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228.

66. **Delay resulting from succeeding carrier's inability to receive or forward goods.**—Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627.

But under the California statute, Civ. Code, § 2196, declaring a carrier liable for delay only when caused by want of ordinary care, and § 2201, stating that a carrier accepting freight for a place beyond its route must, unless otherwise stipulated, deliver to a connecting line, when its liability ceases, a carrier receipting for goods to be shipped beyond its line, with the stipulation that it will not be responsible as carrier any further, is not liable for delay in delivering the goods to the connecting carrier, due to the latter's inability to receive them. Palmer *v.* Atchison, etc., R. Co., 101 Cal. 187, 35 Pac. 630.

67. Petersen *v.* Case, 21 Fed. 885; Helliwell *v.* Grand Trunk Railway, 10 Biss. 170, 7 Fed. 68; Great Western R. Co. *v.* Burns, 60 Ill. 284; Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296.

To whom notice of coal embargoes should be given.—Where a quantity of coal was purchased from a fuel company, which was selling for each of several mine operators in a specified coal district, and which, to keep track of each mine's business, would designate the mines from which the coal came, though the coal was shipped by the constituent mining companies "on account" of the fuel company, the fuel company, and not the mining operator, would be regarded as the shipper to which the carrier was required to give notice of coal embargoes on connecting lines. Chesapeake, etc., R. Co. *v.* O'Gara, etc., Co., 111 Ky. 561, 139 S. W. 803.

without undue delay, and to inform the shipper if it is not; and if, from any unusual and unexpected cause, the connecting carrier can not, when the stock reaches the end of the initial line, furnish facilities for continued transportation, it is the duty of the initial carrier either to promptly forward the stock by some other route, or to notify the shipper of the facts, and for its failure to do so is liable for any injury which results from unreasonable delay.[68]

§ 3627. Liability Where Connecting Carrier Refuses to Receive Goods.—Where a connecting carrier, over whose line a shipment is routed, refuses to receive and transport the same, in the absence of notice of such refusal to the consignor, the initial carrier is liable for the exercise of ordinary care and prudence in selecting another carrier to transport the consignment, and is liable for injuries to the consignment caused by delay resulting from the selection of a carrier having a circuitous route, which might have been avoided.[69] If a carrier, or his servant within the scope of his employment, enters into a special contract to deliver goods in a particular time, or at a particular place, even beyond the terminus of its route, it will be liable in damages to the owner of the goods if it fails to do so, even though the next carrier would not have shipped the goods if tendered or delivered in time.[70]

§ 3628. Defenses in Actions for Delay.—In the appended note will be found cases in which defenses set up by ititial carriers in actions against them for delay in transportation were held insufficient to preclude a recovery.[71]

68. Duty and liability of initial carrier of live stock.—Louisville, etc., R. Co. *v.* Farmers', etc., Comm. Firm, 107 Ky. 53, 52 S. W. 972, 21 Ky. L. Rep. 708.

69. Liability where connecting carrier refuses to receive goods.—Louisville, etc., R. Co. *v.* Duncan, 137 Ala. 446, 34 So. 988.

70. East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272. Cited in East Tennessee, etc., R. Co. *v.* Rogers, 53 Tenn. (6 Heisk.) 143, 19 Am. Rep. 589.

71. Defenses held insufficient to preclude recovery.—Nonperformance of a special agreement of a carrier to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful when made, and was not rendered unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation because of the character of the freight. Decree, Farmers' Loan, etc., Co. *v.* Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

If a through contract for the shipment of goods destined beyond the carrier's terminus is made and the carrier fails to deliver them at their destination within a reasonable time and the goods are damaged thereby, the shipper is entitled to recover such damages as he sustains by reason of the delay, whether or not the route by which the shipment was to be made was indicated. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Where a notice of coal embargoes by an initial carrier to the shipper did not inform the shipper that all future consignments would only be received at the shipper's risk, such initial carrier, on subsequently receiving coal from the shipper for transportation beyond its own lines, in the absence of a special contract to the contrary, assumed the obligation to carry the coal within a reasonable time and deliver the same to proper connecting carriers, notwithstanding the notice, and was therefore liable for damages caused by delay. Chesapeake, etc., R. Co. *v.* O'Gara, etc., Co., 139 S. W. 803, 144 Ky. 561.

Where goods were billed for shipment to a point beyond the terminus of a railroad, with a direction to notify a third person, and on their arrival at the terminus the railroad notified the third person, and on his order retained them at that point for a week, it is liable for the delay; the order from the third person not being sufficient to justify it. Judgment 98 N. Y. S. 609, 112 App. Div. 612, affirmed in Isham *v.* Erie R. Co., 85 N. E. 1111, 191 N. Y. 547.

Where a carrier by rail undertook to transport goods to a point beyond its terminus, the transfer from the terminus to the destination to be made without charge to the shipper, the carrier was liable for delay at its terminus. Judgment 98 N. Y. S. 609, 112 App. Div. 612, affirmed in Isham *v.* Erie R. Co., 85 N. E. 1111, 191 N. Y. 547.

§§ 3629-3632. Liability of Intermediate or Last Carrier—§ 3629. In General.—Where a carrier receives goods on a contract made with the owner, or his agent to carry them to their destination, beyond the terminus of its line, and while in the course of transportation they come into the hands of a connecting carrier, by whose negligence there is unreasonable delay in delivering them at destination, the latter is liable in an action of tort for the delay,[72] though there be no contract relations between the two companies, nor any contract between the owner of the goods and the company causing the damages.[73] If fruit trees and shrubbery are destroyed by the cold, in the hands of an intermediate carrier, by reason of unreasonable delay, or if, by such delay in transportation or in delivering to the next carrier in the line, the latter can not, by reasonable efforts, transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss.[74] But although a carrier may be guilty of unreasonable delay in transportation, he will not be liable for a loss caused by cold weather, if he delivers the freight to the next company in the line in sufficient time for it, by reasonable diligence, to transport and deliver to the consignee before injury by the cold.[75]

§ 3630. Delay Caused by a Preceding or Subsequent Carrier.—An intermediate or last carrier is not liable, in the absence of a contract imposing such liability, or of a partnership or other joint interest between the carriers, for delay in the transportation or delivery of goods caused by a preceding or subsequent carrier, or the agent of such a carrier.[76]

72. **Negligence causing unreasonable delay.**—Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121; Cohen *v.* Southern Exp. Co., 53 Ga. 128. See, also, East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809.

Plaintiff contracted with a railroad for the shipment of cattle by way of a connecting carrier to a station on a third railroad, and the shipping railroad issued a waybill which stated that the freight money for the entire distance had been paid. The agent of the connecting carrier was notified of such fact, but, in delivering the cattle to the third railroad, stated that the freight was unpaid, by reason of which such latter railroad refused to deliver the cattle till the freight was paid, till informed some time later of the mistake by the shipping railroad. Held, that such action of the connecting carrier's agent was negligence making such carrier liable for damages arising from the delay in the delivery. Missouri, etc., R. Co. *v.* Dilworth (Tex. Civ. App.), 65 S. W. 502, judgment affirmed in 67 S. W. 88, 95 Tex. 327.

In an action against a railroad company for delay in delivering a shipment, defendant claimed that the delay was caused by the mistake of the connecting carrier who delivered the shipment to it, and that such carrier was the owner's agent in delivering the goods. It appeared that defendant's negligence contributed to, if it was not the sole cause of, the delay. Held that the defendant was liable. Sherman *v.* Hudson, etc., R. Co., 64 N. Y. 254, affirming 5 Daly 521.

73. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

74. **Goods destroyed by cold by reason of unreasonable delay.**—Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324.

75. Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324.

76. **Last carrier not liable, in absence of contract for delay occurring on other lines.**—Where the initial carrier in its bill of lading issued to plaintiffs undertook to transport goods to their destination without any mention of connecting lines, in an action for damages caused by delay against the last carrier, which was not a party to the contract, it is error to instruct that if defendant was one of the connecting lines over which the goods were shipped it would be liable for unreasonable delay, whether such delay occurred on its own line or not. East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809.

Last carrier, in absence of joint interest, not liable for delay of a preceding carrier.—In absence of proof of a partnership or other joint interest existing between two connecting carriers, the final carrier if itself without fault is not liable for delay on the line of the initial carrier. Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410, modifying judgment 120 S. W. 1146.

Where a carrier gives a bill of lading undertaking to ship freight to a station named, which is beyond the terminus of its line, and makes no mention of the carrier on whose line the station is located, which latter has no privity or contractual relation with the initial carrier, so far as appears and no connection with the shipment until delivered to it by an intermediate line, it is error to

§ 3631. Liability of Second Carrier to First Carrier for Delay in Receiving Goods.—A shipowner can not recover from a connecting carrier damages caused by the latter's refusal for some days to receive the ship's cargo, where it is not alleged that such delay was tortious or inexcusable.[77]

§ 3632. Insufficient Excuses for Delay.—A railroad company receiving cattle from another carrier, though received on Sunday, for transportation over its road, is bound to forward the stock without unnecessary delay.[78] Where a railroad company receives goods from a connecting road, to be transported to the owners, it can not justify their detention on the ground that, by its regulations, goods so received are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods.[79]

§ 3633. Effect of Traffic Arrangements between Carriers.—Where two railroad corporations enter into a traffic arrangement, and associate themselves as a "fast freight line," and a shipper contracts with the general agent of such associated line for the shipment of freight over the line, the companies are jointly liable under the contract for damages resulting from delay in the transportation of the freight irrespective of the portion of the line on which such delay occurs.[80] Where connecting railroads hold themselves out of the public as a through line for the transportation of freight, and the initial carrier so acts for itself and for the others by receiving a shipment which it agrees to carry to its destination, guarantying the through freight, and providing for certain terms in behalf of other carriers, which it designates as "a part of the through line," the contract is that of the initial carrier, and it is liable for any default of its connecting lines in not delivering the shipment in a reasonable time.[81]

§§ 3634-3672. Loss of or Injury to Cars, Goods, or Live Stock—§ 3634. Loss of or Injury to Cars.—Railroad companies in transporting, for hire and under their exclusive control, the cars of other companies or persons, are liable as common carriers, for their safety, in the absence of a special contract to the contrary.[82] But in such case, after the transporting carrier has

charge that if the delivering carrier is one of the connecting lines over which the goods are to be shipped, it will be liable for unreasonable delay in the delivery of the shipment, whether such delay occurs on its line or not. East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809.

Railroad company not liable for delay caused by dispatch companies' agent.—Defendant, as intermediate carrier, contracted to haul to the seacoast cotton shipped with certain dispatch companies under a through bill of lading. It was defendant's custom, on arrival of cotton at the coast, to give notice to the dispatch companies' agent, named in the waybill as consignee, whose duty it was to obtain a permit from the steamship company for delivery thereto, and deliver the permit to defendant, on receipt of which defendant would deliver the cotton on lighters to the proper vessel. On arrival of the cotton, defendant gave prompt notice to the agent, and urged him to obtain the permit, which he failed to do. Held, that defendant was not liable to the shipper for delay in delivery. Whitworth *v.* Erie R. Co., 87 N. Y. 413.

77. **Liability of second carrier to first carrier for delay in receiving goods.**—Freeman *v.* Louisville, etc., R. Co., 32 Fla. 420, 13 So. 892.

78. **Cattle received on Sunday must be forwarded without unnecessary delay.**—Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

79. **Regulations providing for detention of goods until receipt of a bill of back charges.**—Dunham *v.* Boston, etc., R. Co., 70 Me. 164, 35 Am. Rep. 314; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

80. **Effect of traffic arrangements between carriers.**—Rocky Mount Mills *v.* Wilmington, etc., R. Co., 25 S. E. 854, 119 N. C. 693, 56 Am. St. Rep. 682.

81. Cummins *v.* Dayton, etc., R. Co. (Ind.), 9 Am. & Eng. R. Cas. 36.

82. **Liability of railroad companies in transporting cars of other companies.**—*Illinois.*—Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 596; Peoria, etc., R. Co. *v.* United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348.

Kansas.—Missouri Pac. R. Co. *v.*

delivered the cars to the consignee and they are no longer in its control, its liability ceases.[83] Where railroad cars containing freight are shipped over a connecting line of railroad to a certain point, to be delivered to the consignee of the goods to be unloaded, after which the carrier is again to take the cars to its yards for storage and keep them there until called for, the liability of the carrier as an insurer of the cars will be suspended during the time of such stoppage, during which it has no control of the cars, and will not again attach until after the cars have been unloaded and made ready for removal to the place of storage.[84] A carrier which undertakes to haul another carrier's car over its

Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899, 2 Am. & Eng. R. Cas., N. S., 560.

Massachusetts.—Vermont, etc., R. Co. *v.* Fitchburg R. Co., 14 Allen 462, 92 Am. Dec. 785.

New York.—Lansberg *v.* Dinsmore, 4 Daly 490; Mallory *v.* Tioga R. Co., 39 Barb. 488.

If a railroad company take a car for transportation over their road, and, though it remain on its own trucks, take sole possession and care of it, they are responsible as common carriers. New Jersey R., etc., Co. *v.* Pennsylvania R. Co., 27 N. J. L. 100.

In Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506, it appeared that defendant company's principal business was switching cars for other railroad companies; that its tracks were connected with those of such other railroads by a transfer switch, and with mills, elevators and manufactories in and around the city where its business was transacted; that the plaintiff company brought a car, loaded with freight, to the city, and placed the same on the transfer track, with orders to defendant to ship the same to a certain distillery, to which place it was taken and unloaded; that when unloaded it was taken by defendant, without orders from plaintiff, to a sugar refinery, to be loaded, and then switched to the transfer track for shipment; and that on the same day such refinery was burned, and also the car. It was held, that defendant was liable as a common carrier to plaintiff for the value of the car.

A railroad company by special contract with another and connecting railroad company agreed to draw over its own railroad the cars of the latter company with their passengers and freight, for a certain specified compensation; and the latter company agreed to save the transporting company harmless from all claims and damages arising from any injury to passengers, or loss of or damage to baggage, goods and freight, while in transit over the same, unless such injury, loss or damage should be clearly shown to arise from the negligence or default of the transporting company, or from some defect in its road, in which case the claims, damages and loss were to be borne by the transporting company. Certain cars so received and drawn under this contract were injured while in transit in consequence of a defect in the railroad track of the transporting company, which defect was caused without the company's fault. Held, that the transporting company were liable to the other company therefor, either upon the contract, or else as common carriers. Vermont, etc., R. Co. *v.* Fitchburg R. Co. (Mass.), 14 Allen 462, 92 Am. Dec. 785.

Locomotive—Plaintiff's fireman and engineer under control of defendant's conductor.—In Terre Haute, etc., R. Co. *v.* Chicago, etc., R. Co., 150 Ill. 502, 37 N. E. 915, it appeared that a railroad company undertook to transport a locomotive of the plaintiff company to a certain point over its road; that the locomotive was placed on defendant's road in charge of its conductor, and a fireman and engine driver of plaintiff operated such engine under the control of such conductor, their duties being merely mechanical and they having no authority to say when the engine should start or at what station it would be sidetracked to allow trains of defendant to pass. It was held, that if the engine was injured while being so transported, through the negligence of the defendant's conductor, defendant was liable.

83. Liability ceases upon delivery of cars to consignee.—A railroad delivered certain of its cars loaded with coal to defendant, a connecting company, to be by it delivered to the consignee, and the cars to be returned to plaintiff. Defendant delivered the cars to the consignee, who took charge of them, and placed them on a private switch in its yard. On the day of the delivery, and before the cars were unloaded, and before they were redelivered to defendant, they were accidentally destroyed by fire. Held, that defendant was not liable, as the cars were out of its control. East St. Louis Connecting R. Co. *v.* Wabash, etc., R. Co., 123 Ill. 594, 15 N. E. 45, reversing 24 Ill. App. 279.

84. Liability of carrier as insured suspended during stoppage for unloading.—Peoria, etc., R. Co. *v.* United States Rolling Stock Co., 136 Ill. 613, 27 N. E. 59, 29 Am. St. Rep. 348.

track is liable for damages to the car caused by its derailment owing to the car being of a narrower gauge than the track, as the condition of the car could have been discovered by inspection before the carrier received it.[85] A terminal carrier is a bailee of cars of other railroads in its possession, which have been unloaded, while being held for reloading, and not a common carrier, and therefore not liable for their destruction by fire without negligence.[86]

§§ 3635-3672. Loss of or Injury to Goods or Live Stock—§ 3635. In General.—In the absence of a stipulation restricting its liability, any carrier, on whose line loss or injury to property transported by it occurs, is responsible to the owner therefor.[87] Thus, where goods are shipped to be transported by several successive carriers, the carrier in whose possession they are when destroyed or injured is liable, as such, to the owner or consignee, for the loss.[88] But a carrier is not liable beyond its own line, unless by contract it undertakes an extended liability,[89] or unless such a liability is imposed by statute.[90] Thus,

85. **Damages caused by car being of narrower gauge than track.**—New Jersey R., etc., Co. *v.* Pennsylvania R. Co., 27 N. J. L. 100.

86. **Liability for destruction of unloaded cars being held for reloading.**—Central, etc., R. Co. *v.* Milledgeville R. Co., 75 S. E. 614, 138 Ga. 434.

87. **Carrier liable for loss or injury occurring on its line.**—St. Louis, etc., R. Co. *v.* Kilberry, 83 Ark. 87, 102 S. W. 894. See, also, Texas, etc., R. Co. *v.* Warner, 42 Tex. Civ. App. 280, 93 S. W. 489, affirmed in 101 Tex. 664.

88. Packard *v.* Taylor, etc., Co., 35 Ark. 402, 37 Am. Rep. 37; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

89. **Carrier not liable beyond its own line.**—*United States.*—Stewart *v.* Terre Haute, etc., R. Co., 3 Fed. 768, 1 McCrary 312.

Kentucky.—Louisville, etc., Mail Co. *v.* Levey & Co., 11 Ky. L. Rep. 286; Louisville, etc., R. Co. *v.* Crozier, 13 Ky. L. Rep. 175; Louisville, etc., R. Co. *v.* Cooper, 13 Ky. L. Rep. 496; Cincinnati, etc., R. Co. *v.* Greening, 100 S. W. 825, 30 Ky. L. Rep. 1180; Baltimore, etc., R. Co. *v.* Clift, 142 Ky. 573, 134 S. W. 917.

Maine.—Skinner *v.* Hall, 60 Me. 477.

A carrier is not liable for injuries to goods unless they occurred while in its care and control. Reason *v.* Detroit, etc., R. Co., 150 Mich. 50, 113 N. W. 596.

One railroad is not responsible for loss occurring on another; and it was not error to so charge, where it was doubtful from the evidence whether goods, for the loss of which suit was brought, were ever received by the road sued. McCaffrey & Co. *v.* Georgia Southern Railroad, 69 Ga. 622.

In an action against one or several carriers for injuries to live stock, none of them will be responsible for damages occurring beyond the end of the lines controlled by them in the absence of a special contract. Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513.

Before the enactment of Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1909, p. 1166), and Code Ala. 1907, § 5546, in effect making the initial carrier responsible for any loss or injury caused by any carrier to which the property is delivered, or over whose line it passes, each of several connecting carriers was responsible only for loss occurring on its own line. Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

90. **Statutes construed.**—The Georgia statute, Civ. Code 1895, § 2317, providing that when freight that has been shipped to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of either shall cease on delivery to the next "in good order," has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier, on application by the shipper, to trace such freight and inform the applicant where, how and by which carrier the same was lost, damaged, or destroyed, and § 2318, making a carrier which shall fail to comply with section 2317 liable for the value of the freight are by the express terms of § 2317 applicable only where, under the contract of shipment or by law, the responsibility of each carrier is to cease on delivery to the next carrier "in good order," and are inapplicable where the responsibility does not so cease. Atlantic, etc., R. Co. *v.* Henderson, 61 S. E. 1111, 131 Ga. 75.

The South Carolina statute, 24 St. at Large, p. 81, § 2, providing for the recovery of loss or damage to freight, does not impose on one connecting carrier liability for the default of another, unless such carrier obtains and gives information, or uses due diligence, as provided by Civ. Code 1902, § 1710, by furnishing information as to when the loss or damage occurred. Venning *v.* Atlantic, etc., R. Co., 58 S. E. 983, 78 S. C. 42, 12 L. R. A., N. S., 1217.

where parts of a continuous line of transportation are owned by different carriers, between whom no connection exists, in the absence of a special contract each is liable only for injuries occurring on its portion of the line.[91] A carrier is not liable for damages to merchandise occurring after delivery thereof to the next carrier in the regular course of transportation to the place of destination.[92] But where goods are injured after delivery to a carrier, and before they are delivered to a connecting carrier, or after they are received back from the connecting carrier on a return to the point of shipment, it is liable.[93] Where goods are carried over connecting lines to destination and there refused by the consignee, and the shipper in writing appoints a company operating one of the lines his agent to return the goods to him and agrees to save harmless from any suit or damage arising therefrom, it does not imply a verbal contract on the part of such carrier to transport over all connecting lines so as to render it liable for loss of the goods on the return, without its fault, and not on its own road.[94]

Carrier's Negligence Resulting in Damage after Delivery to Another Carrier.—A carrier is liable for damage to goods resulting from its negligence, though the damage may not actually occur until after the goods are delivered to a connecting carrier.[95]

Injury to Goods Held for Payment of Freights Advanced to Connecting Lines.—A carrier is not liable for injury occurring without its negligence or fault to goods held by it for payment of freights advanced to connecting lines.[96]

91. Each of connecting carriers only liable for injuries occurring on its portion of line.—Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394; Bissel *v.* Price, 16 Ill. 408; Hunt *v.* New York, etc., R. Co. (N. Y.), 1 Hilt. 228.

The rule as to transportation by connecting lines of railroads is that each company is only bound, in the absence of a special contract, to carry safely over its own route, and deliver safely to the next carrier. Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

A connecting carrier is not liable for a loss not occurring on its portion of the through route, unless it stands in the relation of principal and agent, or partner, or some similar relation to the defaulting carrier. Chesapeake, etc., R. Co. *v.* Stock & Sons, 51 S. E. 161, 104 Va. 97.

When goods are shipped for transportation over several connecting railroads, each of which is owned by a separate company, each company is, under the laws of Georgia, responsible only to its own terminus and until delivery to the connecting road. Baugh *v.* McDaniel, 42 Ga. 641.

Where goods are shipped without any other direction than that they shall be forwarded by a particular line, and that line is made up of several connecting lines, the liability of each carrier is limited to his own possession of the goods as a means of transportation. Jacobs *v.* Hooker (N. Y.), 1 Edm. Sel. Cas. 472.

Where, in an action against a carrier for loss of freight, the undisputed evidence showed that the goods were delivered to the carrier, and that the loss occurred while in its possession, the liability of a connecting carrier was not involved, and the validity of Act May 13, 1903 (24 St. at Large, p. 1), defining connecting carriers, and fixing their liabilities, was not in issue. De Lorme *v.* Atlantic, etc., R. Co., 60 S. E. 440, 79 S. C. 370.

92. Carrier not liable for damages occurring after delivery to next carrier.—Gray *v.* Jackson & Co., 51 N. H. 9, 12 Am. Rep. 1; Mullarkey *v.* P. W. & B. R. Co. (Pa.), 9 Phila. 114.

93. Carrier liable for injury to goods while in its possession and control.—Reason *v.* Detroit, etc., R. Co., 113 N. W. 596, 150 Mich. 50.

94. No implication of contract imposing liability for loss on another line.—Erie R. Co. *v.* Cappel, 80 O. St. 128, 88 N. E. 144, 22 L. R. A., N. S., 945.

95. Carrier's negligence resulting in damage after delivery to another carrier.—Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 101.

Where a carrier separated two cars of potatoes while they were in transit, so that the caretaker was prevented from attending to one of the cars and the potatoes therein were frozen, the carrier was liable, notwithstanding the potatoes may not have frozen until after they were delivered to a connecting carrier. Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 101.

96. Injury to goods held for payment of freights advanced to connecting lines.—Georgia R., etc., Co. *v.* Murrah, 85 Ga. 343, 11 S. E. 779.

Carrier Assuming Responsibility of Tracing Shipment.—A carrier who on demand of the shipper has accepted and assumed the responsibility of tracing the shipment and reporting delivery if made, so that the shipper might enforce payment of the consignee, can not thereafter claim that its responsibility in that respect terminated on delivery to a connecting carrier.[97]

What Law Governs.—Where one of several connecting carriers, who have formed a joint arrangement for a continuous line, receives goods in one state to be transported over the entire line, and the goods are lost by an intermediate carrier in another state, the rights of the parties will be governed by the laws of the latter state.[98]

§§ 3636-3645. Liability of Initial Carrier—§ 3636. For Loss or Injury on Its Own Line or before Delivery to Succeeding Carrier.—When goods are delivered to a common carrier to be transported beyond its own line, the carrier is subject to the same liability, for loss or damage sustained by them while on its own road, as where goods are received for transportation entirely over its own route, and this common-law liability remains until it has delivered the goods for transportation to the next carrier.[99] The initial carrier's liability as an insurer of freight does not terminate, nor that of the next carrier begin, so long as there remains something to be done by the initial carrier before the entire control of the freight is relinquished to such next carrier.[1] Where a carrier is unable to deliver the goods to the next designated carrier, he should notify the shipper or consignee, and failure to give such notice, if possible,

97. Liability of carrier assuming responsibility of tracing shipment.—Atlantic, etc., R. Co. *v.* Schirmer & Sons, 87 S. C. 309, 69 S. E. 439.

98. What law governs.—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

99. Liability of initial carrier for loss or injury before delivery to succeeding carrier.—Railroad Co. *v.* Manufacturing Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510; Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265; Hadd *v.* United States, etc., Exp. Co., 52 Vt. 335, 36 Am. Rep. 757. See, also, Bissel *v.* Price, 16 Ill. 408.

Where it is the general usage of a railroad company, in reference to goods carried by it to its terminus and marked for points beyond, to transfer them to the next carrier, and the shipper contracts with reference to this usage, the company will be liable as carriers for injury to the goods received before such transfer was completed. Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

Where a common carrier conveys goods over a portion of the route between the points of shipment and consignment, and holds them for delivery to some connecting carrier, the liability of the former in respect to such goods does not thereby cease, but continues until the latter has had a reasonable time to take them away. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

1. *United States.*—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336; Bosworth *v.* Chicago, etc., R. Co., 30 C. C. A. 541, 87 Fed. 72.

Alabama.—Mt. Vernon Co. *v.* Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687; S. C., 84 Ala. 173, 4 So. 356.

Arkansas.—Hot Springs R. Co. *v.* Trippe & Co., 42 Ark. 465, 48 Am. Rep. 65; Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680, 42 R. R. R. 619, 65 Am. & Eng. R. Cas., N. S., 619.

Connecticut.—Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Palmer *v.* Chicago, etc., R. Co., 56 Conn. 137, 13 Atl. 818.

Illinois.—Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

Massachusetts.—Judson *v.* Western R. Corp., 4 Allen 520, 81 Am. Dec. 718.

New York.—Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616, 3 Am. R. Rep. 390; Livingston *v.* New York, etc., R. Co., 76 N. Y. 631; Rogers *v.* Wheeler, 52 N. Y. 262.

Pennsylvania.—Deming *v.* Norfolk, etc., R. Co., 17 Phila. 540.

Tennessee.—Kentucky, etc., Fire Ins. Co. *v.* Western, etc., R. Co., 67 Tenn. (8 Baxt.) 268.

Where there has been no delivery of goods by the initial carrier prior to their destruction by fire, the goods having arrived, but no notification of their arrival having been given to the succeeding carrier, nor possession delivered to the latter company, and they are still under the absolute control and in the possession of the initial carrier and nothing has been done to terminate its common-law liability at the time the fire occurs, the initial carrier is liable. Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253.

renders him liable for any resulting loss.[2] Where an initial carrier turns a car containing a shipment of animals over to the connecting carrier, and it is placed on a transfer track belonging to the initial carrier, but operated and controlled entirely by a third carrier, being used by it to make transfers from its tracks to those of the two other carriers, the initial carrier is not liable for injury there occurring to the animals, on the theory that it occurred to them while in its possession or under its control.[3] If the initial carrier merely stores freight in a warehouse of its own, whence the other carrier is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier, not the last, is answerable for its value.[4] Where goods are in transportation over several connected roads, operated under a general understanding that goods reaching the terminus of one road, intended for the next one in the line, may be deposited in its depot without any formal delivery and acceptance, such deposit terminates the liability of the first road; and if, after such deposit, the goods are destroyed by the burning of the depot of the second company, the first company is not liable to the owner for the loss, even though there is no proof that the goods were taken manually in charge by agents of the second company.[5] The liability of the initial carrier for loss of or injury to goods before delivery to the succeeding carrier is sometimes determined by express contract between such carrier and the owner of the goods. The peculiar provisions of certain contracts of this character have been interpreted by the courts.[6]

2. Carrier's duty to notify shipper or consignee when unable to deliver.—Fisher *v.* Boston, etc., R. Co., 59 Atl. 532, 99 Me. 338, 68 L. R. A. 390, 105 Am. St. Rep. 283.

3. Delivery sufficient to terminate carrier's liability.—St. Louis, etc., R. Co. *v.* Randle, 107 S. W. 669, 85 Ark. 127.

4. Storage by carrier in its warehouse insufficient to terminate liability.—Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130.

In an action for the loss of goods, it appeared that defendant received the goods, consigned to a point on the line of a connecting carrier whose line and defendant's formed a continuous line, on which a joint or through tariff of rates had been established, and that the goods were destroyed, while in defendant's warehouse, before delivery to the connecting carrier. Held, that the owner, in delivering the goods to be carried through, contemplated a contract of carriage, and not of storage, and that the defendant's liability as a carrier did not cease until it had delivered the goods to the connecting carrier, or given it notice of their arrival, and a reasonable time had elapsed for the latter to receive them. Wehmann *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

Goods destined for S., a place beyond D., but directed to F. at D., were transported by the defendant, upon its road, from B. to D. On the day of their arrival at the latter place, they were called for by the carrier who was to carry them from D. to S. The defendant, owing to other engagements of its agent, was not ready to make the delivery when called for, and it was mutually agreed, for the convenience of both parties, that the goods should remain in defendant's warehouse, where they were, until the next morning. During the night the warehouse took fire, by accident, and the goods were consumed. It was held that the responsibility of defendant as a common carrier continued until the goods should be actually delivered to the next carrier. Fenner *v.* Buffalo, etc., R. Co. (N. Y.), 46 Barb. 103.

5. Effect of understanding that deposit of goods in depot terminates liability.—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

6. Contracts construed.—A railroad corporation contracting to transport flour, and deliver it "on board" at D., is liable as a common carrier for its loss by fire in their warehouses at D., before final delivery "on board." Moore *v.* Michigan Cent. R. Co., 3 Mich. 23.

Defendant railroad company received for shipment to Liverpool two car loads of lumber, and issued its bill of lading, providing as follows: "This contract is executed and accomplished, and all liability thereunder terminated, on the delivery of the said property to the steamship, * * * or on the steamship pier at the said port (Newport News), etc." It was held that the placing of the lumber on the pier of defendant at such port, under its own exclusive control and custody, was not sufficient to relieve it of its liability as a common carrier for damages for the loss of the lumber. Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

Where goods had not at the time of a fire passed into the actual custody of the connecting carrier and the contract ex-

§ 3637. Liability of a Forwarder.—Where goods are shipped by a forwarder on the first steamer leaving the port of consignment according to the custom of the parties, and the vessel on which they are shipped is not unseaworthy at the time of her departure, the forwarder is not liable for the loss of the goods.[7]

§ 3638. Liability for Loss Occasioned by Failure to Transmit Consignor's Instructions to Succeeding Carrier.—A common carrier is liable for any loss occasioned by his neglect to transmit to the next carrier en route the consignor's special instructions as to transportation.[8]

§ 3639. Effect of Failure to Give Name of Consignor to Connecting Carrier.—A common carrier of goods is not required, in transferring goods to a second carrier, to ship them otherwise than as directed by the shipper, and where the directions given by the shipper as to the shipment omits to give the name of the consignor, the carrier will be guilty of no negligence because it fails to give the name of the consignor, upon delivering the goods to the second carrier.[9]

§ 3640. Liability for Loss Caused by Delay in Furnishing Cars.—An initial carrier is liable for the entire loss of goods caused by shrinkage and fall of market price caused by delay in furnishing cars to receive the shipment.[10]

§§ 3641-3645. Liability for Loss or Injury by the Succeeding or by a Subsequent Carrier—§ 3641. In General.—If there is no partnership or special business relationship between connecting carriers, a carrier receiving goods or live stock destined to a point beyond the line of its road, is, in the absence of a statute or contract imposing a greater liability, bound to carry them safely only to the end of its line, and there deliver them to the next carrier in the route; and it will not be held liable for the loss of such goods or live stock or any injury happening to them after such delivery,[11] provided it did

pressly declared that if any carrier was liable for their destruction that one alone should be liable in whose actual custody the goods were when destroyed, the initial carrier could not escape responsibility by showing that the connecting carrier could, by reasonable diligence, have taken actual custody prior to the fire. In other words, it could not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them into its actual custody. Texas, etc., R. Co. *v.* Clayton, 173 U. S. 348, 43 L. Ed. 725, 19 S. Ct. 421.

A bill of lading issued by a carrier by water obligated the carrier, in consideration of a certain sum, to carry the goods to destination, if on its line, "otherwise to deliver to a connecting carrier," and by another provision of the bill no carrier was to be liable for damage to the goods "after ready for delivery to the next carrier." The terminal carrier, a railroad, the line of which connected with the carrier by water, had no agent at the place of destination, and hence required prepayment on goods billed to such point. The carrier by water tendered the goods to the railroad at its freight depot, but the railroad refused to receive them without prepayment of the railroad's charges, and the goods while there were damaged and were lost so far as the consignee was concerned. Held, that the carrier by water was liable, as it was its duty to have paid the railroad its charges. Lehigh Valley Transp. Co. *v.* Post Sugar Co., 81 N. E. 819, 228 Ill. 121, affirming judgment 128 Ill. App. 600.

7. **Liability of a forwarder.**—Fowle *v.* Pitt, 183 Mass. 351, 67 N. E. 343.

8. **Loss occasioned by failure to transmit consignor's instructions to succeeding carrier.**—Little Miami R. Co. *v.* Washburn, 22 O. St. 324.

As where the letters "N. M. R. R." were omitted from a freight waybill, and, although on the package, did not come to the notice of the second carrier, and the goods were lost by going to another than the North Missouri Railroad Company. Little Miami R. Co. *v.* Washburn, 22 O. St. 324.

9. **Effect of failure to give name of consignor to connecting carrier.**—Indianapolis, etc., R. Co. *v.* Murray, 72 Ill. 128.

10. **Loss caused by delay in furnishing cars.**—Midland Valley R. Co. *v.* Adkins, 36 Okla. 15, 127 Pac. 867.

11. **Liability of initial carrier terminates upon safe delivery to succeeding carrier.**—*United States.*—St. Louis, Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S.

146, 26 L. Ed. 679; Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 90 Fed. 467, 33 C. C. A. 611; Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Indiana.—Pennsylvania Co. *v.* Dickson, 67 N. E. 538, 31 Ind. App. 451.

Iowa.—Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790.

Kansas.—Hoffman *v.* Union Pac. R. Co., 56 Pac. 331, 8 Kan. App. 379.

Kentucky.—Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637, Louisville, etc., R. Co. *v.* Cooper, 42 S. W. 1134, 19 Ky. L. Rep. 1152; Illinois Cent. R. Co. *v.* Holt, 92 S. W. 540, 29 Ky. L. Rep. 135; Thomas *v.* Frankfort, etc., R. Co., 76 S. W. 1093, 116 Ky. 879, 25 Ky. L. Rep. 1051.

Maryland.—Hoffman *v.* Cumberland Valley R. Co., 37 Atl. 214, 85 Md. 391.

Michigan.—Rickerson Roller-Mill Co. *v.* Grand Rapids, etc., R. Co., 34 N. W. 269, 67 Mich. 110.

Minnesota.—Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

New York.—Root *v.* Great Western R. Co., 45 N. Y. 524, reversing 2 Lans. 199; Berg *v.* Narragansett Steamship Co., 5 Daly 394.

Oklahoma.—St. Louis, etc., R. Co. *v.* Carlile, 35 Okla. 118, 128 Pac. 690.

Rhode Island.—Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46; Harris *v.* Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305.

Texas.—Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing judgment 86 S. W. 47; Gulf, etc., R. Co. *v.* Brown, 99 Tex. 349, 89 S. W. 971, reversing judgment 86 S. W. 54; Missouri Pac. R. Co. *v.* Ryan, 2 Texas App. Civ. Cas., § 430; Ft. Worth, etc., R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414; Houston, etc., R. Co. *v.* Park, 1 Texas App. Civ. Cas., § 332; Hunter *v.* Southern Pac. R. Co., 76 Tex. 195, 13 S. W. 190.

Vermont.—Hadd *v.* United States, etc., Exp. Co., 52 Vt. 335, 36 Am. Rep. 757.

Virginia.—McConnell *v.* Norfolk, etc., R. Co., 86 Va. 248, 9 S. E. 1006.

In the absence of a special contract, a common carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier. Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Where freight is delivered by the initial carrier in good condition and without unreasonable delay to a connecting carrier for shipment to destination, the liability of the initial carrier on account of the shipment ceases. Southern R. Co. *v.* Vaughn, 38 So. 500, 86 Miss. 367.

A carrier who has no business connection with another line, but receives goods to be carried beyond its own line, receiving pay only for transportation over its own route, is not, in the absence of special contract, liable for loss occurring beyond its own line. Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130.

A railroad company receiving goods consigned to a point on the line of a connecting carrier under an agreement to transport them to the terminus of its own road is neither at common law nor by statute answerable therefor after their safe delivery to the connecting line named in the contract of shipment. Fremont, etc., R. Co. *v.* Waters, 70 N. W. 225, 50 Neb. 592.

A contract obligating a carrier to deliver goods beyond its own lines may be implied from facts and circumstances attending the shipment, but, in the absence of such contract, the carrier is not liable for loss beyond its own line. Crawford *v.* Southern R. Ass'n, 51 Miss. 222, 24 Am. Rep. 626.

As a general rule, carriers doing business between certain points, and not undertaking personally for the carriage of freight to any further points, but merely engaging to forward it to its destination through the established lines of transportation beyond, can not be responsible, as common carriers, for the freight after they have delivered it to such other carriers for transportation to its destination. Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Goodrich *v.* Thompson, 27 N. Y. Super. Ct. 75; Stannard *v.* Prince, 64 N. Y. 300; American Exp. Co. *v.* Second Nat. Bank, 69 Pa. 394, 8 Am. Rep. 268.

A carrier who receives goods as a carrier, and not as a forwarder, and forwards them to their destination from the end of his line, in the exercise of a sound discretion, can not be held responsible as common carrier for any subsequent loss, although it failed to give notice of its action to the owner or consignor. Cramer *v.* American Merchants' Union Exp. Co., 56 Mo. 524.

An express company which has received a package for transportation beyond its own route is not liable for its loss after its delivery to another common carrier at the end of such route in accordance with the usual custom of business. United States Exp. Co. *v.* Rush, 24 Ind. 403.

In a suit against an express company for goods lost in transit beyond its line of conveyance the evidence showed no payment for the whole route, and no understanding, usage, or agreement that the company assumed to be responsible for the goods after they left its own line. Held, that it was only bound under its contract or undertaking to transport them safely to the point on its line nearest the place of destination and then to deliver them to the proper carrier to be forwarded, and that, having done this, it was not responsible for the subsequent

not result from its negligence prior thereto.[12] This rule, which is eminently just and reasonable, is supported by the great weight of authority in this country. But in some states it has been held that in the absence of a stipulation

loss. Coates *v.* United States Exp. Co., 45 Mo. 238.

A box marked "J. P., Little Falls," was delivered at New York, on board a towboat plying between New York and Albany, but interested in no boats west of Albany, with no specific directions as to its delivery. The towboat delivered the box, at Albany, to a regular canal boat, going west. On board the canal boat, the box was opened and robbed. Held, that the liability of the towboat as a carrier ceased at Albany, on delivery to the canal boat. At Albany it became a forwarder. Van Santvoord *v.* St. John (N. Y.), 6 Hill 157, reversing 25 Wend. 660.

Goods were received on board a sloop, to be carried from New York to Troy, where the carriers transferred them to a canal boat, pursuant to the owner's directions, but received no reward for the transfer or for further transportation. They were held not liable for the loss of the goods by the upsetting of the boat, their character of carriers having ceased at Troy, and they having used due care in placing the goods in a safe boat. Ackley *v.* Kellogg (N. Y.), 8 Cow. 223.

12. Negligence of initial carrier causing loss or injury after delivery to succeeding carrier.—If a carrier fails to furnish proper cars for a shipment and injury results to the goods from a defect in a car, the carrier is liable, although the injury may have occurred beyond such carrier's line. St. Louis, etc., R. Co. *v.* Marshall, 86 S. W. 802, 74 Ark. 597.

Where a carrier takes horses for transportation beyond its own line, and transfers them to an unsuitable car, and they are thereby injured, it is liable for the loss. Eckert *v.* Pennsylvania R. Co., 60 Atl. 781, 211 Pa. 267, 107 Am. St. Rep. 571.

Where a shipper receives an injury beyond the line of the initial carrier, caused by a defective appliance on the car, even though the connecting carrier is charged with the duty of inspecting the car, its failure to do so will not relieve the initial carrier from responsibility for negligence in assigning the shipper a defective car. Blatcher *v.* Philadelphia, etc., R. Co., 31 App. D. C. 385.

Where lambs for shipment, before being loaded, drank salt water that the carrier negligently allowed to flow into its stock yard, without the knowledge of the owner, the carrier is liable for the death of the lambs resulting therefrom, though the death did not occur until they were in the possession of a connecting carrier. Norfolk, etc., R. Co. *v.* Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855.

Plaintiff shipped cattle over defendant railroad company's line, to a point on another line, the bill of lading providing that he should load, unload, and transfer them at his own cost. At a point on defendant's line, the cattle were unloaded and fed and reloaded by defendant, though plaintiff was present and willing to do so, and, in reloading, some of plaintiff's cattle were placed in the cars of another shipper. Held, that the mistake was defendant's and it was liable for any loss sustained by plaintiff, though such loss occured on the line of the connecting carrier; since it was the result of its own negligent act, committed before the cattle were delivered to the connecting carrier. Norfolk, etc., R. Co. *v.* Sutherland, 89 Va. 703, 17 S. E. 127.

In an action against two carriers for damages to the shipment during transit over their lines, the court instructed that if the initial carrier in reloading the shipment did not exercise ordinary care, and such failure was the proximate cause of the damage, while on the line of the terminal carrier, the jury should find for the terminal carrier over against the initial one such damages as occurred between those points, and also instructed that, if the initial carrier exercised ordinary care, the jury should not find against it anything for damages occurring on the line of the terminal carrier, and that, if a part of the damage occurred on each of the roads, the jury should find against each defendant the damages that occurred on its line without the fault of the other. Held, that the instructions fairly presented the law. Texas, etc., R. Co. *v.* Warner, 42 Tex. Civ. App. 280, 93 S. W. 490, affirmed in 101 Tex. 664, no op.

Description in waybill sufficient to enable intermediate carrier to determine who consignees were.—A waybill of iron rails received by defendant for transportation over several successive lines stated that it was a "waybill of merchandise transported by the F. R. R. from C. to B., Nov. 27, 1852. (Consignees) Ogdensburgh R. R. (Description of the articles) Rails, part lot." The rails were not delivered to the consignee, but were taken by an intermediate carrier, and used by it. Held, that defendant was not liable to the consignee on the ground that it was negligent in making out the waybill, as the description was sufficient to enable the intermediate carrier to determine who the consignees were. Northern R. Co. *v.* Fitchburg R. Co. (Mass.), 6 Allen 254.

restricting liability, the acceptance of goods for transportation by a carrier consigned to a place beyond its line, implies an undertaking on its part to transport them safely to the place to which they are consigned, and to be responsible for loss or injury occurring on the line of a connecting carrier.[13]

§ 3642. Statutory Exemption from Liability.—In some states there are statutes expressly exempting an initial carrier from liability for loss of or injury to goods after safe delivery to the succeeding carrier. The peculiar provisions of some of these statutes have been interpreted by the courts.[14]

13. **Undertaking implied from acceptance of goods consigned to place beyond line.**—*Alabama.*—Mobile, etc., R. Co. *v.* Copeland, 63 Ala. 219, 35 Am. Rep. 13.

Arkansas.—Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742.

Georgia.—Rome R. Co. *v.* Sullivan, etc., Co., 32 Ga. 400; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37; Southern Exp. Co. *v.* Shea, 38 Ga. 519; Cohen *v.* Southern Exp. Co., 45 Ga. 148; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749; Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891; Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265; Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58, overruling Baugh *v.* McDaniel, 42 Ga. 641.

Illinois.—Chicago, etc., R. Co. *v.* Montfort, 60 Ill. 175; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Adams Exp. Co. *v.* Wilson, 81 Ill. 339; Elgin, etc., R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311, affirmed in 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218; Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389.

Tennessee. — East Tennessee, etc., R. Co. *v.* Rogers, 53 Tenn. (6 Heisk.) 143, 19 Am. Rep. 589; Western, etc., Railroad *v.* McElwee, 53 Tenn. (6 Heisk.) 208; Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253; Louisville, etc., R. Co. *v.* Weaver, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 6 Am. St. Rep. 847.

Where a railroad company receives goods to be transported beyond its terminus, and delivered to a named person at a particular place, a contract is implied that the carrier will cause the goods to be transported to their destination without loss or damage, and such railroad will be liable for any loss or damage that may occur before the goods reach their destination. Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58.

14. **Statutory exemption from liability.—Under the Georgia statute** Civ. Code, § 2298, providing that a railroad company shall be liable under its contract of affreightment only to its own terminus, and until delivery to the connecting road, where no contract of freight was entered into between plaintiff and defendant, binding it to transport his goods beyond its line, defendant was not liable for injuries on the connecting line. Felton *v.* Central, etc., R. Co., 40 S. E. 746, 114 Ga. 609.

Code, § 2084, provided that where there are several connecting railroads under different companies, and goods are intended to be transported over more than one road, each company shall be responsible only to its own terminus, and, until delivery to the connecting road, the last company which received the goods in good order being liable to the consignee for any damage thereto. Held, that this statute applied only to cases where there was no contract, express or implied, by the first company, to carry the goods to their destination. Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58, overruling Baugh *v.* McDaniel, 42 Ga. 641.

The Oklahoma statute, Comp. Laws 1909, § 514, exempts an initial carrier from liability for default of the connecting carrier, but does not exempt it from liability for damages occurring on the connecting carrier's line, where the latter is free from fault and the loss was caused by default of the initial carrier. Midland Valley R. Co. *v.* Adkins, 36 Okla. 15, 127 Pac. 867.

Under this statute the liability of an initial carrier ceases when it delivers the freight to a competent connecting carrier in the direction of the destination thereof. Chicago, etc., R. Co. *v.* Walker, 119 Pac. 993, 29 Okla. 856.

The South Dakota statute, Comp. Laws, § 3905, provides that, if a common carrier accepts freight for a place beyond his line, unless he stipulates otherwise, he must deliver it at the end of his line to some other competent carrier, and that his liability shall cease on making such delivery. Held, that an instruction in an action for a loss in shipment, which imposed on the receiving carrier a con-

§ 3643. Liability Imposed by Statute.—By statute in some states, carriers receiving goods for transportation beyond their own lines are liable for loss or damage sustained on the lines of a connecting carrier, unless they exempt themselves therefrom by contract with the shipper.[15] Such statutes, so long as

tinued liability beyond his own line, and covering the negligence of the connecting carrier, was erroneous, since under the statute the liability of the receiving carrier ceased on delivery of the goods to the connecting carrier. Sutton *v.* Chicago, etc., R. Co., 84 N. W. 396, 14 S. Dak. 111.

15. Liability imposed by statute.—Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335, construing § 1295, Va. Code, of 1887; Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755, construing Missouri Rev. Stat. 1889, ch. 26, § 944; Dimmitt *v.* Kansas, etc., R. Co., 103 Mo. 433, 15 S. W. 761, construing Rev. St. 1879, § 598.

The Nebraska statute, Comp. St. 1893, c. 16, § 111, providing that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers," and that "whenever two or more railroads are connected together, the company owning either of said roads receiving freight to be transported to any place on the line of either * * * shall be liable as common carrier for the delivery of the freight to the consignee * * * in the same order in which such freight was shipped," does not render a receiving company, which has only contracted to deliver to the connecting carrier, liable for the latter's default. Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894.

Where freight addressed to a place beyond the route of a common carrier receiving it is lost or injured, the shipper may demand information from the first carrier, under the Oklahoma statute, St. 1893, § 511, that the injury did not occur on its line, and if such carrier fails to furnish within a reasonable time proof tending to show that it was not responsible, it will be held liable, whether in fact it was responsible or not. St. Louis, etc., R. Co. *v.* McGivney, 19 Okla. 361, 91 Pac. 693.

The purpose of this statute is to put the shipper in possession of the information which is in the first carrier, so that he may determine what carrier caused the injury and obtain satisfaction without being compelled to bring a multiplicity of actions. St. Louis, etc., R. Co. *v.* McGivney, 19 Okla. 361, 91 Pac. 693.

A receipt within the South Carolina statute, Code 1902, § 2176, making initial carrier liable for loss of goods shipped over it and connecting lines, unless it produces a receipt in writing, is not required to be in any particular form, and evidence of a freight agent of the railroad company testifying from a record of his office, known as the "per diem sheet," that the goods shipped were received on a waybill on a certain date and transferred to a car of another railroad company for such railroad company, and were receipted for by them at a certain hour on that day, was sufficient. Jonesville Mfg. Co. *v.* Southern Railway, 58 S. E. 422, 77 S. C. 480.

The South Carolina statute, Gen. St. § 1513 ("General Railroad Act"), provides that, in case of loss or damage to articles delivered to any corporation for transportation over its own and connecting roads, the initial corporation first receiving the same shall in every case be liable for such loss, but may discharge itself by the production of a written receipt for the articles from the corporation to whom it was its duty to deliver the articles: provided, however, that if either or any of the railroad corporations should willfully fail or refuse to produce such receipts, then it shall not be entitled to claim the benefits of such exemption, etc. Held, that the act was intended to include a steamship company which happens to be one of the common carriers in a through line of transportation agreed upon by the parties. Miller *v.* South Carolina R. Co., 33 S. C. 359, 11 S. E. 1093, 9 L. R. A. 833.

Plaintiffs shipped goods on defendant's railroad for Buffalo, N. Y., and defendant delivered them to a steamship company, the first connecting line for the point of destination. The goods did not reach their destination. When the evidence of delivery was demanded of defendant by plaintiffs, they did not indicate whether they wished the receipt of the steamship or of the railroad corporation next in the line of transportation. Held, that as the above statute had not then been construed, and it was therefore doubtful whether the receipt of the steamship company would suffice to discharge defendant, its delay in producing it was not a willful failure or refusal, within the meaning of the proviso of the act. Miller *v.* South Carolina R. Co., 33 S. C. 359, 11 S. E. 1093, 9 L. R. A. 833.

The receiving clerk of the steamship line testified that he "recollected the receipt of the goods by referring to my receipts." Being shown the receipts, which identified the goods, and were signed by him, he testified that they were records of the office, and that duplicates were furnished defendant. Held, that production of these duplicates was sufficient to discharge defendant. Miller *v.* South Carolina R. Co., 33 S. C. 359, 11 S. E. 1093, 9 L. R. A. 833.

they merely regulate the form of the contract of exemption, are not unconstitutional as interfering with interstate commerce.[16] Under a Georgia statute,[17] if a carrier, on application, fails to trace freight carried by a connecting carrier, it becomes liable for the value of the freight lost or destroyed in the same manner and to the same extent as if the loss occurred on its line.[18]

§ 3644. Liability under Contract.[19]—Where a carrier has power to con-

16. **Constitutionality of statutes.**—Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335; Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755.

A statute providing that a carrier shall be liable for loss over the whole route, unless he exempts himself therefrom by special contract, and shows, within a certain time after the loss or damage of goods, that the injury was not sustained while the goods were in his charge, is but a regulation as to the form of his contract of exemption and is not unconstitutional as interfering with interstate commerce. Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335.

A statute of Missouri (Rev. Stat. 1889 ch. 26, § 944) provided that: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained." The supreme court of Missouri decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract, in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn. Held that the statute as thus interpreted was not repugnant to the Constitution of the United States. Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755.

17. Civ. Code, § 2318.

18. **Liability of carrier failing to trace freight—Georgia statute construed.**—Central, etc., R. Co. *v.* Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

Under this statute the carrier becomes liable for the negligence of the connecting carrier. Central, etc., R. Co. *v.* Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720.

Where, under the terms of a contract for carriage, a carrier obligated itself to carry freight to one of the termini of its railroad and there deliver it to a connecting line of railroad "or" steamers, to be transported to its destination, and such goods were delivered by the initial carrier to a carrier by water, and transported to their destination, and placed in the warehouse of such carrier by water, subject to the order of the consignee, such goods were not in fact at that time "lost," within Civ. Code, § 2318, so as to afford a right of acton in favor of the consignor against the initial carrier for failing to trace such freight. McElveen *v.* Southern R. Co., 34 S. E. 281, 109 Ga. 249, 77 Am. St. Rep. 371.

Where, in order to avail himself of the right of action afforded by Civ. Code, § 2317, et seq., the shipper of goods over connecting lines of railway merely gives notice to the initial carrier that the goods shipped have not been delivered to the consignee, claiming that they have never arrived at destination, and thereupon demands that such carrier shall trace the goods and "show delivery," he can not recover of it, under these sections, for injury done to the goods in transportation, where the goods were in fact delivered to the consignee prior to the service of such notice. Savannah, etc., R. Co. *v.* Austin, 29 S. E. 11, 101 Ga. 629.

19. As to whether the acceptance of goods for transportation by a carrier, consigned to a place beyond its line, implies an undertaking on its part to transport them safely to the place to which

tract for through carriage, and exercises such power in the proper manner, it is liable in all respects for loss or damage upon connecting roads as upon its own lines,[20] and in some states this liability is enforced by statute.[21] Under such a

they are consigned and to be responsible for loss or injury occurring on the line of a connecting carrier, see ante, "In General," § 3641.

20. Liability of initial carrier under contract for through transportation.—*United States.*—Railway Co. *v.* McCarthy, 96 U. S. 258, 24 L. Ed. 693; Railroad Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Illinois.—Bissel *v.* Price, 16 Ill. 408.

Kentucky.—Bryan *v.* Memphis, etc., F. Co., 11 Bush 597; Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637.

Mississippi.—Crawford *v.* Southern R. Ass'n, 51 Miss. 222, 24 Am. Rep. 626.

Missouri.—Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965.

New York.—Root *v.* Great Western R. Co., 45 N. Y. 524; Berg *v.* Narragansett Steamship Co., 5 Daly 394.

Texas.—Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

Washington.—Allen, etc., Co. *v.* Canadian Pac. R. Co., 42 Wash. 64, 84 Pac. 620.

The carrier with whom a contract of transportation is made is responsible for the safe carriage of the goods to the place of destination as fixed in the contract, both on its own route and on a subsequent route to which the goods may be transferred. Mallory *v.* Burrett (N. Y.), 1 E. D. Smith 234.

Where goods are received by a carrier for transportation, and a through bill of lading given, the shipper may elect to sue it for the negligence of a connecting carrier. Missouri Pac. R. Co. *v.* Twiss, 35 Neb. 267, 53 N. W. 76, 37 Am. St. Rep. 437.

An undertaking to deliver freight in good order at the place to which it is consigned makes the carrier liable for loss occurring beyond the terminus of its own road. Louisville, etc., Mail Co. *v.* Levey & Co., 11 Ky. L. Rep. 286.

The principle is well settled that railroad companies, as common carriers, may make valid contracts to transport property beyond the limits of their own roads, and, when they do, they are bound to deliver the property at its place of destination, according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control. Morse *v.* Brainerd, 41 Vt. 550.

Where a common carrier gives a bill of lading for goods to be delivered beyond its route, and does not by express agreement limit its liability to loss or injury suffered on its own line, it thereby binds itself for the safe delivery of the goods at destination, and is liable for injuries to the goods, whether on its own line or that of a connecting carrier. Southern R. Co. *v.* Levy, 39 So. 95, 144 Ala. 614.

A carrier of freight, who expressly contracts to deliver goods at a destination beyond the terminus of his own road, is answerable for the negligence of any connecting road in the line of transportation. Newell *v.* Smith, 49 Vt. 255. See, also, Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Where a carrier contracts to deliver property beyond its own line, thereby continuing its liability to the point of delivery, it becomes liable for any loss on the connecting line, though under the traffic agreement its trains, while on the connecting line, may be under the control of the connecting carrier; the latter in such case becoming the agent of the initial carrier, and its employees and agents becoming those of the initial carrier, for whose negligence it is liable to the shipper. St. Louis, etc., R. Co. *v.* Wallace, 118 S. W. 412, 90 Ark. 138, 22 L. R. A., N. S., 379.

Where a railway company's agent had authority to sign bills of lading for the company, and signed a bill of lading for a through shipment over the line of a connecting carrier, and it did not appear that the consignor or consignee looked to the responsibility of any other carrier in the event goods were lost, the company was liable for loss of the goods by a connecting carrier, for, having enlarged its liability by reason of such special contract, it must be held liable for the value of the goods lost. Bryan *v.* Memphis, etc., R. Co. (Ky.), 11 Bush 597.

21. The Georgia statute, Code, § 2055, provides that, where goods are handled by connecting carriers, each is only liable to the terminus of its line; but § 2041 provides that, if a special contract be made, the contract will govern. Defendant, whose road terminated at A., where it connected with another line, received cotton consigned to a point on the line of the connecting carrier, giving a receipt specifying that the cotton was "to be transported in turn to" the consignee in New York. Held that, since there was a special contract on the part of the defendant to carry the property to New York, defendant was liable for the value of a portion of the cotton destroyed by fire while in the possession of the connecting carrier. King *v.* Macon, etc., R. Co. (N. Y.), 62 Barb. 160.

Under the New York statute, Act 1847, c. 270, a railroad company receiving goods under an agreement for transpor-

contract, the shipper is not affected by notices placed in the station of the initial carrier by one of the connecting carriers.[22] If a carrier holds itself out as a carrier beyond the end of its line, and undertakes to transport goods beyond its terminus, it is liable for the loss of the goods on the line of a connecting carrier, though it has no through traffic arrangement with the connecting carrier.[23] A steamboat giving a bill of lading obligatory to deliver goods at a point outside of its route, with privilege of transshipment, is liable for a loss occurring while the goods are being transshipped in another vessel.[24] A carrier undertaking to forward goods beyond its own line is liable only until their safe arrival at their destination and storage in accordance with the usual custom, and the fact that they were transported over the last part of the distance by a steamboat company designated by the shipper does not continue such liability beyond the time the shipper is notified of their arrival, or may be presumed from his conduct to have had actual knowledge of the fact.[25] The judicial interpretation of a number of contracts made by initial carriers to determine whether they constitute contracts for through transportation will be found in the appended note.[26]

tation to a point beyond the terminus of its own road and upon the line of a connecting road, whether within or without the state, is responsible as a common carrier for these goods both upon its own line and upon the line of the connecting road. Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269.

22. Effect of notice of second carrier posted in station of first.—Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Where the second road posts its rules in the station house of the first, a person furnishing goods for transportation "through" is not to be held as of necessity to have notice of them from the fact of such posting, and because he was often in the station house of the first company where they were posted. Independently of which, his contract being with the first company only, and it agreeing to carry for the whole distance, its rules are the rules that are to govern the case. Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

23. Through traffic arrangement with connecting carrier not essential to liability.—Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

24. Through bill of lading by steamboat with privilege of transshipment.—Hirsch *v.* Leathers, 23 La. Ann. 50.

25. When carrier's liability terminates.—Illinois Cent. R. Co. *v.* Carter, 46 N. E. 574, 165 Ill. 570, 36 L. R. A. 527.

26. Contracts for through transportation.—Where a railroad gives a receipt for goods, stating they are to be delivered at a point beyond its route, it constitutes a contract to carry to such point, and it is liable thereunder for a loss beyond its route. Bryan *v.* Memphis, etc., R. Co. (Ky.), 11 Bush 597; Kyle *v.* Laurens R. Co. (S. C.), 10 Rich. L. 382, 70 Am. Dec. 231. See, also, Cohen *v.* Southern Exp. Co., 45 Ga. 148.

When a common carrier receives goods to be transported to a certain point of destination expressed upon the face of his receipt therefor, he undertakes to deliver the goods so received, either by his own line of transportation or that he will do so by his own competent agents for that purpose; and it is no defense, in case of the loss of the goods, for the carrier to show that his line of transportation stopped short of the place to which he undertook to carry the goods, especially when the fact as to the extent of his line of transportation was not known to the shipper of the goods, or communicated to him at the time of receiving the goods. Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37; Southern Exp. Co. *v.* Shea, 38 Ga. 519.

A shipper made a contract with a carrier for the transportation and delivery of freight at a certain place. Part of the service was performed by connecting carriers, but the contract was entire. Held, that the connecting carriers were only agents of the contracting carrier, which was liable to the shipper for damages he sustained. Monell *v.* Northern Cent. R. Co. (N. Y.), 67 Barb. 531.

The first of four connecting carriers, the last of which was a steamship company, agreed with the second that the first should receive goods to be forwarded to the end of the route and that the second carrier was to indemnify the first for loss beyond the first carrier's line. Bills of lading were issued for through transportation and the first collected the entire freight, giving the balance, after deducting its portion, to the second, which, in turn, gave it to the third, and then to the fourth. There was no arrangement between the first and the third and fourth carriers, not the second and fourth. Held, that the first carrier contracted for through transportation, and was liable for loss or injury at any point on the whole route. Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

Where a railroad company receives on

Place of Delivery of Goods as Affecting Carrier's Liability.—If a contract for through carriage is made, the fact that part of the goods are only delivered at the place where the second road begins does not affect the first carrier's liability.[27]

its cars, at the consignor's warehouse in a city, freight to be conveyed from the company's depot in another portion of the same city to a point of destination beyond its line, the cars being furnished at the request of the consignor, and the entire freight charges being paid by the consignor to such company for transportation of the goods from its depot, this company is the initial carrier, and is under a contract obligation to transport the goods to the point of destination, and responsible for any loss or damage of the goods in the course of such transportation; and it is immaterial that another railroad company owned the spur track leading from said warehouse to a point intermediate between there and said depot, and received compensation for trackage. Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

A carrier, who receives a consignment of freight under contract to transport it "to destination, if on its road, or otherwise to the place on its road where same is to be delivered to any connecting carrier," through rate of freight as designated being guarantied by the carrier, is liable for an injury on a connecting carrier's line, the car being treated as a through car, and sent to its destination without unloading. Judgment, 98 Ill. App. 311, affirmed in Elgin, etc., R. Co. *v.* Bates Mach. Co., 66 N. E. 326, 200 Ill. 636, 93 Am. St. Rep. 218.

Contracts held not to be for through transportation.—A bill of lading stating that the goods are consigned to plaintiff at P.; that they are to be transported to the carrier's warehouse at ———; that goods consigned to a place beyond its line will be forwarded, but that it will not be liable for loss occurring after they are forwarded.—is not a through contract, entitling plaintiff to recover against the first carrier for loss occurring by reason of a wrong delivery by the last carrier. Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

The plaintiff gave shipping orders to the defendant for the shipment of property to a point known by the plaintiffs to be off the defendant's line of road. By the terms of the contract of shipment, the defendant agreed to deliver the property "with as reasonable dispatch as their business would permit, subject to the conditions mentioned below, in like good order, at ——— station, upon the payment of charges." The company further agreed "to forward the property to the place of destination as per margin, but are not to be held liable on account thereof after the same shall be delivered as above." Held, that this was a contract to deliver the property at any point that might be selected by the company, upon its line of road, most convenient for forwarding to its place of destination, and not for through transportation, and the company was not liable for losses occurring beyond its line. Rickerson Roller-Mill Co. *v.* Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269.

Goods were delivered to a railroad corporation at Worcester to be carried to New York, and the freight was paid to it for the entire distance. They were receipted for as "for transportation." The shipper knew that the railroad terminated at Providence, whence they were to be carried the rest of the way by a steamer of another corporation, and that the freight money was to be divided between the corporations. In an action against the railroad corporation to recover for damage to the goods, happening upon the steamer, held, that the corporation was not a common carrier beyond the end of its road, and was not liable. Washburn, etc., Mfg. Co. *v.* Providence, etc., R. Co., 113 Mass. 490.

The fact that a letter written to a third person by an agent of the defendant carrier, stating that the carrier had perfected arrangements for through shipments by a certain route to a certain point beyond its destination and desired to secure shipments for that point, was shown by such person to the plaintiff, and the plaintiff thereafter made a shipment to the point designated, does not constitute the letter an express contract so as to bind the company for loss or delay occurring beyond its terminus, in the absence of notice by him to the carrier that the shipment was to be made in accordance with the terms of the letter. East Tennessee, etc., R. Co. *v.* Montgomery, 44 Ga. 278.

Under the California statute, Code Civ. Proc., § 2201, declaring that the liability of a carrier who accepts freight for a place beyond his route ceases on delivery to a connecting line, "unless he stipulates otherwise," a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through passage train service. Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

27. **Place of delivery of goods as affecting carrier's liability.**—Where the company owning the first of several connecting lines of railroad undertakes to

Contract to Deliver Live Stock at Point beyond Line.—Where a railroad company contracts for the through carriage of live stock beyond the terminus of its line, it is liable, in the absence of a stipulation to the contrary, for injury to the stock on the line of a connecting carrier.[28]

Guarantee That Car Is Suitable for Carrying Live Stock.—A carrier who guaranties that a car is suitable for carrying live stock is liable for injury to the stock caused by the defective condition of the car, whether the injury occurs on its own line or on the line of a connecting carrier.[29]

Contract to Re-Ice Car.—Where a carrier contracts for the through shipment of a carload of perishable goods, and agrees to re-ice the car on the line of a connecting carrier, or as often as necessary, it is liable for damages resulting from its failure to re-ice in accordance with such contract.[30]

Contract for Through Shipment by Carrier Not Authorized to So Contract Except by a Certain Route.—Where a carrier had no authority from connecting carriers to contract for through shipments except by a certain route, a shipper contracting for through shipment can not recover for damages to the shipment occasioned by their having gone that way instead of another, as requested, he knowing the limitation of the carrier's authority.[31]

§ 3645. Diversion of Freight from Route Stipulated.—Where a common carrier wrongfully substitutes another connecting carrier for the one named in the shipping contract, it becomes an insurer for the substituted carrier, and liable as such for loss of or injury to the freight while in the latter's possession.[32]

carry goods over the entire line, part of the goods being put aboard the cars on the first line, and part to be put on at its termination and where the next road begins, the fare asked and agreed to be paid being, however, the fare usually asked and paid for the carriage over the whole line, and the contract being for transportation over the whole road, and not for carriage to the end of the first line, and then for delivering to the carrier owning the next road and for carriage by him, the fact that a part of the goods were put on the cars only where the second road begins will not exonerate the owner of the first road from liability for their loss. Ogdensburg, etc., R. Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

28. **Liability under contract for through transportation of live stock.**—Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258, 24 L. Ed. 693; St. Louis, etc., R. Co. *v.* Randle, 85 Ark 127, 107 S. W. 669.

Where a carrier by parol contract undertook to deliver a shipment of live stock at a point beyond its line, and the stock was carried over the connecting line under a contract with the initial carrier, and not with the shipper, the initial carrier is liable for a loss resulting from the negligence of the connecting carrier. Louisville, etc., R. Co. *v.* Cooper, 56 S. W. 144, 21 Ky. L. Rep. 1644.

29. **Liability under guarantee that car is suitable for carrying live stock.**—Burnside, etc., R. Co. *v.* Tupman, 72 S. W. 786, 24 Ky. L. Rep. 2052.

30. **Liability under contract to re-ice car.**—A carrier receiving produce to be carried in its refrigerator car to a point beyond its lines and contracting to re-ice the car at two points, one on its line, and the other on the line of another carrier with which it had a through billing arrangement, is liable for the damage from failing to re-ice at such points. Pennsylvania R. Co. *v.* Orem, etc., Produce Co., 73 Atl. 571, 111 Md. 356.

Where a carrier gave a bill of lading for a car of perishable fruit for shipment beyond its own line, reciting the receipt of the goods in apparent good order, consigned from Michigan to another state, subject to the carrier's liability under the common law and statutes in force in the various states through which the goods might pass, and that the car was to be iced at G. and re-iced as often as necessary, the carrier issuing such bill was liable for damage to the fruit by reason of its failure or the failure of a connecting carrier to keep the car properly iced. Johnson *v.* Toledo, etc., R. Co., 95 N. W. 724, 133 Mich. 596, 103 Am. St. Rep. 164.

31. **Contract for through shipment by carrier not authorized to so contract except by a certain route.**—Judgment (Tex. Civ. App.), 86 S. W. 17, reversed in Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761.

32. **Diversion of freight from route stipulated.**—*Georgia.*—Georgia R. Co. *v.* Cole & Co., 68 Ga. 623.

Illinois.—Dunseth *v.* Wade, 2 Scam. 285; Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520.

New York. — Goodrich *v.* Thompson, 27 N. Y. Super. Ct. 75; Hernsfield *v.* Adams, 19 Barb. 577; Hinckley *v.* New York, etc., R. Co., 56 N. Y. 429; Johnson

The initial carrier is liable in such case even if the loss of the freight was caused by inevitable casualties.[33] Where a carload of freight routed over several connecting lines, under the contract of shipment, is diverted by the second carrier from the route specified, the initial carrier, if it participated in the diversion, is liable to the shipper for its loss.[34] If a carrier stipulates in writing that it may forward goods beyond the end of its route by any customary mode which is safe and prudent, such stipulation is binding upon the shipper, notwithstanding a previous oral agreement, not expressed in the written contract, that the forwarding of the goods beyond the carrier's route shall be by rail only.[35] Where a carrier unjustifiably substitutes another connecting carrier for the one named in the bill of lading the shipper does not waive his right to recover from the original carrier for the loss of the goods by making an effort, at its instance, to hold the substitute carrier.[36]

§§ 3646-3659. Liability of Intermediate or Last Carrier—§ 3646. In General.—The liability of a carrier as insurer for the safe delivery of property which has come into its possession is the same whether it was received directly from the owners or from another carrier to whom it was originally delivered.[37] Upon the delivery of the goods to a connecting carrier, it becomes liable as a common carrier,[38] subject at most only to the limitation stipulated for

v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416.

Tennessee.—Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

Wisconsin.—Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Where plaintiff ships over defendant's road goods marked, "Via P., care of A. Coast Line, by fast freight," and defendant delivers the goods at P. to a steamship company, in whose possession they are destroyed by fire, the question of proximate cause does not enter into the question of defendant's liability, as it was liable for breach of contract in not sending the goods by fast freight. Philadelphia, etc., R. Co. *v.* Beck, 125 Pa. 620, 17 Atl. 505, 11 Am. St. Rep. 924.

Manufacturers at North Adams, Mass., consigned goods to "T. W. & Co., Baltimore," the cases being marked "Railroad Line." At New York the carrier, instead of forwarding the goods by rail, forwarded them by a boat bound for Baltimore, and which was lost at sea. Held that, if the words "Railroad Line" plainly indicated an intention that the goods should be forwarded by rail so far as such a mode of transportation was practicable between North Adams and Baltimore, the forwarder was liable for the loss of the goods, though it was usual to forward goods by the boat. Ingalls *v.* Brooks (N. Y.), 1 Edm. Sel. Cas. 104.

A carrier received goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers, with the last of which the shipper had made an agreement for stopping the car at intermediate points on its line for delivery of portions of the goods. It, however, wrongfully sent the goods by different connecting carriers, whose lines reached but one of the intermediate points. On arrival of the goods there, the shipper disclosed his contract to have them distributed at the three points, and demanded compliance herewith. The carrier refused compliance until payment of freight for the whole route, when it delivered the goods destined to that point, and undertook, at its own cost, to carry to each of the other points the portion of the goods to be delivered there, and in doing so the goods were injured. Held, that the initial carrier, though it did not know of the shipper's agreement with the last connecting carrier, to which it was directed to deliver the goods, was liable for the damage. Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

33. Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

34. So held where a car load of fruit trees was so diverted. Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

35. Written contract as to route not affected by previous oral agreement.—Hinckley *v.* New York, etc., R. Co., 56 N. Y. 429.

36. Facts not constituting waiver of right to recover from initial carrier.—Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

37. Liability same whether property received from owner or another company.—Gulliver *v.* Adams Exp. Co., 38 Ill. 503.

38. Liability of connecting carrier upon delivery of goods to it.—Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

A connecting carrier is liable as a common carrier for any injury to the property while in its possession, unless relieved therefrom by the rules applicable to the transportation of that kind of property. Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

in its behalf by the first company.[39] Therefore, a connecting carrier in whose hands property is lost or injured is liable directly to the owner,[40] though there is no privity of contract between it and such owner.[41] If a connecting carrier, without express contract to carry and deliver, receives from another carrier money accepted by it for shipment, the connecting carrier will be liable to the owner in an action for money had and received, if it fails to account for or deliver the money.[42] The liability of an intermediate carrier in a through shipment where a loss of freight occurs on its line is not affected by the fact that the initial carrier is also liable.[43] A railroad company taking loaded cars from its connection with another railroad and transferring them by means of a switch engine over a portion of its own track to a spur of its own and receiving its compensation from the connecting road, acts as a common carrier, and is liable as such for the safety of the goods in the cars, no matter how short the distance from the place of receipt to that of delivery.[44]

§ 3647. Where Initial Carrier Contracts for Through Transportation. —In the absence of a partnership or authority to make its own contract binding upon all carriers over whose lines freight is to pass, connecting lines are but the agencies employed by the contracting carrier to perform its own contract.[45] It follows that in the absence of such partnership or authority the initial carrier has no power to make any contract which will bind the connecting carrier.[46] But if the connecting carrier be so situated in relation to the initial line that the law requires it to receive and carry freight tendered to it, it will be liable if it refuses to do so,[47] or, if it accepts the freight for transportation, it will be liable if it is lost or injured through a breach of its common-law duty.[48] But the lia-

39. Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

40. Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

When goods are delivered to a carrier for transportation over its route and that of several connecting lines to the destination point, the companies forming a continuous line, an intermediate carrier is liable for a loss of the goods occurring on its part of the line. Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

When a railroad company carrying cars belonging to, and to be transported over, a connecting line, has, at the point of connection and transfer, duly observed the regular course of business in making the transfer, the connecting line becomes charged with the duties of a common carrier as to the goods so transferred, and is answerable for damages resulting from subsequent delay or negligence. Livingston *v.* New York, etc., R. Co., 76 N. Y. 631.

Shipper not required to accept tender of return of damaged goods.—Where, after freight had been delivered to a connecting carrier, it was permitted to remain in its possession for nearly a year, during which time the box was broken into and many of the articles defaced, damaged, and some of them destroyed, the shipper was not required to accept a tender of a return of the goods. Cincinnati, etc., R. Co. *v.* Stout, 90 S. W. 258, 28 Ky. L. Rep. 714.

41. **Privity of contract not essential to liability of connecting carrier.**—United States Mail Line Co. *v.* Carrollton Furniture Mfg. Co., 101 Ky. 658, 42 S. W. 342, 19 Ky. L. Rep. 833.

42. **Liability of connecting carrier receiving money from another carrier.**—Southern Exp. Co. *v.* Thornton, 41 Miss. 216.

43. **Liability of intermediate carrier not affected by fact that initial carrier is also liable.**—Lacey *v.* Oregon R., etc., Co. (Ore.), 128 Pac. 999.

44. **Distance of carriage immaterial.**—Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899, 2 Am. & Eng. R. Cas., N. S., 560.

45. **Connecting carriers are but agencies employed by contracting carrier.**—Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

46. **Initial carrier can not make contract binding connecting carrier.**—Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761.

47. **Liability of connecting carrier for refusing to receive freight tendered.**—Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761.

48. **Liability for loss of or injury to freight accepted.**—Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761. See ante, "In General," § 3646.

It seems that where a contract is made with a railroad company to carry goods to a given point, and while in transitu the goods are reshipped by that company upon another road, the latter company would be liable directly to the owner for

bility in such case will not be based upon the unauthorized contract made by the initial carrier.[49] It has been held, however, that a carrier who accepts goods from a connecting carrier with notice that they were shipped under a through bill of lading issued by the initial carrier to the owner assumes contractual relations with the owner and is bound by the terms of such bill of lading at least to the extent that they are usual and customary;[50] and it can not by issuing its own bill of lading to the connecting carrier, containing different terms, impose them on the owner of the goods who has not assented to, and has no knowledge of, such bill of lading.[51] Where a contract for the transportation of goods over connecting lines of railway is made with one railway company as the agent of the other, and the latter company transports the goods, and collects the freight thereon, it can not, when sued for injury done to the goods by its servants, deny the authority of the other company to make the contract for it.[52]

§ 3648. When Liability Commences and Terminates.—The acceptance of freight by an intermediate carrier is complete and its liability fixed whenever the property, with its assent, comes into its possession, and its liability is not terminated until delivery to the succeeding carrier.[53] The initial carrier must yield possession and exclusive control of the goods to the succeeding carrier, in

a loss of goods though their neglect. Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

A party who has contracted with and paid one of a line of connecting roads for the carriage and delivery of goods at the other end of the line may maintain an action for injury to the goods against either of the companies on whose road the injury may have been done. Wing *v.* New York, etc., R. Co. (N. Y.), 1 Hilt. 235.

Where one railroad company contracts to transport live stock over its own roads and a part of the road of another company which is under its control and management, and damage is done to the stock while in the custody of the latter company, through its negligence and inattention, the owner is not confined to suit on the contract against the company making it, but may maintain an action against the company inflicting the injury. Southwestern Railroad *v.* Thornton, 71 Ga. 61.

49. **Liability not based on contract made by initial carrier.**—Southern Exp. Co. *v.* Palmer, 48 Ga. 85; Southern Exp. Co. *v.* Shea, 38 Ga. 519; Cohen *v.* Southern Exp. Co., 45 Ga. 148; Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761.

A shipper can not maintain assumpsit against a connecting carrier on a bill of lading to carry the entire distance, executed by the carrier first receiving the goods. Parker *v.* Macy (O.), Wright 674.

50. **Effect of acceptance of goods with notice they were shipped under through bill of lading.**—Cobb *v.* Brown, 193 Fed. 958, 113 C. C. A. 586.

Where a bill of lading issued by an initial carrier showed that it was a contract for a through shipment, when the goods were delivered to the connecting carrier and carried by it under the bill of lading, such carrier became a party to the original contract by adoption and ratification. Chicago, etc., R. Co. *v.* Chestnut Bros., 28 Ky. L. Rep. 404, 89 S. W. 298.

51. Cobb *v.* Brown, 193 Fed. 958, 113 C. C. A. 586.

52. **Estoppel of connecting carrier to deny authority of initial carrier to contract for it.**—Norfolk, etc., R. Co. *v.* Read, 87 Va. 185, 12 S. E. 395.

53. **When liability of intermediate carrier commences and terminates.**—Pratt *v.* Railway Co., 95 U. S. 43, 24 L. Ed. 336; Alabama, etc., R. Co. *v.* Mount Vernon Co., 84 Ala. 173, 4 So. 356.

Where goods are shipped, under a contract with a common carrier, to be carried over several independent, but connecting, lines to their destination, at an agreed through rate, each carrier to receive and carry to the end of his route, and there forward by the next connecting line, and they are lost at the terminus of the route of an intermediate carrier, while in his possession, and before delivery to the next carrier, held such intermediate carrier is liable for loss at the end of his route before the goods are delivered to the next carrier, unless he is exempted from such loss by the terms of his contract. Erie R. Co. *v.* Lockwood & Son, 28 O. St. 358.

But in Maryland it has been held that where a shipper delivers goods to an initial carrier to be transported over several lines, the liability of an intermediate carrier, after the goods have arrived at the end of its line, and until they are delivered to the next carrier, is that of warehouseman, and he is responsible for ordinary care. Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

order to render the latter's responsibility that of a common carrier.[54] An intermediate common carrier, of a connecting line of carriers, receiving goods from the first carrier of the route for transportation and delivery to the third, is not relieved from responsibility as a carrier by storing them in a warehouse at the end of its own route.[55] A contract by an initial carrier as agent for a connecting carrier which binds the connecting carrier to safely carry live stock, does not make the connecting carrier liable for any negligence in handling the stock at stockyards at which they were delivered by the initial carrier for transportation by the connecting carrier, in the absence of a showing that it controlled the stockyards or that the stock was reloaded there by its agents.[56] After the initial carrier has deposited freight at a junction for further transportation by the next

54. **Possession and exclusive control essential to commencement of succeeding carrier's liability.**—*United States.*—In re Petitions, 21 Fed. 885.

Georgia.—Union Dray Line Co. *v.* Hurt, 30 Ga. 798.

Illinois.—Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

Massachusetts. — Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742.

Michigan. — Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Stapleton *v.* Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739, 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332.

New York.—Fenner *v.* Buffalo, etc., R. Co., 46 Barb. 103; McDonald *v.* Western R. Corp., 34 N. Y. 497.

South Carolina.—Park *v.* Southern Railway, 78 S. C. 302, 58 S. E. 931, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573.

Tennessee.—Southern R. Co. *v.* Bickley, etc., Co., 119 Tenn. 528, 107 S. W. 680, 29 R. R. R. 275, 52 Am. & Eng. R. Cas., N. S., 275, 14 L. R. A., N. S., 859, 14 Am. & Eng. Ann. Cas. 910.

West Virginia.—Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

Delivery insufficient to render intermediate carrier liable.—A steamboat connected with a railroad at a wharf owned by the proprietors of the latter, and the railroad connected elsewhere with another railroad, the three forming a continuous line. Upon the arrival of the steamboat at the wharf, for goods for thorough transportation, a list of them, made up from the freight book of the boat, was delivered by the clerk of the boat to the agent of the first railroad, to be forwarded by an early train to the agent of the second railroad at the end of the line, for the purpose of making out and having ready there the consignees' bills of the goods upon their arrival by a later train, which soon afterwards was run down near the wharf on a track near to the berth of the boat. The employees of the boat and those of the railroad, in equal numbers, then acted in concert in transferring goods from the boat to the cars, partly by hand and partly on trucks, some of which belonged to the boat and some to the railroad, all of them sharing both in the removal of the goods from the boat to the wharf, and there further removal across the wharf into the cars, and no account was kept by any one of goods delivered by the boat or received by the railroad. While they were thus engaged, and before all the goods had reached the wharf, a fire broke out which stopped the work and destroyed the boat, wharf, cars, and all the goods. It was held that the railroad company was not liable to the shipper for any of the goods destroyed upon the boat. Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742.

Facts under which delivery to compress company was sufficient delivery to succeeding carrier.—A former opinion reaffirmed on rehearing, affirming a judgment against defendant railroad company for a loss of cotton delivered to a compress company on its account by a connecting carrier which received the same under a contract for through transportation over its own and defendant's lines, with privilege to compress the same en route, there being evidence that such delivery was in accordance with the usual course of business between the two carriers, and that it was defendant's custom to accept delivery to the compress company as delivery to itself, and that although it was notified of such delivery in the present case, and given the waybills and its share of the freight, it made no objection, and where it was further shown that defendant had a contract with the compress company to receive and compress cotton and load it in defendant's cars, and making the compress company responsible to it for any loss or injury to the cotton while in its possession. Judgment 146 Fed. 31, 76 C. C. A. 489, affirmed on rehearing. Southern R. Co. *v.* Hubbard Bros. & Co., 80 C. C. A. 200, 150 Fed. 312.

55. **Intermediate carrier not relieved from liability by storage in warehouse.**—Bancroft & Co. *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

56. **Effect of contract by initial carrier as agent for connecting carrier.**—Baltimore, etc., R. Co. *v.* Clift, 142 Ky. 573, 134 S. W. 917.

carrier, the latter's liability on account of such goods does not begin until it has been notified of their arrival.[57] But in such case, actual notice is not always necessary, constructive notice, sanctioned by a well-established custom, being sometimes sufficient to bind the succeeding carrier.[58] If there is an agreement between two railroad companies, occupying the relative positions of intermediate and succeeding carrier, that property intended for transportation by the latter may be deposited at a particular place without express notice to it, such deposit amounts to notice, and is a delivery, and the possession of such succeeding carrier is complete and its liability fixed whenever the property thus, with its assent, comes into its possession.[59]

§ 3649. Liability for Injury Occurring after Delivery by Intermediate Carrier to Shipper.—If an intermediate carrier deliver horses to the shipper at a point where they were to be taken by a connecting carrier, or to any one authorized to receive them, other than such connecting carrier, the intermediate carrier will not be liable for injuries occurring thereafter.[60]

§ 3650. Liability for Loss of or Injury to Property Transported in Cars of a Preceding Carrier.—A carrier must provide cars reasonably fit for the conveyance of the particular class of goods it intends to carry, and is not relieved from its duty by transporting the goods over its own line in the car of the connecting carrier in which it received them, since, if it uses the cars of the connecting carrier, it adopts and makes them its own for the purpose of conveying the goods.[61] A connecting carrier receiving a car of horses of the initial carrier,

57. Necessity of notice of arrival at junction.—*United States.*—Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 46 L. Ed. 358, 22 S. Ct. 253; Myrick *v.* Michigan Cent. R. Co., 9 Biss. 44, Fed. Cas. No. 10,001; In re Petitions, 21 Fed. 885.

Alabama.—Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694.

Minnesota.—Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, Gil. 323, 18 Am. Rep. 340.

Missouri.—Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268.

New York.—Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616, 3 Am. R. Rep. 390; McDonald *v.* Western R. Corp., 34 N. Y. 497; Sprague *v.* New York Cent. R. Co., 52 N. Y. 637.

Rule in Alabama—Necessity of shipping directions.—In Alabama it has been held that where an initial carrier places a loaded car on the side track of a connecting carrier, without notice to the latter, and without any mark of the name and address of the consignee, or any waybill or shipping directions, the connecting carrier is only a bailee of the car, and its stringent liability as common carrier does not attach until such waybill or directions are given, or until it is informed to what place the car is to be forwarded, and to whom delivered. Mt. Vernon Co. *v.* Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687.

Defendant had received a car loaded with cotton upon its side track, preparatory to shipment over its line, from the E. A. Ry. Co., which made the contract for transportation with the owner. The two companies had made arrangements for shipping goods over each other's lines, and defendant's agent had reported the car to the car accountant; but there was no evidence of any shipping directions from the E. A. Ry. Co. Held that, though it was customary for defendant to receive such company's cars on its side track for transportation, yet it will not be presumed that the former assumed the responsibility of a carrier before knowing to whom and where to ship the cotton. Alabama, etc., R. Co. *v.* Mount Vernon Co., 84 Ala. 173, 4 So. 356.

58. Constructive notice of arrival of freight.—*United States.*—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

Alabama.—Mt. Vernon Co. *v.* Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687.

Connecticut.—Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

New Hampshire.—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.—Root *v.* Great Western R. Co., 55 N. Y. 636.

Wisconsin.—Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

59. Agreement that property may be deposited at particular place without notice.—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

60. Liability for injury occurring after delivery by intermediate carrier to shipper.—Southern Pac. R. Co. *v.* Meadors & Co., 104 Tex. 469, 140 S. W. 427, reversing judgment 129 S. W. 170.

61. Carrier not relieved from liability by transporting goods in car of preceding carrier.—Shea *v.* Chicago, etc., R. Co., 66 Minn. 102, 68 N. W. 608.

A connecting carrier of stock can not escape liability by carrying the stock in

knowing that it is defective, is answerable to the shipper for the fitness of the car.[62] But a connecting carrier which receives a car, apparently in good condition, of vegetables, and promptly transports and offers it to the consignee, thereafter retaining it at the consignee's request, is not liable for the freezing thereof because of a defect in the car furnished by the initial carrier.[63] Where a connecting terminal carrier accepts a refrigerator car containing peaches, it has implied notice from the character of the car that the goods are perishable, so that it undertakes to exercise reasonable diligence to protect the peaches and to deliver them to the consignee within a reasonable time; and if it fails to properly re-ice the car and to deliver the peaches to the consignee in proper condition, it will be liable for the resulting damages.[64] When freight received by one railroad is to be carried over connecting roads, in the car on which it is shipped, without being transshipped to the cars of the connecting road, the liability of the connecting road does not commence till the car is delivered to, and received by, the latter, and the first road is liable to the shipper till it shows such delivery.[65]

Liability for Loss of Goods in Cars of Lessee of Terminal Facilities.—Where a terminal railroad company owning transfer facilities for the transfer of cars of railroad companies entering a city contracts with one of such companies whereby it can use, for an annual rent and payment for the maintenance of the tracks, all terminal facilities, and whereby it obligates itself to deliver to the terminal company all freight cars for transfer, and whereby the terminal company agrees to transfer cars, such company is a lessee of the terminal company with the right to use the terminal facilities subject to a similar right by the terminal company, and other railroad companies, and cars transferred by the terminal company as ordered by such lessee remain under the exclusive possession of such lessee and the terminal company is not liable for any loss of goods while such cars are on its terminal facilities.[66]

§ 3651. Liability for Failure to Give Live Stock Rest, Water, and Food.—In some jurisdictions there are statutes making carriers liable for confining live stock for more than a prescribed period without rest, water, and food. The provisions of some of these statutes have been construed by the courts to determine the liability of a connecting carrier for failure to conform to their requirements.[67]

a car furnished or owned by another company. Kime *v.* Southern R. Co., 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

But in Louisiana, a railroad company which receives as connecting carrier, outside of the state, cotton in bales shipped in sealed cars, which were in good condition, under through contracts to which it was not a party, and which hauls such cars unopened to their place of destination and delivers the cotton to the consignee, is not liable for the wet, dirty condition of such cotton when so delivered. Vincent *v.* Yazoo, etc., R. Co., 38 So. 816, 114 La. 1021.

The exemption, under Acts 1888, No. 93, from the provisions of the act, of freight received in sealed cars from roads outside of the state, is none the less applicable because the delivering and receiving carriers operate within as well as without the state. Vincent *v.* Yazoo, etc., R. Co., 38 So. 816, 111 La. 1021.

62. Connecting carrier receiving car of horses answerable for fitness of car.—Blair *v.* Wells Fargo & Co., 155 Iowa 190, 135 N. W. 615.

Where horses and mules which were in good condition when delivered to a connecting carrier for transportation were "smothered and suffocated" for want of ventilation, and were so greatly weakened from perspiration they could hardly stand, and some of them were "out of breath," the carrier was negligent in not ventilating the car, and properly caring for the animals en route. Kime *v.* Southern R. Co., 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

63. Defect in car causing freezing of vegetables while retained at consignee's request.—St. Louis, etc., R. Co. *v.* Myer, 75 Ark. 159, 86 S. W. 999.

64. Liability for injury to peaches in a refrigerator car.—Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, rehearing denied in 72 Atl. 458.

65. When liability of connecting carrier commences.—Rome R. Co. *v.* Sloan, 39 Ga. 636.

66. Liability for loss of goods in cars of lessee of terminal facilities.—Chicago, etc., R. Co. *v.* Peoria, etc., R. Co., 250 Ill. 320, 95 N. E. 137.

67. Liability for failure to give live stock rest, water, and food.—Under U. S. Comp. St. 1901, p. 2995, providing that

§ 3652. Liability of a Carrier Diverting Shipment from Route Stipulated.—Where a railroad company which, under a constitutional enactment, is bound to haul the cars of another company, receives a car to be hauled to a certain point, and without authority hauls it to another point, where it is burned, it incurs the liability of a common carrier.[68] Where a contract for a through shipment of stock by railroad does not specify the lines over which the shipment shall be made, but the stock is routed by the initial carrier over certain lines, it is not negligence for an intermediate carrier to divert the shipment to a different line, where, owing to floods, it can not be delivered to or taken by the next connecting carrier, and where no danger of loss or injury by reason of the diversion can reasonably be anticipated.[69] Where an intermediate carrier, on ascertaining that freight, after reaching the terminus of its line, could not be forwarded by the stipulated route, promptly forwarded it by another route, but neglected to notify the shipper of the change of route, it will not be liable to the shipper for the loss of the freight, if the want of notice would not have avoided the loss.[70] What constitutes a diversion of a shipment from the route stipulated is to be determined by a proper construction of the terms of the contract of shipment.[71]

§§ 3653-3657. Liability for Loss or Injury by a Preceding or Subsequent Carrier—§ 3653. In General.—The liability of a carrier of freight is for its own acts, or for injuries to the freight while in its custody for transportation, and not for the acts of preceding carriers, which may have injured the freight.[72] In the absence of special contract or the existence of a relation of

no railroad company shall confine live stock in cars for a longer period than 28 hours without unloading for rest, water, and feed, and that in estimating such confinement the time during which the animals have been confined on connecting roads from which they are received shall be included, a railroad company is guilty of a violation of the statute if it fails to give animals rest, feed, and water when the period of 28 hours from the time they were last fed expires, although they were in the possession of a connecting carrier during part of that period. Cincinnati, etc., R. Co. *v.* Gregg, 80 S. W. 512, 25 Ky. L. Rep. 2329.

A connecting carrier is bound to take knowledge of the fact as to how long a shipment of animals had been confined by the carrier from which it received the shipment, that it may be able to perform its duties under the South Carolina statute, Rev. St. § 1678, making carriers liable for confining animals more than 28 hours without food. Comer *v.* Columbia, etc., R. Co., 29 S. E. 637, 52 S. C. 36.

68. **Carrier liable as such for loss of shipment diverted from stipulated route.**—Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506.

69. **Diversion of shipment on account of floods.**—Empire State Cattle Co. *v.* Atchison, etc., R. Co., 135 Fed. 135; judgment affirmed in 147 Fed. 457, 77 C. C. A. 601, and 147 Fed. 463, 77 C. C. A. 607.

70. **Effect of neglect to notify shipper of change of route.**—Regan *v.* Grand Trunk Railway, 61 N. H. 579.

71. **A bill of lading** for the transportation of goods from New York to Philadelphia was executed in the following form: "Received of Davis, Rhodes & Co. (1) one case merchandise, marked D. W. Mott & Bros., Memphis, Tenn., to be transported to Philadelphia, and there delivered to the Penn. R. R., all rail to Cincinnati, Ohio." Nothing further appeared in the bill, or upon the package, to indicate its destination. The goods were duly received at Cincinnati by the agents of the Pennsylvania Railroad Company, and by them forwarded in the usual course of conveyance to Memphis, but were lost on their voyage thither. In an action by the owner of the goods against the forwarding agents, it was held that, prima facie, the ultimate destination of the goods was Memphis, and not Cincinnati, and that, in the absence of evidence to the contrary, the agents were justified in forwarding them to Memphis, and were not liable to the owners for their loss. Brown & Co. *v.* Mott & Bros., 22 O. St. 149.

72. **Carrier not liable for acts of preceding carriers.**—Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Bissel *v.* Price, 16 Ill. 408; Smith *v.* New York Cent. R. Co. (N. Y.), 43 Barb. 225, affirmed in 41 N. Y. 620.

A carrier who delivers goods in a damaged condition is not liable therefor if they were received in that condition from a connecting carrier. Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894.

It appeared that plaintiff received goods in apparent good order from a previous carrier, but that, subsequent to

partnership or agency between an initial and a connecting carrier, a connecting carrier is liable only for loss or damage occurring on its own line.[73] Where property is delivered to a carrier, consigned to a point beyond its line, and, in order to reach the place of destination, must pass over the lines of several connecting carriers, in the absence of any arrangement constituting the carriers partners or joint undertakers, each carrier is liable only for loss or injury occurring on its own line, and the last carrier is not liable for the property where it is not shown that it received it.[74] But where the clerk of a connecting carrier receipts for a through shipment of goods to the initial carrier, upon the representation that the goods had arrived at the former's warehouse, when, in fact, owing to mistake in the initial carrier's direction of the car, it had been landed at an adjacent warehouse, the connecting carrier is liable to the shipper for its clerk's negligence in receipting without first ascertaining as to the arrival of the goods. In such case the question of ultimate liability is one to be settled by the two companies them-

the delivery to the consignee, it was discovered that the goods had been previously injured by some other carrier. Held, that plaintiff was not liable for injury to the goods in the hands of a previous carrier with whom he had no connection, and defendant could not, therefore, set off the damages in an action to recover freight and previous charges paid by plaintiff. Carson *v.* Harris (Iowa), 4 G. Greene 516.

And in an action against a connecting carrier for damage to freight a nonsuit is properly ordered where the plaintiff admits that the damage was done on a line of road belonging to another company before it was received by the defendant company. Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113.

73. Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 So. 392.

In an action to recover damages for injury to tobacco shipped over several lines of road, the evidence showed that the only contract of shipment was the receipt given by the line of road which received the tobacco from the shipper. The defendant was not a party to the receipt. Held, that the defendant was not bound by such receipt, and in the absence of any contract, by defendant, express or implied, defendant was only bound to deliver the goods, as forwarding agent, to the next line of road. Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

In a Georgia case, where it was conceded that the damage to goods occurred during an ocean voyage, and was complete before their delivery to the defendant railroad company, the liability of the latter to the consignees therefor was held to depend upon the contract of afreightment between the steamship company and the plaintiffs. If the steamship company was not liable, and the railroad company would have no recourse on it, it was held that the railroad company would not be liable to the consignees. East Tennessee, etc., R. Co. *v.* Wright, 76 Ga. 532.

74. **Each carrier liable only for loss or injury occurring on its own line.**—Church *v.* Atchison, etc., R. Co., 1 Okla. 44, 29 Pac. 530.

In an action to recover for damages done to tobacco while being carried over defendant's road and other lines, the court instructed the jury that if they found that the tobacco was not damaged while it was in the custody of the defendant, but that the same was delivered in good condition to the P. & W. road, the plaintiff was not entitled to recover. There was no proof of an agreement or partnership between the roads over which the tobacco was carried. Held, that the instruction was correct. Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

Where injuries to goods in transit over several connecting lines occur, before the goods reach the last carrier, by reason of a defective car being furnished by a preceding carrier, the last carrier is not liable therefor. Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. (12 Pickle) 677, 36 S. W. 392.

An instruction authorizing a recovery against the delivering carrier for injury to hops in transportation, if the injury occurred through the failure of the first or any connecting carrier to furnish suitable cars, without limiting defendant's liability to injury received in such cars on its own line, is reversible error. Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. (12 Pickle) 677, 36 S. W. 392.

But in Maine it has been held that in an action for injuries to goods shipped brought against the last of a succession of connecting carriers, though on the evidence it is manifest that part of the damages occurred on the line of a preceding carrier, no apportionment of the damages is to be made, but the last carrier is liable for all the damages. Colbath *v.* Bangor, etc., R. Co., 74 Atl. 918, 105 Me. 379.

selves.[75] Where a delivering carrier receives mules in bad condition, as the result, apparently, of neglect in the hands of the receiving carrier, and, having unloaded, fed, and watered them, forwards them to their destination, it is not liable for damages sustained in depreciation in value of the animals, but, being a party to the contract under which they were transported, such carrier on refusal of the owner to take them is at liberty to deal with the matter as it sees fit, and, if it agrees that the mules shall be cared for at its expense until other provision is made, is liable for their care and feed.[76]

§ 3654. Liability Imposed by Statute.—By statute in some jurisdictions a conditional or limited liability is imposed on an intermediate or terminal carrier for the loss of or injury to freight, whether the loss or injury occurred on its own line or not.[77]

75. **Liability of connecting carrier for negligence of clerk in receipting for goods that have miscarried.**—Northern Transp. Co. *v.* McClary, 66 Ill. 233.

76. **Delivering carrier receiving mules in bad condition.**—Thompson *v.* Southern Pac. Co., 121 La. 994, 46 So. 993.

77. **Liability imposed by statute.—Under the Georgia statute,** Civ. Code 1895, § 2298 (Code 1882, § 2084), when there are several connecting railroads of different companies, and the goods are intended to be transported over more than one, each company is responsible to its own terminus before delivery to the connecting railroad, and the last company which received the goods as "in good order" is responsible to the consignee for any damage, open or concealed, done to the goods, and the companies must settle among themselves the question of ultimate liability. Southern R. Co. *v.* Waters & Co., 54 S. E. 620, 125 Ga. 520; Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Under this statute, if a railroad company receives from another railroad company goods to be transported, and receipts for them as "in good order," the company so receiving and receipting is concluded by the receipt from setting up as against the consignee that the goods were in fact not in good order when received. Southern R. Co. *v.* Waters & Co., 54 S. E. 620, 125 Ga. 520; Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Where the receipt of the goods in good order by the initial carrier has been shown presumptively, a delivering carrier can only escape the liability imposed upon it by the statute by showing that it did not, as a matter of fact, so receive and receipt for the consignment. Unless this is done it stands as to liability to the shipper in the place of the initial carrier and its defense must rest upon the same ground. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811. See, also, Georgia R. Co. *v.* Gann, 68 Ga. 350.

The policy of the law contained in this statute is to relieve the patrons of railroad companies of the burden and difficulty of ascertaining and fixing liability on that one of the several connecting carriers handling the shipment, upon whose line the damage occurred. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; S. C., 96 Ga. 428, 23 S. E. 416.

It does not change the rule of liability of railroad companies as common carriers as it existed at the time of its adoption. It only declares the rule of liability to be the same as that theretofore existing, where there was no contract, express or implied, general or special, by the first carrier to transport the goods to their final destination; and it gives a cumulative remedy to the consignee in addition to those which he already had. Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58.

The "good order" mentioned in the statute hardly means the manner in which goods are packed or stored in the car. Paramore *v.* Western R. Co., 53 Ga. 383.

In order that a connecting carrier may relieve itself from the liability imposed by the statute, it has simply to decline to receive goods as in good order when in point of fact they are not in good order. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

If the last carrier who receives them finds that they are not in good order, that damage has already occurred, he can protect himself. It might be his duty to receive them in such order and to deliver them—that is, he may be compelled to receive even damaged goods—but he is not bound to receive them when they are so badly packed that they can not be removed without loss. Paramore *v.* Western R. Co., 53 Ga. 383.

Under the statute, if any company, actually or constructively, received a consignment of freight as in good order, it will become responsible, even though the freight before delivery to it was damaged through the negligence of some other carrier and it must look to the carrier actually at fault for reimbursement. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

The provisions of the statute apply to

§ 3655. Liability under Contract.—A contract by a carrier to carry goods to their destination renders the carrier liable for injury to the goods by the negligence of its connecting lines, even though such carrier is itself only a connecting line with that to which the goods were originally delivered by the shipper.[78] But the last carrier's receiving freight for the whole route, merely as an act of agency for the other carriers, will not render the contract one for carriage over the whole line, so as to make the last carrier liable for damage to goods occurring before he received them.[79] The last of several connecting carriers delivering goods in damaged condition, having receipted, in turn, to its next preceding carrier for the good order and condition of the goods, demanding and receiving freight in full from originating point to that of delivery, making no claim of separate contracts with several connecting lines and agreeing that consignees file their claim for damages with it, recognizes but one contract for transportation; and, being unable to show that the injuries complained of were caused by other agencies beyond its control, a judgment for the amount of damages admitted will not be set aside.[80]

§ 3656. Effect of Failure to Examine Goods or to Inspect Manner of Loading.—Where cotton is received by a carrier from a connecting carrier in apparent good order, but, when delivered to the consignee, it is found to be badly damaged by water, the failure of the carrier to open and examine the bales, on receiving the cotton from the connecting carrier, is not such negligence as makes

freight which is of a perishable nature and will, by mere lapse of time, become worthless from natural inherent causes. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

The principle of liability fixed by the statute applies whether the goods pass over all the lines on the same car, or at any terminal point are transferred or loaded from the car of one line onto that of another, and it makes no difference whether the goods go all the way on the same bill of lading or how often new ones are substituted on the way. Central R. Co. *v.* Rogers & Sons, 66 Ga. 251.

An action for damages to goods, brought against a railroad company, under the statute, is not maintainable when it affirmatively appears that the goods in question were consigned from a point beyond the limits of this state under a contract stipulating for their delivery at a point within the state which could not, in the usual and ordinary course of transportation, be reached, and was not intended to be reached, by defendant's railroad. Kerr *v.* Georgia R. Co., 31 S. E. 114, 105 Ga. 371.

In an action against the last of a number of connecting carriers for damage to goods, where it is not shown that such carrier received the goods in good order, and it appears that, before reaching such carrier, they were carried by steamship, a nonsuit is properly granted; the case, under such circumstances, not being within the statute. Joseph *v.* Georgia R., etc., Co., 88 Ga. 426, 14 S. E. 591, following Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

The South Carolina statute, Civ. Code 1902, § 1710, provides that when, under contract for shipment over the lines of connecting carriers, the responsibility of each shall cease on delivery to the connecting line in good order, if freight be lost or damaged, it shall be the duty of the initial or terminal line, on notice, to adjust the same within 40 days, and on failure to do so, or to trace such freight and inform the person giving notice by what carrier it was lost or damaged, such carrier shall be liable for all such loss or damage. Held, that the failure of a terminal carrier to comply therewith renders it liable for goods lost from a consignment over its line, whether lost on its own road or not. Burress *v.* Atlantic, etc., R. Co., 60 S. E. 692, 79 S. C. 250.

Connecting carriers, being by Act May 13, 1903 (24 St. at Large, p. 1), made agents of each other, in case of an intrastate shipment, so that the terminal carrier is estopped to deny, as against the consignee, receipt by the initial carrier of all the goods for which it issued a bill of lading, proof that the terminal carrier did not receive part of such goods does not relieve it of liability to the consignee for nondelivery thereof. Daughty *v.* Northwestern R. Co., 75 S. E. 553, 92 S. C. 361.

78. **Liability under contract.**—Beard *v.* St. Louis, etc., R. Co., 79 Iowa 527, 44 N. W. 803.

79. Hunt *v.* New York, etc., R. Co. (N. Y.), 1 Hilt. 228.

80. Cleveland, etc., Railway *v.* Barron-Boyle Co., 31 O. C. C. 112, 11 O. C. C. C., N. S., 602, judgment affirmed in 89 N. E. 1118, 80 O. St. 707.

it liable for the damages.[81] It is not the duty of a railroad company which receives a loaded car from another railroad company to make an inspection of the manner of loading, when the defect can not be discovered by external examination.[82]

§ 3657. Effect of Refusal to Deliver Goods until the Whole Freight Is Paid.—Where goods destined to a certain place are shipped by boat, with privilege of transshipment on the way, and provision is made in the bill of lading that the owners of the second boat shall not be liable for damages on board the first, and the goods are injured on board the first boat, but the owners of the last boat refuse to deliver them until the whole freight is paid, the owners of the second boat are not thereby made liable, in an action of tort, for damage caused on board the first boat.[83]

§ 3658. Recovery Over by Initial Carrier from a Subsequent Carrier.—Where a carrier contracts for the transportation of goods over its own route and that of a connecting carrier, and the goods are lost after delivery to, and while in the custody of, the connecting carrier, and the shippers recover the value of the goods from the contracting carrier, such carrier is entitled to recover the amount recovered from it from the connecting carrier.[84] An initial carrier contracting for the through transportation of goods, which delivers them to a packet company, to be by it delivered at a designated point to another carrier, by whose negligence or fault the goods are lost, so that the initial carrier is compelled to pay for them, can recover therefor only from such negligent carrier, and not from the packet company.[85]

§ 3659. Facts Not Relieving Carrier from Liability.—Bill of Lading Not Signed by Carrier's Agent.—A railroad company that receives freight from a connecting line and transports it over its own line can not escape liability for negligence in handling such freight on the ground that the bill of lading was not signed by its agent.[86]

Contributory Negligence of Shipper in Loading Goods.—In an action against a connecting carrier for injuries to goods, contributory negligence of the shipper in loading the goods on the car of the initial carrier is no defense.[87]

81. Effect of failure to open and examine bales of cotton.—Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46.

82. Carrier not required to inspect manner of loading car.—Judgment 104 S. W. 424, reversed in Gulf, etc., R. Co. *v.* Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A., N. S., 1227, 16 Am. & Eng. Ann. Cas. 1153.

Where goods are improperly loaded in a closed car, which comes from the initial carrier to a connecting carrier with its doors closed, the improper loading is not apparent to the connecting carrier, nor need it open the car to see whether the loading was properly done. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

83. Effect of refusal to deliver goods until the whole freight is paid.—Wilson *v.* Harry, 32 Pa. 270.

84. Recovery over by initial carrier from a subsequent carrier.—The plaintiffs, a steamboat company, were accustomed to stop at an intermediate station on their route, and there connect with a railroad running from thence to P. In the regular course of their business, they receipted for goods to be delivered at P., the railroad company, who were the defendants in the suit, to be paid their proportion of the freight therefor, landed them on Sunday, and deposited them in the warehouse of the railroad company to be forwarded on the next day, the labor being performed by the agents of the plaintiffs, with the exception of the unlocking and opening of the warehouse, which was done by the defendants' servant. Afterwards, and on the same day, the warehouse and goods were destroyed by fire. The plaintiffs having been sued and obliged to pay the value of the goods to the shippers, it was held that they were entitled to recover in the suit against the railroad company for their loss. Powhatan Steamboat Co. *v.* Appomattox R. Co. (U. S.), 24 How. 247, 16 L. Ed. 682.

85. Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

86. Bill of lading not signed by carrier's agent.—St. Louis, etc., R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

87. Contributory negligence of shipper

Goods in Bad Condition When Delivered by Connecting Line.—Where goods were shipped in good condition, properly packed, but when delivered to the consignee by the last carrier, were greatly damaged, and in condition to suffer additional injury by the movement of the car, it is not a sufficient defense for such carrier to show in a general way that the goods were in bad condition when delivered to it by a connecting line, it not being shown that they were then placed in condition for shipment the remainder of the way without further injury.[88]

Directions Given by Cartman without Authority of Owner of Goods.—Where a cartman, without authority from the owner of goods, gives to a railroad company directions in regard to them, different from instructions previously given by the owner, the company is not protected by them.[89]

Custom to Haul Cars Received from Connecting Carrier without Changing the Cargo.—Where a carrier receives a shipment of butter from another carrier in a sealed car, and it is the custom to haul cars received from such carrier, without changing the cargo, such facts do not excuse the carrier's negligence in failing to take precautions to preserve the butter.[90]

Failure to Get Waybill or Other Information as to Whom Goods Are Consigned.—That a carrier, receiving goods from a connecting line, fails to get a waybill or other information as to whom the goods are consigned, whether through its own negligence or not, will not relieve it from the duty to safely transport the goods, where the owner does not prevent it from obtaining the waybill or information.[91]

Freight Consigned to Point Beyond Its Destination by Mistake of Initial Carrier.—Where by a mistake of the initial carrier freight was consigned to a point beyond its destination and was so received and carried by a connecting carrier, the latter is liable for damages occurring by reason of its negligence, while the freight was at the place to which it was carried through mistake.[92]

Inability of Initial Carrier to Say in What Car Freight Was Delivered to Terminal Carrier.—In an action against a railroad company to recover damages for its failure to deliver a quantity of flour delivered to it by a connecting line for shipment, the fact that the company to which the flour was first delivered was unable, by reason of a mistake in billing the flour, to say in what car the flour was delivered to defendant, does not deprive plaintiff of the right to recover; it being shown that the flour was delivered to defendant in one or the other of two cars, and there being no explanation by defendant as to what became of the cars.[93]

in loading goods.—Walter *v.* Alabama, etc., R. Co., 142 Ala. 474, 39 So. 87.

A carrier may protect himself against liability for receiving goods in bad order or not so prepared for transportation by the shipper as to be safely carried, but as the carrier has full control of the manner in which the goods shall be packed in his cars or in those which he makes his own by receiving from another line, he can not set up as a defense to liability for injury caused by the wrongful manner in which the goods were packed, the fact that they were improperly packed when he received them, as by the continuance of that wrongful act, damage has probably ensued. In such a case the burden is on him of showing that it was not by his fault or negligence that the injury was caused. Paramore *v.* Western R. Co., 53 Ga. 383.

88. **Goods in bad condition when delivered by connecting line.**—Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144.

89. **Directions given by cartman without authority of owner of goods.**—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

90. **Custom to haul cars received from connecting carrier without changing the cargo.**—Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

91. **Failure to get waybill or other information as to whom goods are consigned.**—Western Railway *v.* Hart, 160 Ala. 599, 49 So. 371.

92. **Freight consigned to point beyond its destination by mistake of initial carrier.**—Bryant *v.* Southwestern R. Co., 68 Ga. 805.

93. **Inability of initial carrier to say in what car freight was delivered to terminal carrier.**—Cincinnati, etc., R. Co. *v.* Miles & Son, 13 Ky. L. Rep. 539.

§§ 3660-3672. Effect of Agreements between Connecting Carriers and Joint Liability—§ 3660. In General.—Where an undertaking by connecting carriers to transport goods is a joint one, every carrier is liable for the negligence of each.[94] A contract for through transportation over the connecting lines of several railroad companies, as between themselves composing a partnership, or holding themselves out as such, is binding on all, and one is responsible for the act of another.[95] The facts that a through bill of lading was given by the initial carrier, that through freight charges were made, that the freight was to be carried in a designated car for the whole distance, and that the agent of one of the carriers at the end of the route received the freight money, are sufficient to establish a joint liability.[96] Where goods are shipped in bond over connecting lines, and both carriers take part in taking them out of bond, in consequence of which they are of less value, and in carrying them to their destination, as between the two carriers, the responsibility is solidary.[97] The giving of transportation by each of two or more connecting carriers to the person accompanying a cattle shipment does not tend to show a partnership or joint contract between the different carriers.[98] Certain facts or agreements which have been held not to create a partnership or joint liability between connecting carriers, will be found in the appended note.[99]

94. Liability for negligence under joint undertaking.—Chicago, etc., R. Co. *v.* Halsell, 35 Tex. Civ. App. 126, 80 S. W. 140, judgment affirmed in 98 Tex. 244, 83 S. W. 15.

95. Carriers composing a partnership or holding themselves out as such.—Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

96. Facts sufficient to establish a joint liability.—International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

97. Facts rendering responsibility, as between two carriers, solidary.—Smith Bros. & Co. *v.* New Orleans, etc., R. Co., 106 La. 11, 30 So. 265, 54 L. R. A. 923, 87 Am. St. Rep. 285.

98. Giving transportation to person accompanying cattle shipment.—Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

99. Facts or agreements not creating a partnership or joint liability.—An action was brought against three railroads as joint contractors for damage to goods transported over them in November, 1852. In 1849 one of them published a notice by which they made themselves liable as joint contractors with the others. On the 1st of October, 1852, they published another notice that they would be liable for damage to cotton "after it came into their possession, but no further." The receipt given by one railroad contained the clause: "Roads liable for such injuries only as shall be established to have occurred while in their possession." Held, that defendants were not liable as joint contractors, and a nonsuit was ordered. Bradford *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 201, 62 Am. Dec. 411.

Defendant was the only express company in B., and received goods from another company, with which it had a mileage agreement, in either of two ways, one of which, being longer than the other, was of benefit to defendant, and for this purpose it sent labels to its customers directing goods to be expressed the longer way, and to plaintiff, a large patron, it gave a letter addressed to the other company directing the shipments to him over the longer route. A consignor delivered goods to the other company consigned to plaintiff which he never received, and he sued defendant for the loss. Held not to show any partnership between the two companies so as to charge defendant with the loss, in the absence of a showing that the goods were delivered to it. Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 So. 392.

Held, also, that the facts did not show that defendant had made the other company its agent so as to render defendant liable, in the absence of evidence that it had received the goods. Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 So. 392.

By a contract between plaintiff and a railroad company whose line connected with that of defendant, it was agreed that plaintiff's cattle should be transported to a point beyond the line of such road, the liability of the contracting road to cease at its terminus. From that point the cattle were hauled over several roads, and were finally delivered to the defendant road, which delivered them at their destination, and collected all charges for carriage from plaintiff. The Texas statute, Rev. St., art. 4251, provides that every railroad company shall, for a reasonable compensation, draw over its road, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with its road. Held, that the facts were insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than

§ 3661. Agreement by Carriers, under a Certain Name, to Carry between Distant Points.—If several railroads forming a continuous line agree, under a certain name, to carry goods from and to distant points, and if, in so carrying goods for a party, a portion thereof is lost, such party has his remedy against such roads as co-partners, and may recover from them jointly or severally for the loss sustained.[1]

§ 3662. Carriers under One Management or Holding Themsleves Out as a Line for Through Transportation.—Where two connecting railroads are under one management, so as to constitute one system, or have contracts for the carriage of goods, in which the roads are held out as a line for through transportation, they are jointly liable as partners for injuries to goods so shipped, though the general management of each road is retained by the respective companies.[2] A railroad company which receives freight for transportation over its own and connecting lines, which, by arrangement with it, have united in making the respective roads a continuous line, and collects the freight charges for the entire route either upon the receiving of the goods or upon delivery at their destination, is liable for the default of any of the connecting lines, without any special contract to that effect.[3]

§ 3663. Joint Association for Transmission of Through Freight.—Where several corporations associate, forming a continuous line of common carriers, each being empowered to contract for freight and passengers for the whole

its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract. Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530; Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 13 S. W. 637; Ft. Worth, etc., R. Co. *v.* Fuller, 3 Tex. Civ. App. 340, 22 S. W. 1006. See, also, Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954; Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761, reversing 86 S. W. 17.

An agreement between two railroad corporations, that any injury to persons or goods shall be paid for by the one on whose road it may occur, and that, when the damage can not be traced to either, it shall be paid for by each in the proportion it shares in the through price of carriage, does not make them partners. If one has made a contract for the carriage of goods over the roads of both, an action for its breach can not be maintained against the other, if the loss is not proved to have taken place while the goods were in its custody, and the agreement is inadmissible. Aigen *v.* Boston, etc., Railroad, 132 Mass. 423.

Where, by a written contract between an express company and a railroad company, the latter agreed to "receive, load and unload, deliver and waybill" all freight sent by the former, and other railroads, forming a continuous line with the first, made similar agreements, each to be responsible for all loss or damage to the goods while in its possession, and the last road to deduct its charges and account to the preceding, and so on to the first, held, that the different railroads did not become partners, and that each was liable only for its own negligence. St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679, affirming Fed. Cas. No. 12,238.

On the trial of an action to charge three railroad corporations forming a continuous line with the loss of goods delivered to one of them for transportation over the line, without any written contract, and burned on the road of another, where the evidence was conflicting as to the terms of plaintiff's contract, and as to what were the arrangements of the defendants, a ruling that the corporations were liable jointly if either was liable was erroneous. Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557.

1. **Agreement by carriers, under a certain name, to carry between distant points.**—Block *v.* Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348. Compare Irwin *v.* New York Cent. R. Co. (N. Y.), 1 Thomp. & C. 473, affirmed in 59 N. Y. 653.

2. **Carriers under one management or holding themselves out as a line for through transportation.**—Alabama, etc., R. Co. *v.* Lankin, 78 Miss. 502, 30 So. 47.

A railroad company is jointly liable with a connecting line for loss of goods occurring on the latter line, where both roads were operated under one management as parts, the gross receipts being divided between them. Houston, etc., R. Co. *v.* McFadden, 40 S. W. 216, 42 S. W. 593, 91 Tex. 191; Missouri, etc., R. Co. *v.* Wells, 24 Tex. Civ. App. 304, 58 S. W. 842.

3. Phillips *v.* North Carolina R. Co., 78 N. C. 294.

line, and to receive pay for the same, which is to be divided in prescribed proportions, they are jointly liable for injuries and losses upon any part of the line.[4] Where several connecting carriers form an association for through traffic, and each company guaranties the bill of lading, each and all of the associated companies become liable for loss or damage to goods occurring on any part of the entire line.[5] Where a traffic association issues a through bill of lading, containing a stipulation that in case of loss, detriment, or damage, the carrier alone shall be liable in whose actual custody the shipment shall be at the time of the loss, the shipper is entitled to an uninterrupted and continuous transportation to the point of destination, and the carrier who has transported the freight to a point where another is to assume custody and control becomes a guarantor or surety that the latter will receive it, and is liable as an actual custodian, where the connecting carrier unreasonably neglects or refuses to receive it.[6]

§ 3664. Establishment of Joint or Through Tariffs of Rates.—The establishment by two or more common carriers of joint or through tariffs of rates does not make them joint carriers, or one of them liable for the default of another.[7] But the liability of railroad companies is that of joint contractors,

4. **Corporations forming a joint association jointly liable for injuries and losses.**—Barber & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs. Coates *v.* United States Exp. Co., 45 Mo. 238.

In an action by a shipper against a railroad company for loss of goods on a connecting line, it appeared that the goods were delivered to defendant marked for a point beyond its line, to be transported to the connecting line and by it to be forwarded to the point of destination, and that the entire freight was paid to defendant. There was no special agreement that the goods should be transported by defendant to the point of destination, or that defendant's liability should end on delivery to the connecting line. Held, that defendant could contract for the transportation of goods beyond its own line, and was liable for a loss on the connecting line, it appearing that its line and the connecting line united in one continuous route, over which goods were carried for one price under an agreement by which the freight was divided among the associated carriers in proportions fixed by the agreement. Nashua Lock Co. *v.* Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 242.

But in Arkansas it has been held that a joint association of carriers for the transmission of through freight and proportionate division of receipts does not constitute them partners, nor render them jointly liable for goods so transported. Hot Springs R. Co. *v.* Trippe & Co., 42 Ark. 465, 48 Am. Rep. 65.

5. **Liability of carriers forming association for through traffic and each guaranteeing bill of lading.**—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

6. **Liability under through bill of lading issued by traffic association.**—Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619.

7. **Effect of establishment of joint or through tariffs of rates.**—Wehmann *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

Three common carriers ran lines of transportation, each covering a part only of a certain continuous line of through transportation of goods. A rate of freight fixed by mutual agreement was charged for the through service, collected by the carrier whose line included the end of the route, and divided between the three in an agreed proportion. Held, that no partnership or joint liability to shippers of goods was created by these facts. Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742.

The defendants were a joint-stock corporation organized for the purpose of conducting the business of common carriers by water between N. and L. They had made a contract with a railroad company, whose line ran from L. to S., by which it was agreed that their boats should run daily in connection with certain trains upon the railroad; that through freight received for transportation over the routes of both companies should be carried at reduced rates; that the receipts from such freight should be divided in certain proportions between them; that the railroad company should build a wharf and depot in L., where both companies could transact their freight business, the defendants paying a rent for their use of it, and which contained other minor provisions, directed to the same general purpose of securing a through-freight business for the benefit of both. Goods hav-

where several companies enter into an arrangement to carry freight over all their lines for one through-fare in solido, payable at the terminus, and pledge themselves collectively to give satisfaction, so as to evidence by this and other acts an intention to contract collectively; and one of the companies is liable in a suit for damage to freight, though the injury did not occur on its road.[8] A bill of lading guarantying a through rate to destination does not establish an agency or partnership relation between the connecting railroads, so as to render one liable for the default of the other.[9]

§ 3665. Arrangement as to Payment and Collection of Freight Charges.—If an arrangement is made between several connecting lines of transportation for carrying goods by which each carrier subsequent to the first pays what is due for freight when the goods are delivered to him, and the last carrier collects the whole bill of the consignee, though these accounts are settled periodically, and each route stipulates to charge only certain rates, such an arrangement does not constitute a partnership or joint liability, and each line is liable only for injury caused by its own negligence.[10]

§ 3666. Contracts of Shipment Made with Joint Agent of Carriers.—Where a contract of shipment is made with the vice principal and agent of two connecting lines, who divide the proceeds of through shipments, for such a shipment, and subsequently, on receipt of the goods, bills of lading are issued by the joint agent of the companies at that point, the jury are justified in finding that the contract is joint on the part of the companies.[11]

§ 3667. Liability for Negligence of Joint Agent.—Connecting carriers are jointly liable for injury through the negligence of their joint agent to goods in transit over their lines.[12]

§ 3668. Damages to Freight Resulting from Violation of Traffic Agreement.—A shipper of freight over one of two roads acting under a traffic agreement to use each other's lines can not recover from the other for damages to goods shipped resulting from an alleged violation of the traffic agreement by such other road.[13]

§ 3669. Agreements Not Exempting Carrier from Liability to Owner of Goods.—A railroad corporation which has leased a portion of another railroad connecting with its own is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by an agreement with the proprietors of that road, by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first.[14]

ing been shipped at N. for transportation to S., the defendants gave a written receipt for them as received "on board the Norwich and Worcester boat, bound for S." Held that, in the absence of further evidence of an express contract, the defendants were only bound to carry the goods to L., and there deliver them to the railroad company, and they are not liable for loss occurring after delivery to the railroad company. Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

8. Bradford *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 201, 62 Am. Dec. 411.

9. Effect of bill of lading guaranteeing through rate to destination.—Chesapeake, etc., R. Co. *v.* Stock & Sons, 101 Va. 97, 51 S. E. 161.

10. Arrangement as to payment and collection of freight charges.—Darling *v.* Boston, etc., R. Corp. (Mass.), 11 Allen 295.

11. Contracts of shipment made with joint agent of carriers.—Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583.

12. Liability for negligence of joint agent.—Kansas, etc., R. Co. *v.* Embry, 76 Ark. 589, 90 S. W. 15.

13. Damages to freight resulting from violation of traffic agreement.—St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

14. Agreements not exempting carrier from liability to owner of goods.—McCluer *v.* Manchester, etc., Railroad (Mass.), 13 Gray 124, 74 Am. Dec. 624.

Where two railroad companies operate a continuous line of road between certain points under a contract by which one of them furnishes all the cars, motive power, and employees for the carriage of freight over its portion of the line, such carrier is an independent contractor, and as such liable for the negligence of its servant in misbilling freight over such continuous line, even though it stands in the relation of agent to such other company.[15]

§ 3670. Contract Making Payment of Freight Charges or Indorsement of Guarantee on Waybill Essential to Delivery.—Where two railroad companies agree that neither will consider goods as having been delivered to the other for transportation unless there has been payment of freight charges or an indorsement on the waybill of "freight charges guarantied," and goods are burned after being transferred from one to the other, but before the latter company has received the certificate of "freight charges guarantied," the former is liable for the loss.[16]

§ 3671. Diversion by First Two Carriers and Receipt by Third without Sufficient Shipping Instructions.—Where a shipment routed over specified connecting lines is diverted by the first two carriers without authority to a line not included in the contract, and that line receives the shipment without sufficient shipping instructions, the three carriers are jointly and severally liable for loss resulting to the shipment.[17]

§ 3672. Injuries to Live Stock from Failure to Properly Feed Them.—Connecting carriers of live stock are jointly and severally liable for injuries to the stock resulting from failure to properly feed the same during transportation, where such neglect begins on the initial line and continues to the point of destination.[18]

§§ 3673-3690. Carriers of Passengers—§ 3673. Traffic Arrangements between Carriers.—It is not ultra vires for a railroad corporation to agree with other railroad corporations upon such terms of co-operation in transacting their joint passenger business as may be satisfactory.[19] Where the lines of several railroad corporations are conducted as a single system for the purposes of the traffic between different points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency.[20]

15. Judgment 92 Ill. App. 391, affirmed in Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890.

16. **Contract making payment of freight charges or indorsement of guarantee on waybill essential to delivery.**—Palmer *v.* Chicago, etc., R. Co., 56 Conn. 137, 13 Atl. 818.

17. **Diversion by first two carriers and receipt by third without sufficient shipping instructions.**—Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

18. **Injuries to live stock from failure to properly feed them.**—Baltimore, etc., R. Co. *v.* Wood & Co., 130 Ky. 839, 114 S. W. 734.

19. **Co-operative agreement for transacting joint passenger business not ultra vires.**—Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840.

20. **Partnership between carriers as to traffic between different points originating upon line of either.**—Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840.

Where the lines of several railroad corporations are conducted as a single system, for the purpose of the traffic between different points, originating on either, and such corporations divided the proceeds of such business on a mileage basis, the several corporations as to such business were partners, and liable to third persons on the principles of the law of agency. Lehigh Valley R. Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478.

But in Illinois it has been held that the fact that each of two connecting lines sells through tickets, taking its own share of the price according to its mileage, does not constitute them partners. Chicago, etc., R. Co. *v.* Mulford, 44 N. E. 861, 162 Ill. 522, 35 L. R. A. 599.

§ 3674. System of Dominant and Subordinate Carriers.—When a relation of joint and several agency exists in a system of dominant and subordinate carriers, the dominant carrier is liable for all breaches of obligation by any of the the other constituent carriers in the performance of a contract made by it for the transportation of passengers.[21]

§§ 3675-3678. Transportation beyond Carrier's Line—§ 3675. Duty to Transport.—A carrier can not be compelled to transport beyond its termini.[22] It is only because the carrier has voluntarily contracted to do so that it can be required to transport a passenger over any other than its own line, and it results that, like other contracting parties, it may define the terms and limit the extent of its undertaking over other lines, insomuch as may be required to leave upon them the responsibilities of their own negligence.[23] Where a passenger's route is over connecting lines of independent carriers, the first carrier discharges its duty when it delivers the passenger at the end of its own line ready to continue the transportation on the connecting line, and is not liable for the connecting carrier's failure to perform its independent contract.[24]

§§ 3676-3678. Contracts for Through Transportation—§ 3676. Power to Contract.—One railroad corporation may make a contract with a passenger to carry him beyond its own road and upon or over the connecting roads of other railroad corporations and assume towards him all the ordinary obligations of a passenger carrier during the transit.[25] The contract, being incidental to one to carry him over its own road, is not ultra vires.[26] Such a contract may be express, or may be implied from the carrier's acts.[27]

A part owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route.[28]

§ 3677. What Constitutes a Contract for Through Transportation—Effect of Contract.—If a railroad company contracts to carry passengers, not only over its own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to it if it contracted solely to carry over its own line.[29] A carrier may so issue its passenger tickets and so conduct itself as to have the purchasers understand that it undertakes to carry them to a point beyond the terminus of its route, in

21. System of dominant and subordinate carriers.—Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840.

22. Carrier can not be compelled to transport beyond its termini in absence of contractual obligation.—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199.

23. Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862. See post, "Contracts for Through Transportation," §§ 3676-3678.

24. When initial carrier's duty and liability terminates.—Mills *v.* Baltimore, etc., R. Co., 111 Md. 260, 73 Atl. 885.

25. Railroad corporation may contract to carry passenger over connecting roads. —Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840; Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199; Mills *v.* Baltimore, etc., R. Co., 111 Md. 260, 73 Atl. 885, 887; Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852; S. C., 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705.

An authority to operate a road, and to "cross and intersect" other roads, authorizes a railroad company to issue "through tickets," operating as evidence of a contract for conveyance over connecting roads. Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

26. Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840.

27. Contract may be express or implied. —Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852; S. C., 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705. See post, "What Constitutes a Contract for Through Transportation—Effect of Contract," § 3677.

28. Power of part owner of one of several connecting lines to contract.—Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469.

29. Liability under contract to carry passengers over line of another carrier. —Chollette *v.* Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135.

which case it will be held responsible to that extent.[30] Thus a railroad company which sells and issues tickets to passengers over its own lines of road and lines of road of other companies, known as through tickets, is liable for the sure and safe transportation of such passengers to the point of destination.[31] In such case the company constitutes the connecting carrier its agent for the purpose of performing the contract, and is liable for the negligence of such connecting carrier.[32] The employees of the connecting line are, as regards such passengers, the employees of the contracting company, so as to render it liable for their acts.[33] But where there is no evidence that a carrier's agent in any way deceived plaintiff, or had knowledge that any quarantine regulations existed in a state through which plaintiff must pass, the fact that he sold plaintiff a ticket through such state will not render the carrier liable for damages occasioned by the wrongful act of a connecting line in enforcing its quarantine regulations.[34] And it has been held that the sale by a carrier of a ticket to a station on a connecting line creates no implied obligation that the train for which it is sold shall stop at that station, or that it will be reached without change of cars, or waiting at stations for other trains.[35] A ticket issued, not as a coupon ticket, but as the joint contract of several carriers, entitles the purchaser to transportation by each of the said carriers, notwithstanding that the delay of one of them may have occasioned the expiration of the ticket before its presentation to all.[36]

Through Tickets Issued in the Form of Coupons.—Through tickets over several distinct lines of transportation, issued in the form of coupons, and recognized by the proprietors of each line, are to be regarded as distinct tickets for each line sold by one as agent for the others, and the rights and liabilities of the parties are the same as if the purchase had been made at the ticket offices of the

30. Carrier may by its conduct bind itself for through transportation.—Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Transaction not raising implied contract for through transportation.—Plaintiff, desiring transportation to Dawson City, paid to the agent of defendant railroad company in Chicago $362, for which he received tickets for rail transportation to Seattle, and an order on defendant's agent at that place for a ticket from there to Dawson City on a certain steamship. The order stated its value at $300. When plaintiff arrived at Seattle and presented the order, defendant's agent went with him to the office of a steamship company, and paid $300 for a ticket on the designated vessel. This was a contract ticket signed by the steamship company and plaintiff, and containing certain limitations. Held, that no contract by defendant, as carrier, to transport plaintiff through from Chicago to Dawson City, could be implied from such transaction, and, in the absence of evidence of an express contract to that effect, defendant could not be held liable for a delay occurring after plaintiff left Seattle. Dresser *v.* Canadian Pac. R. Co., 116 Fed. 281, 53 C. C. A. 559.

31. Liability of railroad company selling through tickets.—Central R. Co. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582; Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

The sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and, in the absence of other conditions or limitations and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199.

But in Tennessee it has been held that the sale of a passenger ticket by a carrier to a point beyond the terminus of its road does not conclusively establish a contract binding it to be responsible for the entire route. Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852; S. C., 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705. But see Carter *v.* Peck, 36 Tenn. (4 Sneed) 203, 67 Am. Dec. 604.

32. Omaha, etc., R. Co. *v.* Crow, 74 N. W. 1066, 54 Neb. 747, 69 Am. St. Rep. 741.

33. Watkins *v.* Pennsylvania R. Co., 10 Mackey (21 D. C.) 1.

34. St. Clair *v.* Kansas, etc., R. Co., 77 Miss. 789, 28 So. 957.

35. Atchison, etc., R. Co. *v.* Cameron, 66 Fed. 709, 14 C. C. A. 358.

36. Effect of expiration of through ticket before presentation to all the carriers.—Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787.

respective lines.[37] The mere sale of such ticket does not import an undertaking on the part of the company selling the same to be responsible for the safety of the passenger beyond its own line.[38] But in New York it has been held that if one undertakes, as a common carrier, to transport a passenger the whole route between two places, it is a contract for through transportation, though separate tickets be issued for different portions of the route.[39] By accepting a coupon ticket over a number of railroads which provides that it is "good for one continuous passage," the purchaser merely agrees that he is not entitled to any stop-over privileges on any of the lines, and will continue his journey over any line without interruption after beginning it over that line.[40]

37. **Through tickets issued in the form of coupons.**—Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449; Milnor *v.* New York, etc., R. Co., 53 N. Y. 363, affirming 4 Daly 355; McCollum *v.* Southern Pac. Co., 31 Utah 494, 88 Pac. 663; Fitzgerald *v.* Southern Pac. Co., 31 Utah 510, 88 Pac. 669.

Where a coupon ticket is issued by an initial carrier as agent for subsequent carriers, the body of the ticket and each coupon constitute a separate contract between the passenger and the carrier to whose line the coupon applies, and neither line is responsible for delays occuring on others, so that a passenger would not be entitled to carriage over the last road after the time limited for transportation over it had expired, though prevented from presenting his ticket within that time by the fault of the other carriers. Brian *v.* Oregon Short Line R. Co., 105 Pac. 489, 40 Mont. 109.

The plaintiff was familiar with the route, his ticket was a coupon ticket, of which certain coupons purported to be issued by the Central Railroad Company as agent. And he did not deny that he knew that the Central Railroad Company acted as agent only as to points beyond its own road. It was held that the relation of carrier and passenger did not exist between plaintiff and the Central Railroad Company after the train left the latter's road. McDonald *v.* Central R. Co., 72 N. J. L. 280, 19 R. R. R. 58, 42 Am. & Eng. R. Cas., N. S., 58, 62 Atl. 405, 2 L. R. A., N. S., 505.

Defendant railway company sold to plaintiff ticket brokers a quantity of tickets over its own road, with coupons attached for transportation over a connecting line. Said tickets were issued under an agreement with said connecting road, and were for a number of years honored by the latter road, and until it passed into the hands of a receiver, who was ordered by the federal court to refuse to accept for passage the remainder of said tickets. Held, that in selling said coupons defendant acted merely as agent for the connecting line, and was not liable for the latter's failure to perform the contract. 59 Ill. App. 479, reversed in Chicago, etc., R. Co. *v.* Mulford, 44 N. E. 861, 162 Ill. 522, 35 L. R. A. 599.

It was immaterial that in negotiating the sale to plaintiffs defendant's agent stated that defendant would give plaintiffs rates through to certain points so low that by adding the local rate they could make a through rate to eastern cities that would be less than the regular through rate. Chicago, etc., R. Co. *v.* Mulford, 44 N. E. 861, 162 Ill. 522, 35 L. R. A. 599.

A statement in the tickets that they were issued by defendant for first-class passage to station stamped in margin of coupon did not make them contracts to transport the holder over the connecting line, and the name of the connecting line on the coupon, showing over what line the tickets were good, did not alter the contract. Chicago, etc., R. Co. *v.* Mulford, 44 N. E. 861, 162 Ill. 522, 35 L. R. A. 599.

In the sale of a round-trip ticket with coupons attached, good for passage over two roads under a special contract with the passenger, each road may stand on the contract and if one passes him the other is not bound thereby to pass him also in the face of the terms of the contract. Moses *v.* East Tennessee, etc., Railroad, 73 Ga. 356.

38. Hartan *v.* Eastern R. Co., 114 Mass. 44; Pennsylvania Co. *v.* Loftis, 72 O. St. 288, 74 N. E. 179, 106 Am. St. Rep. 597; S. C., 72 O. St. 300, 74 N. E. 182.

"Where coupon tickets are sold over long lines of connecting roads by the first company, acting alone as the agent of those over whose roads the passenger is to travel, the company selling the ticket is liable only for a safe passage over its line." Chollette *v.* Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1106, 1109, 4 L. R. A. 135.

39. **Contract for through transportation binding though separate tickets be issued for different portions of route.**—Van Buskirk *v.* Roberts, 31 N. Y. 661.

Thus, if one undertakes, as a common carrier, to transport a passenger the whole route from New York to San Francisco, he is liable in damages for negligent detention, though separate tickets be issued for different portions of the route. Van Buskirk *v.* Roberts, 31 N. Y. 661.

40. **Effect of acceptance of coupon ticket "good for one continuous passage."**—Brian *v.* Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489.

Effect of Withdrawal of Connecting Line.—Where a railroad company sells a through ticket, calling for transportation over a connecting line, if the connecting line be withdrawn after sale of the ticket, in consequence of the prevalence of yellow fever, the passenger can recover no damages. But if the connecting carrier be withdrawn before the sale, and there is no other convenient route to his destination, he can recover the expenses of his journey thus far and his return and compensation for his time.[41]

§ 3678. Liability for Acts of Agent Making the Contract.—Where the agent of a carrier, selling a ticket over its own line to its terminus, thence via and for the account of a connecting line to a certain point, fails to designate, in the coupon covering passage on the connecting line, the point of ultimate destination, and to stamp the ticket, whereby the passenger at the connecting point is refused further passage, and obliged to buy a new ticket, the initial carrier is liable for such acts as those of its agent, and not as those of an agent of the connecting line.[42]

§ 3679. Obligation of Carrier to Honor Tickets Issued by Another Carrier.—In the absence of any arrangement between connecting railroad companies, there is no obligation on the part of either to honor passenger tickets issued by the other.[43] But one railroad company may authorize another company to issue and sell tickets good over the line of the former, and where it does so it is bound to honor such tickets.[44]

41. **Effect of withdrawal of connecting line.**—Central R. Co. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582.

42. **Liability for acts of agent making contract for through transportation.**—Griffin *v.* Utica, etc., R. Co., 41 Hun 448, 3 N. Y. St. Rep. 155.

43. **Carrier not obliged to honor tickets issued by another carrier.**—Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465; Mills *v.* Baltimore, etc., R. Co., 111 Md. 260, 73 Atl. 885.

44. **A railroad company which authorizes another company to issue and sell mileage tickets good over its road** makes such company its agent, and can not repudiate the contract so made with a passenger, who in good faith buys a ticket from such agent, on account of any subsequent disagreement between the two companies. Cowen *v.* Winters, 37 C. C. A. 628, 96 Fed. 929, affirming 90 Fed. 99.

Facts sufficient to show authority of issuing company to sell ticket for transportation over other lines.—That a railroad company had repeatedly issued tickets similar to one sold to plaintiff for transportation over a number of lines, including defendant's which tickets had been accepted by defendant, was sufficient to show authority of the issuing company to sell the ticket to plaintiff; plaintiff not being bound to ascertain whether the issuing road was the agent for defendant. Brian *v.* Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489.

Facts showing that connecting carriers were bound by acts of agent of initial carrier.—The agent of an initial carrier sold plaintiff a through ticket and coupon tickets over several connecting roads, stamping the time limit thereon, the agent stating that plaintiff could stop over at a certain point on one of the lines. Plaintiff did so, and purchased a local ticket to the end of that line. The same conductor and train continued on the next line, and plaintiff's through ticket, though within the time limit, was refused, and plaintiff ejected. His ticket was accepted on a later train. Held sufficient to show that the connecting carriers were bound by the acts of the agent of the initial carrier, and that the ticket was good over their lines, within the time limit. Young *v.* Pennsylvania R. Co., 115 Pa. 112, 7 Atl. 741.

Facts not binding connecting carrier to receive round trip ticket on return trip.—Where, in an action against a carrier for refusal to furnish transportation, the ticket sold showed on its face that it was intended to have coupons for several connecting lines, over which defendant sold it, attached to it so that plaintiff could go to a certain place and return, and defendant warranted the ticket to be good, the fact that the conductor over the connecting line passed it on the outgoing trip, does not bind such connecting line, so as to require another conductor on the same road to receive it on the return trip. Bussey *v.* Charleston, etc., Railway, 55 S. E. 163, 75 S. C. 116.

Facts not creating presumption that carrier was authorized to place with ticket broker certain tickets for passage over another carrier's road.—The fact that an Illinois railroad company was the agent of a Georgia railroad company to sell in Chicago tickets from that city to Jacksonville, Fla., and return, with

§ 3680. On What Trains Passengers Received from a Connecting Carrier Must Be Transported.—The failure of a train carrying second-class passengers to connect with the proper train of another road, the two roads forming a through line, does not impose upon the second road an obligation to transport passengers holding second-class through tickets upon the next train—a limited express—upon which such tickets are not valid.[45]

§ 3681. Through Tickets Limited as to Time.—Where a ticket over connecting carriers provides that it must be used on or before a day specified therein, it is sufficient if the trip is begun upon a particular line and the ticket presented before midnight on the day named, though the journey is not completed on that line until after that time.[46] Where a coupon ticket provides that it will not be accepted for passage unless used to destination before midnight on a certain date, if the limitation is reasonable, the passenger is not entitled to transportation over the last road upon presenting his ticket after that time.[47] Where an agent of a connecting line, who issued a through ticket to a purchaser over defendant's railroad, had previously so acted, and his action in limiting such tickets had always been acceded to by defendant in order to obtain a share of the business, and defendant's proportionate part of the cost of the purchaser's ticket must have been received by defendant, and was retained prior to the purchaser's offer of the return portion of his ticket for transportation within the time limit specified therein, defendant is bound by the act of such issuing agent in limiting the ticket, whether he is a general or a mere special agent.[48] The acceptance of a railroad ticket by one of the connecting carriers over whose lines it provides for passage does not require another of such carriers to accept it, the time for using it having expired.[49]

§§ 3682-3690. Injuries to Passengers—§ 3682. In General.—A depot and track used in common by two chartered railroad companies in the city where their lines connect, though belonging to one of them exclusively, may be considered as belonging to each relatively to its own operations and business. Each must protect its own passengers from the other's negligence, so long as passengers are in their proper places, but not when they are out of place.[50]

coupons thereon for passage over the Georgia road, each ticket containing a special contract, to be signed by the original purchaser, stipulating that the ticket should be used by him only, did not create a presumption that the Illinois company was authorized to place in the hands of a ticket broker, for sale in Atlanta, tickets of that kind, stamped at the Chicago office of the Illinois company, with the contracts thereon left unsigned, and the coupons for the railroads between Chicago and Atlanta detached. Atkinson, J., dissenting. Comer *v.* Foley, 25 S. E. 671, 98 Ga. 678.

Facts establishing agency of carrier for receiver of other carriers.—Where a through coupon passenger ticket of a certain class was issued by a railroad company over its own line and the lines of other companies, including a system of railways in the hands of a receiver, which were operated in separate divisions, the fact that, with the receiver's knowledge, conductors in his employment had been recognizing as valid the coupons for his lines of such class of tickets, in connection with the fact that a coupon of a particular ticket of such class had been accepted for passage over one of said divisions, sufficiently established, in behalf of the holder of the ticket so issued, the agency of the initial company for the receiver in issuing the ticket. Spencer *v.* Lovejoy, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152.

45. On what trains passengers received from a connecting carrier must be transported.—New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 1 C. C. A. 544.

46. Ticket providing for use on or before a day specified.—Brian *v.* Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489.

47. Ticket providing for use to destination before midnight on a certain date.—Brian *v.* Oregon Short Line R. Co., 40 Mont. 109, 105 Pac. 489.

48. Carrier bound by act of connecting carrier's agent in limiting ticket.—Cherry *v.* Chicago, etc., R. Co., 90 S. W. 381, 191 Mo. 489, 2 L. R. A., N. S., 695, 109 Am. St. Rep. 830.

49. Effect of acceptance of ticket by one of connecting carriers.—Bolling *v.* St. Louis, etc., R. Co., 88 S. W. 35, 189 Mo. 219.

50. Injuries in depot or upon track used in common by two carriers.—Central R., etc., Co. *v.* Perry, 58 Ga. 461.

Injury from Defect in Platform Used in Common with Intersecting Road.—Where a passenger was set down from a train on a railroad platform, used in common with an intersecting road which the passenger intended to take, the company which brought him there is liable for an injury sustained by him from a defect in the platform, without regard to the question of which company in fact owned it or was bound to keep it in repair.[51]

§ 3683-3689. Liability of Initial Carrier—§ 3683. Injury on Wharf Connecting Carrier's Line with Steamboat.—Where a railroad company sells a ticket entitling the purchaser to through transportation over its road to a certain place and thence by a steamboat owned by another carrier to the place of destination, it will be liable to such purchaser, as a common carrier of passengers, for an injury received on a wharf owned by it, and connecting its road with the steamboat, and made subsidiary and necessary to the proper use and enjoyment of its road.[52]

§§ 3684-3689. Injuries on the Line of the Succeeding or a Subsequent Carrier—§ 3684. Injuries Resulting from Misrepresentation of Initial Carrier's Agent as to the Best Route.—Where by the misrepresentation as to the best route made by an initial carrier's agent plaintiff and his family were caused to go in a wrong direction on such carrier's railroad, which necessarily caused them delay and inconvenience, to the injury of plaintiff's wife, such carrier was not liable for delays on other connecting roads over which plaintiff traveled to his destination, in the absence of proof that such delays were not caused by failure of such connecting carriers to run their trains on time or by other negligence on their part.[53]

§ 3685. Injuries Resulting from Negligence of a Subordinate Carrier.—Where a railroad company sells a ticket for transportation between two points, containing nothing to show that such transportation, or a part thereof, is to be performed on a railroad, operated by another corporation, whose stock is entirely owned by a third railroad company, the stock of which in turn is owned by the initial carrier, which in fact controls the operation of the second carrier through its officers, the initial carrier is liable for the wrongful killing of the purchaser of the ticket, though resulting from the negligence of the second carrier.[54]

§§ 3686-3689. Liability under Contract—§ 3686. In General.—Where a carrier undertakes to transport a passenger over its own line and that

51. **Injury from defect in platform used in common with intersecting road.**—Wabash, etc., R. Co. *v.* Wolff, 13 Ill. App. 437.

52. **Injury on wharf connecting carrier's line with steamboat.**—Where the plaintiff's ticket entitled her to a passage over the defendant's road to P. and thence by steamboat; and it appeared that the defendants had built their track upon their wharf down to the steamboat, and had run their passenger train upon it for a time, and still continued to run their baggage train there; and that they directed their passengers by printed sign to use the wharf as a passageway to the boat, and it was so used; and that defendants made the wharf subsidiary and necessary to the proper use and enjoyment of their road, in an action by the plaintiff to recover for an injury upon the wharf, held, that the defendants were bound to exercise the same degree of care, in making the wharf safe and convenient for their through passengers to travel over, as is required of common carriers of passengers, although they required them to disembark at their depot, 40 rods distant from the steamboat; and that this liability continued until, in the ordinary course of the passage over the wharf, the passengers reached the point where the liability of the steamboat company commenced. Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

53. **Injuries resulting from misrepresentation of initial carrier's agent as to best route.**—Judgment, 86 S. W. 71, reversed in St. Louis, etc., R. Co. *v.* White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A., N. S., 110, 122 Am. St. Rep. 631.

54. **Injuries resulting from negligence of a subordinate carrier.**—Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840.

of another carrier, it will be liable for an injury to the passenger caused by the negligence of the connecting carrier.[55] Where a railroad company sells a through ticket over its own road and the road of another railroad company, and the passenger is conveyed over the entire route in the train of the initial carrier, such carrier will be liable for an injury to the passenger on the line of the connecting carrier, caused by the negligence of those in charge of the train.[56] If a street railway company sells a return ticket to a point on another railway with which it connects and runs a car operated by its own crew to the point in question, it will be liable to the purchaser of the ticket injured by the negligence of its employees while the car is running on the connecting line.[57] Where an initial

55. Liability for injury caused by negligence of connecting carrier.—Texas Cent. R. Co. *v.* Marrs, 100 Tex. 530, 101 S. W. 1177.

56. Liability where through ticket is sold by initial carrier.—Chollette *v.* Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135.

It seems that a railroad company in one state which sells a through ticket to a point in a different state, over a specified route, by an arrangement with the other railroad companies whose lines make up the route in the other states, is bound to carry the passenger and his baggage safely to such place of destination, and is liable for any injury to his person or baggage occurring on any of the lines of the connecting roads. Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

Plaintiff applied to an agent in the ticket office at the station at W., on defendant's road, for a ticket to E., on the U. P. Railroad, a number of miles east of the eastern terminus of defendant's road, which was operated by the U. P. Railroad, and by such agent was furnished a single local ticket from W. to E. By direction of the agents in charge of the train she took her seat in the car, in which she was carried to the junction of the two roads, and on to E., without change. At E. plaintiff was injured, while alighting from the train, by the negligence of those in charge of the train. Held, that defendant was liable under Comp. St. c. 72, art. 1, § 3, making every railroad company liable for personal injuries to passengers while being transported over its road, unless caused by the criminal negligence of the passengers or violation of some express rule actually brought to their notice. Chollette *v.* Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135.

But in Tennessee it has been held that where a passenger purchases tickets of an agent of a railroad company for carriage over the railroad line and a connecting steamboat line, the passenger can not sue the railroad company for injuries occurring on the steamboat, unless he can show a partnership between the railroad and steamboat lines. Nashville, etc., R. Co. *v.* Sprayberry, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705.

But in this same state it has been held that where two lines of a stage route were owned by different persons, between whom there was an arrangement that passengers at either end might purchase of their respective agents through tickets which would entitle them to transportation to the other end of the route, a passenger so purchasing through tickets, who is hindered or detained in his journey by the fault of the owners of the connecting line, may recover damages from the party of whom such tickets were purchased; and his right in this respect is in no way impaired by his previous knowledge of such distinct ownership and the arrangement between said owners. Carter *v.* Peck, 36 Tenn. (4 Sneed) 203, 67 Am. Dec. 604.

Facts not proving a special contract to carry beyond carrier's line.—The defendants, at the time specified in the declaration, were running their cars, as common carriers, from N. H. to P., five miles short of C., their liability ending at P., except as resulting from stage carriage beyond P. They had given public notice, by advertisement in the newspapers, that the cars on their road from N. H. would arrive at P., and stages would leave P. for C., at the time specified in such notice. The plaintiff bought of the defendants a ticket for the fare from N. H. to C. The injury complained of happened in the stage between P. and C. The defendants did not own or control the stage, nor participate in the profits of its use. In an action founded on a special contract to carry the plaintiff safely from N. H. to C., by railroad and stage, it was held that the advertisement implied no liability of the defendants beyond the line of their road, and the ticket showed only the receipt of so much money paid by the plaintiff, which was all that he was to pay previous to his arrival at C., and, consequently, the undertaking alleged was not proved; therefore, a verdict for the plaintiff was set aside as against the evidence. Hood *v.* New York, etc., R. Co., 22 Conn. 1.

57. Liability of street railway company selling return ticket to point on another railway.—Moss *v.* Lancaster, etc., St. R. Co., 218 Pa. 601, 67 Atl. 869.

carrier contracts for through transportation over the lines of connecting carriers in a car furnished by such initial carrier, it is liable for injuries to passengers occasioned by its furnishing a car which is not capable of being made comfortably warm, without regard to whether the injuries occur on its own line or on the line of a connecting carrier.[58] Where a passenger train passes from one road to another, and the original company has assumed the liability for the safe carriage of passengers beyond its own line, such liability is not affected by the fact that on the connecting road the general control over the train is exercised by the officers of that road, who become pro hac vice those of the company which contracted to transport safely over that road beyond its own line.[59]

§ 3687. Effect of Sale of Coupon Ticket.—The sale by a railroad company of a coupon ticket for transportation of a passenger over its own and a connecting line, does not import an undertaking on the part of the company to be responsible for the safety of the passenger beyond its own line,[60] or render it liable to him for an injury received upon the connecting road.[61] But a company selling such a ticket may by contract make itself responsible for the safe carriage of the passenger over the entire route covered by the ticket.[62]

§ 3688. Liability for Accident Happening on a Special Excursion Train.—A railroad company which advertises an excursion over its road on a day named, by special train, to a certain city, and return, and does not in such advertisements limit its responsibility for the excursion from first to last, but treats the city as one of the stations of its road in the time-table for the special train, and sells the excursion tickets over its own and a terminal association's line, to which the entire train, except the engine, is transferred, for the purpose of being drawn into and out of the city, is responsible for an accident resulting from an overcrowded condition of the cars, though such accident happen on the terminal association's line.[63]

§ 3689. Liability for Assault by Employee of a Connecting Carrier.—Where a railroad company which has sold a ticket for a continuous passage over connecting lines fails to notify the gatekeeper of a connecting line to permit the passenger to ride on a later train than the one called for by the ticket, or to correct the passenger's ticket, the passenger having failed to make connections, due to the contracting company's fault, it is liable for an assault by the gatekeeper made on the passenger to prevent his taking such later train.[64] But the conductor of a railroad train has no authority to bind the company, by allowing a stop-over, so as to make the company liable, where a connecting road ejected the passenger because the ticket provided for a continuous trip on the two roads.[65]

58. **Liability for injuries occasioned by condition of car furnished by initial carrier.**—Missouri, etc., R. Co. *v.* Harrison, 80 S. W. 1139, 97 Tex. 611, reversing judgment 77 S. W. 1036; Missouri, etc., R. Co. *v.* Foster, 80 S. W. 1197, 97 Tex. 618, reversing judgment 78 S. W. 1134.

59. **Initial carrier's liability not affected by fact that train is controlled by officers of connecting carrier.**—Jones *v.* Pennsylvania R. Co., 8 Mackey (19 D. C.) 178.

60. **Effect of sale of coupon ticket.**—See ante, "What Constitutes a Contract for Through Transportation—Effect of Contract," § 3677.

61. The sale for one sum of a railroad ticket, composed of coupons invalid if detached, and each bearing the name of the railroad corporation selling it, empowering the purchaser to pass over the connecting roads of different corporations, does not render the selling corporation liable to the purchaser for an injury received upon a connecting road. Hartan *v.* Eastern R. Co., 114 Mass. 44.

62. Pennsylvania Co. *v.* Loftis, 72 O. St. 288, 74 N. E. 179, 106 Am. St. Rep. 597; S. C., 72 O. St. 300, 74 N. E. 182.

63. **Liability for accident happening on a special excursion train.**—Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93. See, also, Washington *v.* Raleigh, etc., R. Co., 101 N. C. 239, 7 S. E. 789, 1 L. R. A. 830.

64. **Liability for assault by employee of a connecting carrier.**—Watkins *v.* Pennsylvania R. Co., 10 Mackey (21 D. C.) 1.

65. International, etc., R. Co. *v.* Best, 55 S. W. 315, 93 Tex. 344.

§ 3690. Effect of Agreements between Connecting Carriers and Joint Liability.—Connecting carriers may by contract between them render themselves jointly liable for injuries to passengers occurring on either line.[66] If several connecting carriers, by agreement among themselves, appoint a common agent at each end of the route to receive the fares and give through tickets, this does not of itself constitute them partners as to passengers so as to render each one liable for personal injuries occurring upon any portion of the line.[67] The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business is done by them, fails to show such a community of interest as will make them partners inter sese, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination.[68] But where a railroad company operating a connecting line agrees with the initial carrier that a ticket issued by the latter shall entitle the purchaser to carriage over both roads, the rights of the passenger and the liabilities of the connecting line for personal injuries to him are the same as if the ticket had been bought at a station on its own line to any other station thereon.[69] An agreement between railroad corporations operating connecting lines as to the division of through-ticket money and as to the sale of through tickets, does not render the selling corporation liable to the purchaser for an injury received upon a connecting road.[70] Where a railroad company and an omnibus driver enter into an agreement for the transportation by the latter of passengers from the station, the company selling a ticket for the purpose, the company is not liable to a passenger on the omnibus for an injury caused by the driver's negligence.[71]

66. **Contract creating a joint liability.**—Defendant operated an electric railway connecting with another line, and had a contract with the latter whereby through cars were run by both lines between their respective terminals. The agreement provided that each company should have full control of the cars while on its tracks, and that the ownership of the tracks should determine their responsibility to the public, etc.; that each company should receive a rental for the use of its cars by the other; and that the fares should belong to the company owning the tracks over which they were collected. Plaintiff boarded one of defendant's cars while on the tracks of the other company, and paid her fare to the terminus of the latter's line. She was injured while alighting as the car was about to turn onto defendant's track, and after the switch had been thrown. She was entitled, for the fare paid, to ride at least a block further, and over a portion of defendant's road. Held, that the companies were jointly liable for the injury, each receiving a consideration for her ride—the other company, the fare; and defendant, a rental for its car, with the privilege of through service. Richard *v.* Detroit, etc., Railway, 89 N. W. 52, 129 Mich. 458.

67. **Agreement appointing common agent to receive fares and give through tickets.**—Nashville, etc., R. Co. *v.* Sprayberry, 56 Tenn. (9 Heisk.) 852. See, also, Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749.

68. **Sale of through ticket and checking of baggage to end of route.**—Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199.

69. **Agreement between carriers as to ticket issued by initial carrier.**—Schopman *v.* Boston, etc., R. Corp. (Mass.), 9 Cush. 24, 55 Am. Dec. 41.

70. **Agreement as to division of through-ticket money and sale of through tickets.**—Hartan *v.* Eastern R. Co., 114 Mass. 44.

71. **Agreement between railroad company and omnibus driver for transportation of passengers from station.**—Poole *v.* Delaware, etc., R. Co. (N. Y.), 35 Hun 29.

CHAPTER XXXII.

Limitation of Liability.

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§§ 3691-3767. Carriers of Goods and Live Stock—§§ 3691-3755. Limitations to Carrier's Own Line or to Carrier Having Custody of Property—§§ 3691-3720. Power to Limit and Validity—§§ 3691-3693. Carrier Receiving Consignment to Point Beyond Its Own Line—§ 3691. Power to Limit in General.—An initial carrier receiving goods consigned to a point beyond the end of its route may limit its liability to loss or injury occurring on its own route.[1]

§ 3692. American Rule as to Effect of Receipt of Goods.—The law applicable to the simple receipt or acceptance of goods by common carriers, directed or consigned beyond the line of the carrier, by the conceded weight of American authority requires them to be transported to the terminus of its lines, and there delivered to a connecting carrier to be forwarded to their destination, and with this the responsibility ceases. This is the doctrine of the supreme court of the United States[2] and a large majority of the state courts, among

1. Power to limit in general.—*Georgia.*—Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

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Missouri.—Snider *v.* Adams Exp. Co., 63 Mo. 376.

Tennessee. — East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; Deming *v.* Merchants', etc., Storage Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.—Houston, etc., R. Co. *v.* Park, 1 Texas App. Civ. Cas., § 332; International, etc., R. Co. *v.* Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67; Gulf, etc., R. Co. *v.* Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355; Texas, etc., R. Co. *v.* Smith (Tex. Civ. App.), 24 S. W. 565; Rogers *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 28 S. W. 1024; International, etc., R. Co. *v.* Welbourne (Tex. Civ. App.), 113 S. W. 780.

2. American rule as to effect of receipt of goods.—Michigan Cent. R. Co. *v.* Min-

which are Connecticut,[3] Indiana,[4] Kansas,[5] Kentucky,[6] Maine,[7] Maryland,[8] Massachusetts,[9] Michigan,[10] Minnesota,[11] New Hampshire,[12] North Carolina,[13] New York,[14] Oregon,[15] South Carolina,[16] Texas,[17] Vermont,[18] West Virginia,[19] and Wisconsin.[20]

Stipulation Declaratory of Common Law.—A stipulation in a bill of lading of the initial carrier, limiting its liability to loss occurring while the property is in its possession, is simply declaratory of the common law,[21] for where the contract is not for through transportation, and is silent on the subject, the initial carrier is not liable for any loss or damage which occurs after the freight has

eral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; St. Louis Ins. Co. *v.* St Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425.

3. Where goods are delivered to a carrier marked for a particular destination, without any directions as to their transportation and delivery, the carrier is bound to transport them merely to the end of his line if such has been the custom, though the consignor was ignorant of the custom. Hood *v.* New York, etc., R. Co., 22 Conn. 1.

4. Pittsburg, etc., R. Co. *v.* Bryant, 36 Ind. App. 340, 75 N. E. 829.

5. Where it is apparent, from the bill of lading, that the carrier assumed the responsibility of delivering the goods to a connecting line, and of safe transportation over its own road only, no further responsibility is incurred. Berg *v.* Atchison, etc., R. Co., 30 Kan. 561, 2 Pac. 639.

6. Cincinnati, etc., R. Co. *v.* Greening (Ky.), 100 S. W. 825, 26 R. R. R. 235, 49 Am. & Eng. R. Cas., N. S., 235; Louisville, etc., R. Co. *v.* Cooper, 13 Ky. L. Rep. 496.

7. Taylor *v.* Maine Cent. R. Co., 87 Me. 299, 32 Atl. 905.

8. Hoffman *v.* Cumberland Valley R. Co., 85 Md. 391, 37 Atl. 214.

9. Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78.

10. Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120; Rickerson Roller-Mill Co. *v.* Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269; McEacheran *v.* Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612.

11. Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

12. Gray *v.* Jackson & Co., 51 N. H. 9, 12 Am. Rep. 1.

13. One of several connecting carriers may limit its liability to damages sustained by the goods while in its own custody. Weinberg *v.* Albemarle, etc., R. Co., 91 N. C. 31.

14. Wright *v.* Boughton (N. Y.), 22 Barb. 561.

15. Taffe *v.* Oregon R., etc., Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

"'A railroad company is a carrier of goods for the public,' says Mr. Justice Field in Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425, 'and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of this business, to the end of its route, and there deposit them in a suitable place for their owner's or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it.'" Taffe *v.* Oregon R., etc., Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

16. Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; McMeekin *v.* Southern Railway, 85 S. C. 381, 67 S. E. 745.

A railroad company may relieve itself from liability for damage to goods received for shipment, if the damage occurs on a connecting line, by expressly so stipulating in the bill of lading. Hill *v.* Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337.

17. The mere fact that a railroad company receives goods marked for a place beyond its own line does not import an agreement to transport the goods to the destination named as a common carrier. Hunter *v.* Southern Pac. R. Co., 76 Tex. 195, 13 S. W. 190.

18. Morse *v.* Brainerd, 41 Vt. 550.

19. Roy *v.* Chesapeake, etc., R. Co. (W. Va.), 57 S. E. 39, 26 R. R. R. 230, 49 Am. & Eng. R. Cas., N. S., 230.

20. Detroit, etc., R. Co. *v.* Farmers', etc., Bank, 20 Wis. 122.

The first or any succeeding one of connecting carriers may, by contract, restrict its liability to losses occurring on its own line. Tolman *v.* Abbot, 78 Wis. 192, 47 N. W. 264.

21. Stipulation declaratory of common law.—Pittsburg, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735.

left its line,[22] but may by special contract extend his liability so as to cover a safe delivery at the place of destination.[23]

Naming Destination in Receipt Clause of Bill of Lading.—The receipt clause in a bill of lading, naming the destination of the property to be shipped—a point beyond the terminus of the carrier's line—does not impose on it the liability of a carrier beyond such terminus, and hence does not conflict with a subsequent express stipulation that its liability as carrier shall cease at its freight station in the terminus of its line, or with a provision that, when necessary to transport the property to point of destination over the line of any other carrier, delivery to such carrier may be made, and the original carrier shall not be liable for the negligence of such other carrier.[24]

Receipt of Goods Marked C. O. D.—The liability of an express company which receives goods for transportation over its own and a connecting line is ordinarily discharged by delivery to the connecting line, and such liability is not extended in this respect by the fact that it receives the goods marked "C. O. D.," where the company gives a receipt, made out by the shipper on one of its blanks, furnished him for his daily use, stating that the company only undertakes to carry the goods to the point on its line of destination, to there deliver them to the other company, and that it will not be liable for loss at a point not on its own line.[25]

Connecting Point Not Properly Stated.—Where a bill of lading stated that the initial carrier had received the goods to be transported and delivered to the succeeding carrier, to be forwarded to destination, it being expressly agreed that the initial carrier's responsibility ceased on the arrival of the goods at its terminal depot, where they were to be delivered to the connecting carrier, such contract, in the absence of statute, limited the initial carrier's liability to loss accruing on its own line, though the blank in the bill for the insertion of the connecting point was not properly filled,[26] or left blank.[27]

§ 3693. English Rule as to Effect of Receipt of Goods.—The English rule, and by the doctrine of some of the courts of this country, such a receipt of goods for transportation, without else to indicate the intent of the parties concerned, implies, prima facie, an undertaking or contract upon the part of the carrier to convey them to the point of destination, as indicated by the direction or consignment, whether the carrier owns or controls all the lines of transportation in the route of their travel or not.[28] This is the doctrine in Illinois,[29]

22. Morse *v.* Brainerd, 41 Vt. 550.
A railroad company, as a common carrier, is liable for injuries that occur beyond the termination of its own road, only when it stipulates to deliver the property at a point beyond. Morse *v.* Brainerd, 41 Vt. 550.

23. Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

24. **Naming destination in receipt clause of bill of lading.**—Keller *v.* Baltimore, etc., R. Co., 196 Pa. 57, 46 Atl. 261.

25. **Receipt of goods marked c. o. d.**—Gibson *v.* American Merchants' Union Exp. Co. (N. Y.), 1 Hun 387, 3 Thomp. & C. 501.

26. **Connecting point not properly stated.**—Nenno *v.* St. Louis, etc., R. Co., 105 Mo. App. 540, 80 S. W. 24.

27. **Blank for destination not filled.**—A contract of shipment of goods consigned to New York was made upon the carrier's printed form of bill of lading, containing a blank space for the place of destination, with directions not to insert points not on the carrier's lines. The blank was not filled. The written part of the contract provided for "fastest passenger train service, consigned as above." A stipulation relieved the carrier from liability for loss or injury to the property, except on its own lines. Held, that the blank space for the destination of the goods was reserved for points on carrier's own lines, and that the written part of the contract was a contract for general carriage, containing the designation of the place of shipment, subject to the stipulation as to liability, and therefore the carrier was not liable for losses on lines of connecting carriers. Taffe *v.* Oregon R., etc., Co., 67 Pac. 1015, 68 Pac. 732, 41 Ore. 64, 58 L. R. A. 187.

28. **English rule.**—Taffe *v.* Oregon R., etc., Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187; Morse *v.* Brainerd, 41 Vt. 550.

29. The rule is that where goods are delivered to a railway company, marked to a place not upon the line of its road, but beyond the same, with no other directions or without any express contract

Iowa,[30] and Tennessee.[31] The distinction between the rules is that by the former the duty implied is to carry the goods to the end of the receiving carrier's line, and there to deliver them to the next carrier in the route, to be forwarded thereby;[32] while by the latter the duty implied is to carry them through to their destination. The engagement, of course, may be varied in either case, by express contract, or the circumstances attending the shipment may raise a different obligation by implication; and thus, in order to exempt a carrier beyond its own lines, under the English rule, there must be an express or implied limitation or restriction of primary liability; and to enlarge the liability, under the American rule, there must be an express or implied undertaking to that effect, aside from the mere receipt of the goods destined to a point beyond the route of its own authority. The so-called American rule is perhaps better grounded in equal justice towards the shipper and carrier, and in public policy, and is therefore preferable upon principle, as well as by the preponderance of American authority.[33]

Refusal of Connecting Carrier to Receive Shipment.—Under the English rule it is no excuse for failure to receive shipment that the connecting road refused to receive the freight and advance the charges due and paid by the company sued.[34]

Bills of Lading Received by Consignor from Connecting Lines.—Where the consignor of property which a railroad company agreed to transport from one point to another, partially over connecting lines, signed and received from the connecting lines bills of lading in which they assumed all liability, there was sufficient evidence that the consignor did not regard the initial carrier as having assumed a carrier's liability for the entire distance.[35]

Shipping Over Each Road under Separate Contract.—The fact that the destination of a shipment received by a railroad for transportation is beyond its own line, or that it was received from another carrier to be transported to a point on its own line, does not create any joint responsibility between the connecting carriers, where the shipment over each is under a separate contract which limits its liability for loss or injuries to such as may occur on its own line.[36]

Shipper Having Knowledge of Usage of Carrier to Deliver Goods at Terminus and Collect Charges Over Its Own Road Only.—Although a railroad company received goods marked and destined to a point beyond the terminus of its own line, and did not expressly limit its liability to carry the goods to such terminus, if the company shows that it was its unvarying usage to deliver the goods at the terminus of its road; and that it only undertook to transport

as to the place of delivery, the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked. Milwaukee, etc., R. Co. *v.* Smith, 74 Ill. 197.

30. A carrier's undertaking to transport goods delivered to it to their destination may be implied from the circumstances of the delivery and acceptance, as well as expressed; and in either case its responsibility for the safety of the goods is the same. Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281.

Receipt of a carrier for goods directed to a place beyond his professed termini is prima facie evidence of a contract to deliver at such place. Angle & Co. *v.* Mississippi, etc., R. Co., 9 Iowa 487.

31. Where a railroad company, without contracting for restricted liability, receives goods consigned to a point beyond its terminus but on the line of a connecting route, it is bound to deliver them at their destination. Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

32. Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297.

33. Taffe *v.* Oregon R., etc., Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

34. **Refusal of connecting carrier to receive shipment.**—A railroad company received freight for carriage and delivery at a point beyond its line on a connecting road. In the absence of a special contract limiting the responsibility, the company receiving the freight is bound to deliver it at its destination. It is no excuse for not doing so, that the connecting road refused to receive the freight and advance the charges due and paid by the company sued. Railroad *v.* Stockard, 58 Tenn. (11 Heisk.) 568.

35. **Bills of lading received by consignor from connecting lines.**—Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88, 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569.

36. **Shipment over each road under separate contract.**—McGuire *v.* Great Northern R. Co., 153 Fed. 134.

over its own line; and that this fact was known to the shipper, and if, moreover, it charged the shipper freight, and collected it from him for transportation over its own road only, such facts would be sufficient to rebut the inference of an implied contract to carry the freight to its destination and deliver it to the consignee.[37]

§§ 3694-3711. Carrier Contracting to Carry Beyond Its Own Line—§ 3694. In General.—A common carrier which contracts to convey goods beyond its own line may in the contract restrict its liability for such goods to the time they are on its own line,[38] since a common carrier is not bound in law to transport goods beyond its terminus. This doctrine prevails in Arkansas,[39] Georgia,[40] Illinois,[41] Indiana,[42] Iowa,[43] Michigan,[44] Minnesota,[45] Missouri,[46] Nebraska,[47] Tennessee [48] and Texas.[49]

37. **Shipper having knowledge of usage of carrier to deliver goods at terminus and collect charges over its own road only.**—Western, etc., Railroad *v.* McElwee, 53 Tenn. (6 Heisk.) 208.

38. **Carrier contracting to carry beyond its own line.**—Wabash R. Co. *v.* Harris & Co., 55 Ill. App. 159.

39. A railroad company, in giving a bill of lading for the transportation of goods over its own line and other connecting lines, or other public means of carriage, may contract against liability for loss of or damage to the goods happening beyond the termination of its own line. Taylor, etc., Co. *v.* Little Rock, etc., R. Co., 32 Ark. 393, 29 Am. Rep. 1.

40. Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817; Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281.

41. Chicago, etc., R. Co. *v.* Chapman, 133 Ill. 96, 24 N. E. 417, 42 Am. & Eng. R. Cas. 392, affirming 30 Ill. App. 504; Michigan Cent. R. Co. *v.* Chicago Elect. Vehicle Co., 124 Ill. App. 158; Wabash R. Co. *v.* Harris & Co., 55 Ill. App. 159; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Illinois Match Co. *v.* Chicago, etc., R. Co., 250 Ill. 396, 95 N. E. 492, reversing 153 Ill. App. 568; Elgin, etc., R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311, affirmed in 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218.

A carrier may by express contract obligate itself to deliver at destination beyond its own line, and may also limit its liability to such damage or loss as occurs on such line. Coats *v.* Chicago, etc., R. Co., 87 N. E. 929, 239 Ill. 154.

42. Pittsburg, etc., R. Co. *v.* Bryant, 36 Ind. App. 340, 75 N. E. 829.

43. Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88, 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569.

44. Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

45. The obligation of a carrier to carry goods beyond its own line being a matter of contract, and not of legal duty, if he contracts for through transportation, he may limit his responsibility to his own line. Dodge *v.* Chicago, etc., R. Co., 111 Minn. 123, 126 N. W. 627.

46. Miller *v.* Missouri, etc., R. Co., 157 Mo. App. 638, 138 S. W. 902. See post, "Missouri," § 3701.

47. Although a railroad company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line. Fremont, etc., R. Co. *v.* New York, etc., R. Co., 92 N. W. 131, 66 Neb. 159, 59 L. R. A. 939. See post, "Express Contract," § 3724.

48. East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; Dillard Bros. *v.* L. & N. R. Co., 70 Tenn. (2 Lea) 288; Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188; Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253; Merchants' Despatch Transp. Co. *v.* Bloch, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 6 Am. St. Rep. 847; Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

The first carrier has the legal right, at its election, to undertake the transportation of the goods to the terminus of its own line merely, or to their ultimate destination. It is under no legal obligation, in the first instance, to transport them beyond the end of its own line, and, for that reason, it is authorized in law, when contracting for through transportation, to limit its liability to losses occurring on its own line. Merchants' Despatch Transp. Co. *v.* Bloch, 86 Tenn. (2 Pickle) 392, 6 S. W. 881, 6 Am. St. Rep. 847; East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; Dillard Bros. *v.* L. & N. R. Co., 70 Tenn. (2 Lea) 288; Telegraph Co. *v.* Munford, 87 Tenn. 189, 10 S. W. 318, 2 L. R. A. 601; Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

Delivery to succeeding carrier.—A condition in a bill of lading providing that the carrier's liability shall cease upon delivery to the carrier over whose connecting line the freight is to be shipped is valid. T. & P. R. Co. *v.* Rogers (Tenn.), 3 S. W. 660.

49. A common carrier may stipulate in a contract of shipment to a point beyond

Public Policy.—Where a common carrier contracts to transport goods from one point to another, necessarily over connecting lines, it is not prevented on grounds of public policy from contractually limiting its liability for the negligence of the connecting carriers.[50] Aliter in Kentucky.[51]

§§ 3695-3696. Effect of Federal Statutes—§ 3695. Prior to Hepburn Act.—As to interstate through shipments made by an initial carrier before the amendment of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), forbidding the limitation by an initial carrier of its liability as insurer where it contracts to carry though, it could limit its liability as insurer for a consideration such as a reduced rate of freight.[52]

§ 3696. Under Hepburn Act.—A carrier may not by contract limit the liabilities imposed on it by Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 ([U. S. Comp. St. 1901, p. 3169]) § 20, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 U. S. Comp. St. Supp. 1909, p. 1163), making the initial carrier of an interstate shipment liable for any loss or injury thereto caused

its line that it shall be released from liability after the goods have left its road. McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39, following Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; disapproving Gulf, etc., R. Co. *v.* Vaughn, 4 Texas App. Civ. Cas., § 182, 16 S. W. 775; Gulf, etc., R. Co. *v.* Golding, 3 Texas App. Civ. Cas., § 33; St. Louis, etc., R. Co. *v.* Frazar, 43 Tex. Civ. App. 585, 97 S. W. 325; Missouri Pac. R. Co. *v.* Creath, 3 Texas App. Civ. Cas., § 83; Texas, etc., R. Co. *v.* Logan, 3 Texas App. Civ. Cas., § 186; Texas Exp. Co. *v.* Dupree, 2 Texas App. Civ. Cas., § 318; Texas, etc., R. Co. *v.* Scrivener, 2 Texas App. Civ. Cas., § 328; Rogers *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 28 S. W. 1024; Houston, etc., R. Co. *v.* Park, 1 Texas App. Civ. Cas., § 332; International, etc., R. Co. *v.* Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67. See, to the same effect, Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530; Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471; Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777; Hunter *v.* Southern Pac. R. Co., 76 Tex. 195, 13 S. W. 190; Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 13 S. W. 637; McCarty *v.* Galveston, etc., R. Co., 79 Tex. 33, 15 S. W. 164; International, etc., R. Co. *v.* Startz, 97 Tex. 167, 77 S. W. 1, reversing 74 S. W. 1118; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; Houston, etc., Nav. Co. *v.* Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17, reversing 31 S. W. 560.

A carrier may limit its liability to its own line in a contract for a through shipment to a point on another carrier's line. Galveston, etc., R. Co. *v.* Short (Tex. Civ. App.), 25 S. W. 142; Gulf, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 21 S. W. 186.

Partnership between roads.—A railway company has the right to limit its liability to its own line, and is not liable for injuries received on another line of railway, if there is no partnership existing between them. Texas, etc., R. Co. *v.* Hawkins (Tex. Civ. App.), 30 S. W. 1113. See post, "Connecting Carriers Which Are Partners," § 3713.

50. Public policy.—*Illinois.*—Lehigh Valley Transp. Co. *v.* Pillsbury-Washburn Flour Mills Co., 92 Ill. App. 628; Elgin, etc., R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311, affirmed in 66 N. E. 326, 200 Ill. 636, 93 Am. St. Rep. 218.

Iowa.—Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88, 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569.

Michigan.—Kibby *v.* Michigan Cent. R. Co., 142 Mich. 313, 105 N. W. 769.

Missouri.—Eckles *v.* Missouri Pac. R. Co., 112 Mo. App. 240, 87 S. W. 99.

Ohio.—Stevens *v.* Lake Shore, etc., R. Co., 20 O. C. C. 41, 11 O. C. D. 168.

Tennessee.—Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

51. A stipulation, in a contract by an initial carrier for through shipment over connecting carriers, that the initial carrier shall not be liable for loss or damage occurring on the connecting line is void as against public policy, as the initial carrier can not exempt itself from liability for the act of its agent. Ireland *v.* Mobile, etc., R. Co., 49 S. W. 188, 453, 20 Ky. L. Rep. 1586, 105 Ky. 400.

52. Prior to Hepburn Act.—Blackmer, etc., Pipe Co. *v.* Mobile, etc., R. Co., 137 Mo. App. 479, 119 S. W. 1.

by any connecting carrier, because of the rate charged for the transportation.[53] Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), the Hepburn act, is declaratory of the common law when it makes a carrier responsible for loss or damage occurring on its line or that of a connecting carrier, but is derogatory thereto when it forbids and annuls contracts exempting the initial carrier from liability for loss or damage occurring upon the line of a connecting carrier.[54] The act makes void all contracts by an initial carrier limiting the liability of a connecting carrier.[55] A contract for an interstate shipment of goods, limiting the liability of the carrier to loss occurring while the goods were in its possession and the damages to a stated amount, is void in these particulars and can not affect the shipper's right to recover for their loss.[56]

Unauthorized Diversion by Intermediate Carrier.—Under the Act of Cong. Feb. 4, 1887, as amended by the Carmack amendment of June 29, 1906, an initial carrier, under a contract of shipment of a car load over specified connecting lines, is liable for loss following unauthorized diversion of the shipment from the specified route by the second carrier, though the contract purported to limit liability to an agreed valuation.[57] Under the Hepburn act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]) a bill of lading issued after the taking effect of such act for goods to be transported from a point in one state to a point in another state is of no effect, in so far as it stipulates a limitation of such carrier's liability to loss occurring on its own line.[58] The act

53. Under Hepburn Act.—Central, etc., R. Co. *v.* Sims, 169 Ala. 295, 53 So. 826; St. Louis, etc., R. Co. *v.* Grayson, 89 Ark. 154, 115 S. W. 933.

54. Southern Pac. Co. *v.* Crenshaw Bros., 5 Ga. App. 675, 63 S. E. 865.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 906), providing that a carrier, on receiving property for interstate transportation, shall issue a bill of lading therefor, and be liable to the holder for any loss, and no contract shall exempt the carrier from the liability imposed, abrogates the common-law rule that each carrier is liable for the losses occurring on its own line, and makes the initial carrier liable for losses occurring on the lines of connecting carriers, and forbids it from exempting itself by agreement from such liability. Judgment, 111 N. Y. S. 235, 59 Misc. Rep. 431, reversed in Greenwald *v.* Weir, 115 N. Y. S. 311, 130 App. Div. 696, application denied to resettle order 116 N. Y. S. 172, 131 App. Div. 568.

55. The Hepburn amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) makes interstate carriers liable for loss or injury to property caused by it, prohibits contracts exempting the carrier from the liability thereby imposed, and provides that the carrier issuing the freight receipt or bill of lading may recover from the carrier on whose line the injury occurred any damages it may be required to pay the owner. Held, that the act made invalid all contracts limiting a carrier's liability for loss of freight, and an initial carrier could not contract to limit the liability of a connecting carrier. Kansas, etc., R. Co. *v.* Carl, 91 Ark. 97, 121 S. W. 932.

56. Southern Exp. Co. *v.* Meyer, 94 Ark. 103, 125 S. W. 642.

57. Unauthorized diversion by intermediate carrier.—Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

58. *Mississippi.*—Southern Pac. R. Co. *v.* Lyon & Co. (Miss.), 54 So. 784, overruling suggestion of error, S. C., 99 Miss. 186, 54 So. 728, 34 L. R. A., N. S., 234, Ann. Cas. 1913D, 800.

Texas.—Pecos, etc., R. Co. *v.* Crews (Tex. Civ. App.), 139 S. W. 1049; International, etc., R. Co. *v.* Wilbourne (Tex. Civ. App.), 115 S. W. 111.

The initial carrier issued at New Orleans a bill of lading reciting that it had received two cars of fruit to be transported by them and by steamers, railroad companies, or forwarding lines with which it connected to Waco, Tex., with as reasonable dispatch as its general business permitted; the consignment being to Waco via a named line at Houston. Another provision limited the initial carrier's liability to injuries happening on its own line. Rate Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1164]) § 7, amending the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), makes any common carrier receiving property for transportation from a point in one state to a point in another state liable for injury caused by it or any carrier over whose lines the property passes, and forbids the exemption of the initial carrier from liability by any contract.

is not retroactive,[59] and did not as to interstate shipments displace the previously existing Kansas statute (Geh. St. Kan. 1901, § 5987), prohibiting a railroad company, except as otherwise provided by regulation of the Board of Railway Commissioners from limiting its common-law liability as a carrier.[60]

Delay in Transportation of Cattle.—Under Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1167]), making a carrier liable for damages to an interstate shipment caused on its own or a connecting line, and providing that no contract or regulation shall exempt it from such liability, an initial carrier is liable for its own negligence or that of connecting carriers resulting in delay in the transportation of cattle by reason of which they failed to reach their destination within a reasonable time, whether they were shipped under an oral or under a written contract attempting to limit the carrier's liability for its own acts or delays occurring on its own line.[61]

§§ 3697-3705. Effect of State Statutes—§ 3697. In General.—State statutes prohibiting carriers from limiting their common-law liability do not apply to a stipulation limiting the carrier's liability to safe carriage over its own lines, since the carrier was under no obligation at common law to undertake to carry beyond its own line.[62]

§ 3698. Georgia.—The remedy afforded by Civil Code 1895, § 2298, can be waived by special contract between the consignor and the initial railroad, and when so waived the consignee's remedy is on the common-law liability of carriers over whose lines the shipment is made.[63]

§ 3699. Illinois.—Rev. St. of Illinois 1874, c. 114, § 82, prohibiting carriers from limiting their common-law liability, does not apply to contracts limiting the liability of a carrier to its own line.[64]

Another paragraph provides for recovery over by it against the carrier on whose lines the injury occurred. Held that the bill of lading was for a through shipment from New Orleans to Waco, though it named intermediate lines over which the shipment was to pass, so that the initial carrier could not limit its liability to negligence on its own line. Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73.

59. Defendant, a carrier operating a line of vessels between New York and Colon, and a line of railroad from Colon to Panama, contracted with plaintiff to transport certain articles from New York to Colon to be there delivered to a connecting carrier. The contract provided that, if they were delivered to any other carrier for transportation to the ultimate destination, the carrier selected should be the agent of the owner, and that the liability of each carrier should be terminated by proper delivery to the succeeding carrier; that the bill of lading was signed for the different carriers severally; that only the carrier in whose actual custody the goods were at the time of any loss, damage, or delay should be responsible therefor; and that the receipt of any carrier for the goods should be prima facie evidence of the condition in which he received them. The contract named a through rate, not to be prepaid, but of which each carrier was to collect his portion from the succeeding carrier, the full amount to be collected by the terminal carrier from the consignee. The contract did not provide who should be the carriers beyond the end of defendant's route, and it selected the carrier to continue the transportation. The contract was made prior to the enactment of the Hepburn act, making the initial carrier of goods for transportation from one state to another liable for transportation to their destination. Held, that defendant was only bound to deliver at the end of its route to some other competent carrier for transportation, and that thereupon its liability ceased, as under Civ. Code, § 2201, if a common carrier accepts freight for a place beyond its usual route, he must, unless he stipulates otherwise, deliver to some other carrier and his responsibility thereupon ceases. Schwartz *v.* Panama R. Co., 103 Pac. 196, 155 Cal. 742.

60. Atchison, etc., R. Co. *v.* Rodgers, 16 N. Mex. 120, 113 Pac. 805.

61. Delay in transportation of cattle.—Chicago, etc., R. Co. *v.* Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043.

62. Effect of state statutes.—Chicago, etc., R. Co. *v.* Church, 12 Ill. App. 17.

63. Kavanaugh & Co. *v.* Southern R. Co., 120 Ga. 62, 47 S. E. 526.

64. Chicago, etc., R. Co. *v.* Church, 12 Ill. App. 17.

§ 3700. Iowa.—Code, § 2074, providing that no contract shall exempt a railway corporation from a liability which would have existed had no contract been made, does not invalidate the limitation of liability in a contract by which a railroad company contracted to transport property from one point to another, necessarily involving the use of connecting lines, and by the same instrument provided that it should not be liable for negligence of such connecting carriers.[65]

§ 3701. Missouri.—Under Rev. St. 1889, § 944 (Laws 1879, p. 171), Rev. St., 1899, § 5222, a railroad company can not contract for a through shipment to a point beyond its own line and at the same time exempt itself from liability for negligence of the connecting carrier.[66] This section is not unconstitutional.[67] Where an initial carrier contracts for a through shipment, the connecting carriers are regarded as its agents making it liable for their negligence, notwithstanding a provision in a contract exempting it from liability beyond its line.[68]

Contract Limited to End of Carrier's Route.—Under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), making the carrier receiving the property, or the railroad company issuing bills of lading, liable for damage caused by the negligence of any other carrier over whose lines the property passes, the initial carrier may escape liability for injuries beyond its own line by agreeing to transport only to its terminus,[69] and it is immaterial that the intention is to ship beyond the terminus of the carrier, and the bill of lading so indicates,[70] but is liable when it contracts to carry to a destination beyond its own line.[71] Under Rev. St. 1899, §

65. Hartley *v.* St. Louis, etc., R. Co., 115 Iowa 612, 89 N. W. 88, 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569.

66. State Nat. Bank *v.* Chicago, etc., R. Co., 72 Mo. App. 82; Nenno *v.* St. Louis, etc., R. Co., 105 Mo. App. 540, 80 S. W. 24.

Goods were delivered to a carrier for shipment to a point outside of the state. Before the shipment was made, the shipper inquired of the agent of the carrier whether it carried goods to that place, and was informed that it did. The carrier issued a bill of lading which indicated the place of destination, and which recited that the carrier received the goods to be forwarded subject to the rules and conditions printed on the regular shipping bills. The place of destination was not on the carrier's line, but on the line of another carrier, with which a point traffic arrangement existed. Held, that the contract was for through shipment, and under Rev. St. 1889, § 944, the initial carrier was liable for the negligence of the connecting carrier causing injury to the goods, notwithstanding a stipulation in the bill of lading limiting the liability of the initial carrier to its own line. Western Sash, etc., Co. *v.* Chicago, etc., R. Co., 76 S. W. 998, 177 Mo. 641.

Live stock.—McCann *v.* Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110.

67. Marshall, etc., Grain Co. *v.* Kansas, etc., R. Co., 75 S. W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

68. Blackmer, etc., Pipe Co. *v.* Mobile, etc., R. Co., 137 Mo. App. 479, 119 S. W. 1.

An initial carrier's contract to transport from a point on its line to C. via a certain connecting carrier "at" K., an intermediate point beyond the initial carrier's line, is a contract for through shipment, making the initial carrier liable for negligence of a connecting carrier in preventing exercise of the shipper's right to divert the shipment at K. by taking the car over another route, notwithstanding a provision in the contract exempting it from liability for connecting carrier's negligence. Lord, etc., Co. *v.* Texas, etc., R. Co. (Mo. App.), 134 S. W. 111.

69. **Contract limited to end of carrier's route.**—Crockett *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 243.

70. State Nat. Bank *v.* Chicago, etc., R. Co., 72 Mo. App. 82.

A contract made in New York for the transportation of fish from New York to Kansas City over the lines of two connecting carriers, expressly stipulating that the fish should be carried by the initial carrier to the end of its own line, and that such carrier should not be responsible for a loss occurring beyond its own line, was valid. McLendon *v.* Wabash R. Co., 95 S. W. 943, 119 Mo. App. 128.

71. Hardin Grain Co. *v.* Missouri Pac. R. Co., 96 S. W. 681, 120 Mo. App. 203.

Under the statute of Missouri (Rev. St. 1889, § 944), making a carrier liable for its negligence or that of a connecting carrier, a carrier contracting for a through shipment beyond its own line cannot exempt itself from liability by a limitation of liability in the bill of lading to loss occurring on its own line. Missouri Pac. R. Co. *v.* Baden, 102 Pac. 502, 80 Kan. 405.

Where a carrier issued a bill of lading in Missouri for a through shipment beyond its own line to a point in Arkansas, it could not exempt itself from liability

5222 (Ann. St. 1906, p. 2718), a carrier receiving property for transportation over its own line and other lines need not contract to carry beyond its own line; but, where in the main clause of the contract it undertakes to carry to destination, it can not limit its statutory liability by exceptions set out in subsequent clauses, but where it specially contracts in the main clause to carry only to the end of its line, its liability extends no further.[72] Missouri Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), impliedly allows an initial carrier to restrict its liability as insurer to its own line, notwithstanding the main purpose of the act is to make it liable for negligence occurring on a connecting line, and makes a carrier issuing a bill of lading in the state liable for damage to property caused by its negligence or the negligence of a connecting carrier.[73]

What Constitutes an Agreement to Carry beyond Carrier's Line.—A bill of lading which is blank as to the point to which it was agreed to transport the goods though their destination is beyond the receiving carrier's line, which further stipulates for the nonliability of the carrier beyond its line, is an agreement to carry beyond its line, so as to invalidate the stipulation against liability.[74] Where the contract with defendant for transportation to the place of destination over its line and other connecting lines stipulated that the exception from liability made by such other carriers of the goods should operate in the carriage of them, respectively, and defendant received pay for the transportation of the goods for the whole route, and its soliciting agent solicited the shipment, and designated the connecting lines over which it would be continued to the place of destination, it was liable for a loss of the goods occasioned by another carrier's negligence, though the contract provided that defendant should be liable only for loss or damage happening while the goods were on its own road.[75]

Necessity for Stipulation.—Where an agent of a railroad company receives goods for transportation, and fails to limit his company's liability to liability for negligence on its own line, and issues a bill of lading for shipment over the line of a connecting carrier, the right to limit the liability of his own company to negligence on its own line is lost, and the provisions of the bill of lading prohibiting the agent from contracting for shipment beyond defendant's line becomes a nullity.[76] Where a carrier receives freight, and issues a bill of lading to a destination beyond its line, it is liable for the negligence of connecting carriers, unless the contract stipulates that the carrier is only to transport the shipment to the end of its line, and a stipulation that the initial carrier is to be relieved of responsibility beyond its line is unavailing.[77]

Authority of Agent of Carrier to Contract for Through Transportation.—A provision in a carrier's bill of lading prohibiting its agent from contracting for the delivery of goods beyond its own route is a nullity; the agent being required to receive the goods for transportation, though entitled to limit his employer's liability to its own line.[78]

for a conversion of the property by a connecting carrier by a provision in the bill limiting its liability to its own line. Marshall, etc., Grain Co. *v.* Kansas, etc., R. Co., 75 S. W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

72. Simmons Hardware Co. *v.* St. Louis, etc., R. Co., 140 Mo. App. 130, 120 S. W. 663.

73. Blackmer, etc., Pipe Co. *v.* Mobile, etc., R. Co., 119 S. W. 1, 137 Mo. App. 479.

74. What constitutes an agreement to carry beyond carrier's line.—Marshall *v.* Kansas, etc., R. Co., 74 Mo. App. 81.

75. Eckles *v.* Missouri Pac. R. Co., 72 Mo. App. 296.

76. Necessity for stipulation.—Miller *v.* Missouri, etc., R. Co., 157 Mo. App. 638, 138 S. W. 902; Steckdaub *v.* Missouri, etc., R. Co. (Mo. App.), 138 S. W. 904.

77. Lee *v.* Wabash R. Co., 94 S. W. 991, 118 Mo. App. 476; Bushnell *v.* Wabash R. Co., 94 S. W. 1001, 118 Mo. App. 618; Ratliff *v.* Quincy, etc., R. Co., 94 S. W. 1005, 118 Mo. App. 644; McLendon *v.* Wabash R. Co., 95 S. W. 943, 119 Mo. App. 128.

78. Authority of agent of carrier to contract for through transportation.—Marshall Medicine Co. *v.* Chicago, etc., R. Co., 126 Mo. App. 455, 104 S. W. 478.

§ 3702. Nebraska.—Const. Neb. art. 11, § 4, declaring that "the liability of railroad corporations as common carriers shall never be limited," does not affect a contract limiting the receiving carrier's liability to loss occurring on its own lines.[79]

§ 3703. South Carolina.—Under South Carolina, Civ. Code 1902, § 2176, an initial carrier sued for injury to goods in transportation may, under an agreement in the bill of lading that no company shall be liable for any loss not occurring on its line, exonerating itself from liability by showing delivery of the goods to a connecting carrier, and an instruction holding it liable on whatever road the injury occurred is erroneous.[80] The initial corporation may discharge itself from liability by producing a receipt in writing for the article from the corporation to whom it was its duty to deliver the articles, includes delivery by the initial carrier to a steamship line.[81] Where, in a suit for loss of goods against the initial carrier, it produced a receipt from the connecting carrier, in which the destination was different from that given in the bill of lading, the initial carrier could not, if this mistake caused the loss, claim advantage of a stipulation in the bill of lading that it should not be liable for loss not occurring on its portion of the route, nor of Civ. Code 1902, § 2176, discharging from liability an initial carrier producing a receipt for the goods from the first connecting carrier.[82] Under South Carolina Civ. Code 1902, § 1710, imposing a liability on a carrier for loss of goods shipped under a contract providing for transportation over the lines of two or more connecting carriers, where the responsibility of each or any of them ceases on delivery of the goods to the connecting carrier "in good order," a bill of lading limiting the carrier's liability to injuries or loss of goods on its own line, and providing that the carrier's responsibility should cease when it delivered the goods to the next carrier "in the same order in which the delivering carrier received them," constitutes a contract in effect to deliver to the contracting carrier "in good order," and is therefore within the statute.[83]

§ 3704. Texas.—Under Texas (Rev. Stat. 331a, 331b), where the initial carrier contracts for through shipment, it is liable for damages inflicted by its connecting carrier, no matter what restrictions are inserted in the shipping contract,[84] and none of the succeeding carriers can by contract limit its liability to damages occurring on its line.[85] But it was not the purpose of the articles to deny the right of one or more connecting carriers to execute separate and independent contracts limiting its liability to its own line, the statute provided for joint liability where the contract of through carriage was recognized, acquiesced in, or acted upon by the carriers.[86] Where a carrier accepts freight from an-

79. Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894.

80. Whittle *v.* Southern Railway, 88 S. C. 172, 70 S. E. 456.

81. Chartrand *v.* Southern Railway, 67 S. E. 741, 85 S. C. 479.

82. Chartrand *v.* Southern Railway, 85 S. C. 479, 67 S. E. 741.

83. Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

84. Galveston, etc., R. Co. *v.* Botts, 22 Tex. Civ. App. 609, 55 S. W. 514. See Texas, etc., R. Co. *v.* Bigham (Tex. Civ. App.), 47 S. W. 814, affirmed in 93 Tex. 673, no op.; Texas, etc., R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

85. Gulf, etc., R. Co. *v.* Terry (Tex. Civ. App.), 89 S. W. 792.

86. Texas, etc., R. Co. *v.* Lynch, 97 Tex. 25, 75 S. W. 486; San Antonio, etc., R. Co. *v.* Turner, 42 Tex. Civ. App. 532, 94 S. W. 214. The case of Houston, etc., R. Co. *v.* Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318; Gulf, etc., R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. 261, affirmed in 93 Tex. 685, no op.

Under Rev. St. 1895, art. 331b, providing that for any damages to freight anywhere in a through transportation between points in the state over connecting lines either carrier shall be liable, neither can by contract limit his liability to damages occurring on its line. Gulf, etc., R. Co. *v.* Terry (Tex. Civ. App.), 89 S. W. 792.

The case of Gulf, etc., R. Co. *v.* Terry (Tex. Civ. App.), 89 S. W. 792, in effect holds that as to domestic shipments there can be no contract against joint liability; "and possibly it is not necessary for us

other line, but requires from the shipper a separate shipping contract, exempting from liability for damages occurring on any other line of road, but respects so much of the through contract originally made with the initial carrier as relates to the through rate, it is not a connecting line, within Rev. St. arts. 331a, 331b, making all carriers connecting lines which recognize, acquiesce in, or act on a contract for through carriage, and is not liable for any damage to the freight not occurring on its own line.[87]

Under Texas Rev. St. art. 278, where a common carrier contract to carry goods, not only over his own route, but over connecting lines, he can not contract that his responsibility may terminate at the end of his own line. He will still be held responsible for the negligence, not only of himself and his servants, but of the connecting lines, they being considered his agents for carrying out the particular contract.[88]

Interstate Contracts.—On interstate shipments under the statutes of Texas the initial and succeeding carriers may limit their liability to damage occurring on their respective lines.[89] And in such case where there is no agency or part-

to criticise that case or to express any view contrary to the doctrine there announced, as this case can clearly rest upon the provisions of the statute, for the reason, as above stated, that it does not appear that the Santa Fe transported the shipment upon any separate contract." San Antonio, etc., R. Co. *v.* Turner, 42 Tex. Civ. App. 532, 94 S. W. 214.

87. Gulf, etc., R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. 261.

88. Texas Exp. Co. *v.* Dupree, 2 Texas App. Civ. Cas., § 318.

89. Interstate contracts.—Order, 85 S. W. 854, modified in Gulf, etc., R. Co. *v.* McCampbell (Tex. Civ. App.), 85 S. W. 1158; Texas, etc., R. Co. *v.* Gray, 99 S. W. 1125, 45 Tex. Civ. App. 208; McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; Gulf, etc., R. Co. *v.* Crossman, 21 Tex. Civ. App. 622, 33 S. W. 290; Houston, etc., R. Co. *v.* Smith, 44 Tex. Civ. App. 299, 97 S. W. 836; Ft. Worth, etc., R. Co. *v.* Wright, 24 Tex. Civ. App. 291, 58 S. W. 846; Cane Hill Cold Storage, etc., Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751; Texas, etc., R. Co. *v.* Byers Bros. (Tex. Civ. App.), 73 S. W. 427; Chicago, etc., R. Co. *v.* Halsell, 36 Tex. Civ. App. 522, 81 S. W. 1243; Texas Mexican R. Co. *v.* Gallagher (Tex. Civ. App.), 70 S. W. 97; San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883.

On a shipment of goods from a point without to one within the state, a provision in a through bill of lading is valid, which limits the liability to the carrier by whom the damage is occasioned. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56.

Effect of art. 331, Sayles' Rev. Civ. Stat.—Texas, etc., R. Co. *v.* Berry, 31 Tex. Civ. App. 3, 71 S. W. 326; Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530; Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 13 S. W. 637; McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; Ft. Worth, etc., R. Co. *v.* Fuller, 3 Tex. Civ. App. 340, 22 S. W. 1006; Houston, etc., R. Co. *v.* Groves, 48 Tex. Civ. App. 45, 106 S. W. 416.

Effect of arts. 331, 331b, Sayles' Ann. Civ. St. 1897.—San Antonio, etc., R. Co. *v.* Turner, 42 Tex. Civ. App. 532, 94 S. W. 214; Houston, etc., R. Co. *v.* Groves, 48 Tex. Civ. App. 45, 106 S. W. 416.

Sayles' Rev. Civ. St. 1897, art. 331b, relating to the liability of connecting common carriers for goods received by one of them on a contract for through carriage between points in the state, and making them the agents of each other and of the shipper, and making the through bill of lading or proof that one of them had received the freight prima facie evidence of their agency, notwithstanding any stipulations by them to the contrary, has no application to an interstate shipment; but in such case each connecting carrier may by contract limit its liability to such loss as may occur on its own line, and no recovery can be had for loss occurring on the lines of connecting carriers, in the absence of allegation and proof of some joint traffic arrangement between the several connecting carriers. Houston, etc., R. Co. *v.* Groves, 48 Tex. Civ. App. 45, 106 S. W. 416.

The acts 1899, p. 214, c. 125, is entitled "An act to prescribe the parties to and venue of suits against railroad corporations * * * over whose * * * lines, or parts thereof, any freight * * * has been carrier"; did not affect the validity of a contract limiting a carrier's liability with reference to an interstate shipment to its own line, nor affect the rights of the parties thereunder. Missouri, etc., R. Co. *v.* Elliott, 99 Tex. 286, 89 S. W. 767.

The main purpose of the legislature in enacting the act of May 26, 1899, was to fix the venue of suits against railroad companies which were engaged in operating any part of their roads in the state, and had agents in the state, and also to au-

nership between them, they are not jointly liable for what happens on either or both lines.[90] Thus where the initial carrier received goods in New York which were not delivered in Texas until nearly three months later, while the usual time was 20 days, a connecting carrier was not liable for the delay; there being no showing on what line the delay occurred.[91]

Intermediate Carrier Requiring Separate Contract.—Where a carrier accepts freight from another line, but requires from the shipper a separate shipping contract, exempting it from liability for damages occurring on any other line of road, but respects so much of the through contract originally made with the initial carrier as relates to the through rate, it is not a connecting line, within Rev. St. arts. 331a, 331b, making all carriers connecting lines which recognize, acquiesce in, or act on a contract for through carriage, and is not liable for any damage to the freight not occurring on its own line.[92]

Under Hepburn Act.—See, ante, "Under Hepburn Act," § 3696.

§ 3705. Virginia.—Under the Va. Code 1887, § 1295, providing that a common carrier shall insure safe carriage to the destination of all freight shipped on its line, unless by contract it limits its liability to injuries happening on its own line, a bill of lading signed by the shipper which limits the liability of the carrier to damage arising on its own line is a valid contract.[93]

§§ 3706-3711. What Amounts to Contract to Carry beyond Carrier's Own Line—§ 3706. In General.—An initial carrier which has undertaken to transport a shipment from one point to another over connecting lines, without expressly limiting its liability, is regarded as contracting for the safe delivery at the point of destination,[94] but where the contract limits liability to loss occurring on its own line or to safe delivery to a connecting line, the contract is not one for through carriage.[95] Thus, where a through bill of lading is

thorize the shipper to join in one action all railroads which had participated in the transportation of the freight, whether as partners, joint contractors, or under a contract or separate contracts, limiting the liability of each to its own line. Missouri, etc., R. Co. *v.* Elliott, 99 Tex. 286, 89 S. W. 767.

It is apparent from the language of the act that it was not intended in any way to affect the rights of the parties under the contract made between them, but, in one action, to enforce such contract according to its terms against all of the participants in the transportation of the freight. Missouri, etc., R. Co. *v.* Elliott, 99 Tex. 286, 89 S. W. 767.

90. Texas, etc., R. Co. *v.* Byers Bros. (Tex. Civ. App.), 73 S. W. 427.

Where the bill of lading of an interstate shipment limited the liability of each carrier to such injury as might occur on its own line, a connecting carrier, in the absence of proof of partnership between it and the initial carrier, was not liable for goods not received by it. Texas, etc., R. Co. *v.* Weisman & Co., 47 Tex. Civ. App. 319, 105 S. W. 45; Goldstein *v.* Sherman, etc., R. Co., 25 Tex. Civ. App. 365, 61 S. W. 336; Texas, etc., R. Co. *v.* Byers Bros. (Tex. Civ. App.), 73 S. W. 427; Gulf, etc., R. Co. *v.* Griffith (Tex. Civ. App.), 24 S. W. 362; Texas, etc., R. Co. *v.* Kelly (Tex. Civ. App.), 74 S. W. 343.

91. Texas, etc., R. Co. *v.* Weisman & Co., 47 Tex. Civ. App. 319, 105 S. W. 45.

92. Intermediate carrier requiring separate contract.—Gulf, etc., R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. 261.

93. Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

94. What amounts to contract to carry beyond carrier's own line.—Alabama, etc., R. Co. *v.* Mount Vernon Co., 84 Ala. 173, 4 So. 356.

95. A bill of lading with a condition limiting liability to the initial carrier's line, if goods are destined beyond, on notice to next carrier of readiness to deliver to it, is not evidence of a through contract. Harris *v.* Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305.

A receipt by an initial carrier of freight which recited that the goods were received in good order for the consignee, subject to bill of lading, and provided that the property received on the dray ticket was subject to the conditions of the bill of lading, and a bill of lading which contracted for the carriage of the freight to the consignee or to a connecting carrier, and limited liability for loss to that occurring on its own line; do not establish a contract for through carriage. Simmons Hardware Co. *v.* St. Louis, etc., R. Co., 140 Mo. App. 130, 120 S. W. 663.

A receipt for goods, given by the Detroit, etc., R. Co., stated that the goods were "addressed to H. & S., Agent, New York, to be sent by the Detroit, etc., R.

given and through freight charged to the destination, by an initial carrier receiving a shipment to a point beyond its own line, these conditions are controlling elements in the contract and make it one for through or entire transportation;[96] so, also, where such contracts contain an exemption for loss by fire through to destination.[97]

Letter Offering to Transport Over Road and Connecting Lines.—A letter from the superintendent of a railroad offering to receive freight and transport it over his road and over the road of connecting lines, is, on acceptance of the offer by the person to whom it is addressed, a special contract for the carriage of freight over all the roads mentioned.[98]

The mere fact that the consignee's address is incorporated in the receipt in general by the initial carrier merely for the purpose of identification, where the contract limits the liability to the carrier's own line, does not render the contract one for through transportation.[99]

Unauthorized Use of Receipts Furnished by Shipper.—A fact that a station agent without authority used blank receipts furnished by the shipper, which contained a promise to forward and deliver the freight at the end of the route, instead of those furnished by the carrier which limited its liability to its own line, does not constitute the contract one for through transportation.[1]

Part of Goods Put on Cars Where Second Road Begins.—Where goods received at one place are to be transported over several distinct lines of railroad to another and distant one, and the common carrier owning the first road

Co., subject to their tariff, and under the conditions stated on the other side, care Swift Sure Line, Albany [goods described], through to New York, at $1.95 per barrel"; and on the other side was a notice. among others, "that all goods addressed to consignees resident beyond the places at which the company have stations * * * will be forwarded to their destination by public carriers or otherwise, as opportunity may offer, * * * but that the delivery of the goods by the company will be considered as complete, and its responsibility will be considered to have ceased, when such carriers shall have received the goods for further conveyance. And the company hereby further give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occurs beyond their said limits." Held, that these conditions were a part of the receipt; and that it did not import a contract to carry the goods to New York; but constituted a valid limitation of the liability of the company. Detroit, etc., R. Co. *v.* Farmers', etc., Bank, 20 Wis. 122.

96. Defendant gave plaintiff a through bill of lading and received through freight on sheep shipped by plaintiff over defendant's road from Cisco, Tex., to Chicago, Ill. A special contract by the parties, stipulating "that, in case the live stock mentioned herein is to be transported over the line or lines of any other railroad or steamboat company, the party of the first part [defendant] shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part [plaintiff] so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Texas & Pacific Railway Company, excepting to protect the through rate herein." Held, that as, by the contract, the sheep were to be shipped to Chicago, and a through bill of lading was given and through freight charged to that point, these conditions were controlling elements in the contract, and, having agreed to these, defendant could not limit damages on its connecting lines. Texas, etc., R. Co. *v.* Scrivener, 2 Texas App. Civ. Cas., § 328.

97. A steamboat bill of lading for the delivery of goods at a certain point, specifying the rate of freight to a more distant point, and an exemption from liability for loss by fire "through to destination," is a through contract, and binds the carrier to deliver at the latter point. Woodward *v.* Illinois Cent. R. Co., Fed. Cas. No. 18,006, 1 Biss. 403; S. C., Fed. Cas. No. 18,007, 1 Biss. 447.

98. **Letter offering to transport over road and connecting lines.**—East Tennessee, etc., R. Co. *v.* Montgomery, 44 Ga. 278.

99. **Consignee's address incorporated in receipt signed by initial carrier merely for purpose of identification.**—Wright *v.* Boughton (N. Y.), 22 Barb. 561.

1. **Unauthorized use by station agent of blank receipts furnished by shipper instead of those furnished by railroad.**—Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78.

undertakes to carry goods over the entire line, part of the goods being put aboard the cars on its line, and a part to be put on at its termination and where the next road begins, the fare asked and agreed to be paid being, however, the fare usually paid for the carriage over the whole line, and the contract being for transportation over the whole line, and not carriage to the end of the first line and then for delivering to the carrier owning the next road, and for carriage by him, the fact that a part of the goods were put on the cars only where the second road begins will not exonerate the owner of the first road from liability for their loss.[2]

§§ 3707-3708. Collection of Charge for Entire Distance—§ 3707. By Initial Carrier.—In the absence of specific stipulations on the subject, the acceptance of goods by a carrier for shipment to their ultimate destination over its own and connecting lines, and receipt by the initial carrier of the charges for the whole distance, may involve an undertaking on the part of such carrier to transport them the whole distance and deliver them to the consignee, and so make it responsible for the default of connecting lines; but, when the bill of lading contains explicit provisions on the subject, these must be regarded and given effect, in the absence of averments and evidence that would authorize a court to ignore or set aside such contract of shipment.[3] Where the shipper is aware at the time of shipment that the bill of lading contains provisions limiting the liability of the initial carrier to its own lines, and that the destination of the goods is beyond the lines of such initial carrier, the mere acceptance by such initial carrier of the freight charges for the whole distance to the point of destination is not enough to warrant a disregard of such limiting provisions,[4] and the fact that the shipper failed to notice the terms of the bill of lading is not enough to warrant a departure from its terms.[5] Aliter in Missouri,[6] Nebraska,[7] and Texas.[8]

2. Part of goods put on cars where second road begins.—Ogdensburg, etc., R. Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

3. By initial carrier.—Stevens *v.* Lake Shore, etc., R. Co., 20 O. C. C. 41, 11 O. C. D. 168.

4. *Massachusetts.*—Washburn, etc., Mfg. Co. *v.* Providence, etc., R. Co., 113 Mass. 490.

Ohio.—Stevens *v.* Lake Shore, etc., R. Co., 11 O. C. D. 168, 20 O. C. C. 41.

Tennessee.—The fact that two lines are connected, and for their mutual convenience collect freight for each other upon goods delivered for transmission over both lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to do. East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; Telegraph Co. *v.* Munford, 87 Tenn. 189, 10 S. W. 318, 2 L. R. A. 601.

Shipper's knowledge that railroad ended at intermediate point—Accident on steamer.—Goods were delivered to a railroad company to be carried to New York, and the freight was paid to it for the entire distance; that the goods were receipted for as "for transportation;" but that the shipper knew that the railroad terminated at an intermediate point, where the freight was to be carried the rest of the way by a steamer of another carrier; and that the freight money was to be divided between the carriers. In an action against the railroad for damages to the goods, happening upon the steamer, it was held that defendant was not a common carrier beyond the end of its road, and was not liable. Washburn, etc., Mfg. Co. *v.* Providence, etc., R. Co., 113 Mass. 490.

5. Failure of shipper to notice terms of bill of lading.—Stevens *v.* Lake Shore, etc., R. Co., 11 O. C. D. 168, 20 O. C. C. 41.

6. Missouri and Nebraska.—Where a railway company receives goods for shipment beyond its line, and collects the entire charge for transportation, it assumes the responsibility for safe carriage over every part of the route, and such liability can not be limited by express contract. Marshall, etc., Grain Co. *v.* Kansas, etc., R. Co., 176 Mo. 480, 75 S. W. 638, 98 Am. St. Rep. 508; Popham *v.* Barnard, 77 Mo. App. 619; Jones *v.* St. Louis, etc., R. Co., 89 Mo. App. 653; Redmon *v.* Chicago, etc., R. Co., 90 Mo. App. 68.

7. Chicago, etc., R. Co. *v.* Western, etc., Grain Co., 2 Neb. 748, 90 N. W. 205.

8. A contract whereby a railroad company agreed to transport a number of carloads of cattle from Talpa, Tex., a certain distance over its own line, and deliver same to its connecting lines for transportation to Chicago, at a fixed rate per carload for the whole distance, is a through bill of lading. Gulf, etc., R. Co. *v.* Vaughn, 4 Texas App. Civ. Cas., § 182, 16 S. W. 775.

Contract Fixing Price for Entire Carriage.—Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight for through carriage, it makes its connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property either on its own or the connecting lines, which liability it can not limit by contract.[9]

Contract to Deliver to Succeeding Carrier.—Where a common carrier contracts for the transportation of freight over its road, and for the delivery thereof to another carrier to be forwarded to a connecting line, the fact that the contract fixes the price for the entire carriage,[10] gives the shipper a through rate,[11] or guarantees the freight on the connecting line,[12] does not make the contract a through contract; but constitutes a several contract between the shipper and each carrier,[13] particularly where the bill of lading specifies the terminus of the initial carrier's line as the destination and contains directions as to delivery to the succeeding carrier.[14]

9. **Contract fixing price for entire carriage.**—Smeltzer *v.* St. Louis, etc., R. Co., 158 Fed. 649.

10. **Contract to deliver to succeeding carrier.** — *Missouri.*—Bennitt *v.* Missouri Pac. R. Co., 46 Mo. App. 656.

Where a carrier by bill of lading agrees to carry goods to the destination if on its road, or, if the destination is not on its road and the company guarantees a through rate to destination, then it agrees to deliver to the other carrier, but does not agree to carry to any point beyond its own line, or to be responsible beyond its own line, and guarantees a certain rate to a point beyond its own line, the contract is one for through transportation, and the carrier can not limit its liability for negligence of the connecting carrier. Central American Steamship Co. *v.* Mobile, etc., R. Co. (Mo. App.), 128 S. W. 822.

New York.—Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; S. C., 5 Lans. 480.

Wisconsin.—A contract for shipment of goods beyond the line of the receiving carrier, in which it guaranties the cost of transportation to their destination, but limits its liability as a carrier to its own lines, is not a through contract, and beyond its own line the carrier is simply a forwarding agent. Schneider *v.* Evans, 25 Wis. 241, 3 Am. Rep. 56.

11. **Effect of giving through rate.**—The shipper delivered freight to defendant railroad company, consigned to a point beyond its line, and received a bill of lading, in which it was stated that the lumber was received for transportation to its destination, if upon such company's line of road, otherwise, to the place where it should be received by the connecting carrier, upon the terms and conditions appearing upon the back of the bill of lading. Among such conditions was one providing that the railroad in forwarding the lumber from the point where it left its road, was to be held as a forwarder only. It was held that the mere fact that the company gave the shipper a through rate for freight would not, in view of the terms expressed in the bill of lading, upon which it received the freight, make the railroad company liable as a carrier beyond its own line. McEacheran *v.* Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612.

12. The fact that the shipper of goods consigned to a point beyond the end of the first carrier's route guarantied the freight on the connecting line does not affect the special agreement with the first carrier that the latter's liability shall be limited to its own line. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

13. A bill of lading for goods to be carried over several connecting lines, by which the initial carrier undertakes, for itself and the connecting carriers named, "severally and not jointly," that each carrier on the line shall safely carry and deliver the goods received to the next succeeding carrier, until they reach their destination, expressly stipulating that the liability of each as to the goods destined beyond its own line shall terminate on their delivery to the next succeeding carrier, and that in case of loss or damage to the goods the carrier in whose actual custody they are at the time of such loss or damage shall alone be responsible therefor, although it names a through rate, constitutes a several contract between the owner of the goods and each carrier accepting them thereunder in the course of shipment, and renders any carrier in whose custody they are at the time of loss or damage liable directly to such owner therefor, as carrier, and not merely for negligence as agent of the initial carrier. Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 90 Fed. 467, 33 C. C. A. 611.

14. A bill of lading for transportation of goods from one city to another, in the same state, and for delivery at the latter city to the consignee or a connecting carrier, is not a contract for carriage beyond that place, though it may guaranty a through rate of freight to a town in another state, which is named in it as the

§ 3708. By Succeeding Carrier.—The fact that a connecting carrier receives and hauls a car of goods and collects the charges does not render it jointly liable for damages to the goods with the company that executed the bill of lading, nor does it operate as a ratification by it of the contract for shipment.[15] An arrangement between two carriers that each should receive traffic from the other, and one collect the entire toll, does not create such an agency or relation between them as to render one liable for loss by the other.[16]

§ 3709. Agreement to Forward Car to Destination.—An agreement by a railway company to forward cars which were loaded on its line of road, and on lines connecting with it, and to deliver the cars thus loaded and forwarded to the agent of the shipper at a point beyond its terminus, is in effect a contract that the freight shall go through upon those cars over the entire route without change.[17]

§ 3710. Car Forwarded Over Connecting Line by Order of Consignee.—Where the consignee of freight, on its arrival at the destination named in the bill of lading, directs the car forwarded over connecting lines, and by transfer of the original bill of lading the shipment is continued, all the carriers treating the consignment as a single shipment, the transportation may be considered as a single shipment, in an action for damages to the freight.[18]

§ 3711. Effect of Through Waybill.—Where a written contract issued by a carrier for the shipment of cattle to a point on its line limits its liability to damage accruing on its own line, a waybill issued by it for the guidance of its employees, which denominated plaintiff's shipment as a through live stock waybill to a point on a connecting line, via the point on defendant's line specified in the written contract, did not change or affect the terms of such written contract.[19] The waybill afforded no proof of partnership or agency between defendant and the connecting line.[20]

§ 3712. Losses Which May Be Limited.—Loss by Negligence.—It has been held in Missouri,[21] Ohio,[22] Texas[23] and Kansas,[24] that an initial carrier

ultimate destination of the goods. Bennitt *v.* Missouri Pac. R. Co., 46 Mo. App. 656.

A bill of lading was given at M. for goods consigned to parties at O., that being the termination of the carrier's line; but on the margin of it there was an address to parties at B., the freight charges to B. being paid in full. The carrier had connections, and an agreement for the transportation of its freight to that place. Held, that the bill of lading undertook to deliver the goods at O. only, to be forwarded. Ætna Ins. Co. *v.* Wheeler (N. Y.), 5 Lans. 480.

15. By succeeding carrier.—Houston, etc., R. Co. *v.* Groves, 106 S. W. 416, 48 Tex. Civ. App. 45; Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954.

16. Houston, etc., R. Co. *v.* Groves, 48 Tex. Civ. App. 45, 106 S. W. 416.

17. Agreement to forward car to destination.—Galveston, etc., R. Co. *v.* Allison, 59 Tex. 193.

18. Car forwarded over connecting line by orders of consignee.—Missouri, etc., R. Co. *v.* Mazzie, 29 Tex. Civ. App. 295, 68 S. W. 56.

19. Effect of through waybill.—San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

20. San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

21. Blackmer, etc., Pipe Co. *v.* Mobile, etc., R. Co., 137 Mo. App. 497, 119 S. W. 1; Central American Steamship Co. *v.* Mobile, etc., R. Co. (Mo. App.), 128 S. W. 822; Funsten Dried Fruit, etc., Co. *v.* Toledo, etc., R. Co., 163 Mo. App. 426, 143 S. W. 839.

22. Where a railroad company contracts, for transportation of goods over other railroads forming with its own a continuous line, any stipulation in the contract, or notice to the other party, to the effect that the company will not be liable for losses or damages occasioned by negligence or fault while the goods are upon its road is against public policy and void, equally as in case of transportation exclusively upon its own road. Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391, followed in Attorney General *v.* Hobart, 11 O. Dec. 166, 8 N. P. 246.

23. International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845. See Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Gulf, etc., R. Co. *v.* Vaughn, 4 Texas App. Civ. Cas., § 182, 16 S. W. 775.

24. Loss by negligence.—The St. Louis,

which contracts for transportation of a shipment over other roads forming a continuous line, can not restrict its liability for the negligence of itself or its connecting carriers. But an agent of a railroad company, while bound to receive goods for transportation consigned to a point beyond the terminus of the road, has the right to limit his company's liability to liability for negligence on its own line,[25] notwithstanding a state statute making a carrier receiving goods for carriage beyond its route liable for the negligence of a connecting carrier.[26]

Loss from Delay in Delivery—Delay at Connecting Points.—As a carrier at common law was under no liability beyond its own line unless it undertook to carry beyond its own line, Kentucky Const. § 196, providing that no common carrier shall be permitted to contract for relief from its common-law liability has no application where a carrier receiving live stock to be transported to a point beyond its own line stipulates that its liability as carrier shall cease at its terminus when the stock is ready to be delivered to the connecting carrier, and such stipulation is therefore valid.[27]

Refusal or Inability of Connecting Line to Receive.—A common carrier, receiving live stock for transportation over its own and connecting lines, may, by contract, limit its liability for any delays at connecting points caused by the refusal or inability of the connecting line to take charge of the stock after receiving notice of their arrival on the connecting track; but it is the plain duty

Kansas City & Northern Railway Company, owning and operating a line of railroad from Kansas City to Mexico, and there connecting with another road running to Chicago, made a contract to "forward" certain cattle from Kansas City to Chicago, stipulating therein that the shipper should "take care of the cattle while on the trip," and that "it and connecting lines overlines over which such freight might pass should not be responsible for any loss, damage, or injury which might happen in loading, forwarding, or unloading, by suffocation, * * * or by any other cause except gross negligence," and that "it and such connecting lines should be deemed merely forwarders, and not common carriers, and only liable for such loss * * * as might be gross negligence only, and not otherwise." Held, that said St. Louis, Kansas City & Northern Railway was liable, as a carrier, for the transportation the entire distance, and was responsible for any loss or injury occurring from ordinary negligence, whether such negligence was on its own or a connecting line. St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505.

25. Miller *v.* Missouri, etc., R. Co., 157 Mo. App. 638, 138 S. W. 902; Steckdaub *v.* Missouri, etc., R. Co. (Mo. App.), 138 S. W. 904.

26. **Missouri statute.**—Notwithstanding Rev. St. 1889, § 944, making a carrier receiving goods for carriage beyond its route liable for the negligence of a connecting carrier, a carrier receiving goods consigned to a point beyond its route may limit its liability to its own negligence by issuing a bill of lading to its own terminal point only, and expressly stating therein that it will carry the goods no further, and will only be liable for loss or damage occurring on its own line. Drew Glass Co. *v.* Ohio, etc., R. Co., 44 Mo. App. 416; Historical Pub. Co. *v.* Adams Exp. Co., 44 Mo. App. 421. But see Baker *v.* Missouri Pac. R. Co., 54 Mo. App. 98; Heil *v.* St. Louis, etc., R. Co., 16 Mo. App. 363; Orr *v.* Chicago, etc., R. Co., 21 Mo. App. 333.

Under Rev. St. 1889, § 944, providing that when a carrier receives property to be transported from one place to another, within or without the state, it shall be liable for any loss, damage, or injury to such property caused by the negligence of a connecting carrier, a railway carrier receiving goods in this state to be shipped over its own and connecting lines to the point of destination may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. Dimmitt *v.* Kansas, etc., R. Co., 103 Mo. 433, 15 S. W. 761; Hill *v.* Missouri Pac. R. Co., 46 Mo. App. 517.

A bill of lading by a railway company of goods to be transported over its own and connecting lines stipulated that damages for loss or injury sustained in transit should be recoverable against the particular railway company having custody of such goods at the time of such loss or injury. Held, that defendant was liable for loss or damage on its own line only. Nines *v.* St. Louis, etc., R. Co., 107 Mo. 475, 18 S. W. 26.

27. **Loss from delay in delivery—Delay at connecting points.**—Pittsburg, etc., R. Co. *v.* Viers, 113 Ky. 526, 68 S. W. 469, 24 Ky. L. Rep. 356; but see Louisville, etc., R. Co. *v.* Farmers', etc., Comm. Firm, 107 Ky. 53, 21 Ky. L. Rep. 708, 52 S. W. 972.

of the initial line, under such contract, to promptly notify the connecting line of the arrival of the stock at the receiving track.[28]

§§ 3713-3720. Carriers Which May Contract—§ 3713. Connecting Carriers Which Are Partners.—Where connecting carriers are partners in the transportation of freight, the connecting lines forming practically one line for the through shipment of freight, each line is liable for the negligence of the other, and the initial carrier can not, by stipulations in contracts for through shipments, restrict its liability for damages to such only as occur on its own line,[29] incorporating such a condition in the shipping contract.[30]

Reliance by Shipper on Partnership.—A carrier receiving a shipment is not liable for damage occurring on a connecting line, on the ground that it held itself out as a partner of such line, where the shipper did not rely on such holding out, but accepting a contract expressly exempting the carrier from liability for loss occurring beyond its own line.[31] A clause in a contract limiting the liability of the initial carriers to its own line repudiates an alleged partnership between it and the connecting lines.[32]

Road Not Sued as a Partner.—Where a connecting railroad was not sued as a partner, the terms of a contract limiting its liability to injuries caused on its own line were valid, even though the agent acting for it in making such contract was also agent of the other connecting roads.[33]

Partnership Ultra Vires.—If a railway company enters into copartnership with other carriers, to carry freight, and an action is brought against the contracting carrier for damages to through freight, on connecting line, defendant is estopped from alleging that partnership is ultra vires.[34] Allegations of partnership must charge a joint ownership and partnership in the operation of the different lines, in express terms.[35]

Mere Act of Hauling Shipment.—The action of a railroad company in hauling stock delivered to it by another road which connects with its line, as required by statute, does not of itself amount to a ratification of the original contract of shipment and make it a partner of the former road.[36]

28. Refusal or inability of connecting line to receive.—Louisville, etc., R. Co. *v.* Bourne, 16 Ky. L. Rep. 825, 29 S. W. 975.

29. Connecting carriers which are partners.—Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410; Texas, etc., R. Co. *v.* Hawkins (Tex. Civ. App.), 30 S. W. 1113; Galveston, etc., R. Co. *v.* Houston (Tex. Civ. App.), 40 S. W. 842; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345.

30. Where there was a joint contract by connecting carriers to transport freight thereby making each liable for the other's default, their liability is not affected by provision in bills of lading limiting the initial carrier's liability to delays occurring on its own line. Gulf, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 139 S. W. 81.

31. Reliance by shipper on partnership.—Galveston, etc., R. Co. *v.* Houston (Tex. Civ. App.), 40 S. W. 842.

32. Gulf, etc, R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

33. Road not sued as a partner.—Askew *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 73 S. W. 846.

34. Partnership ultra vires.—Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

35. Texas, etc., R. Co. *v.* Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125; Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410, and Mexican Nat. R. Co. *v.* Savage (Tex. Civ. App.), 41 S. W. 663, affirmed in 93 Tex. 646, no op.

36. By a contract between plaintiff and a certain railroad and its connecting lines it was agreed that certain live stock should be carried from a point in Tennessee to a point in Texas, the liability of the contracting carrier to cease when the stock was delivered to a connecting line. The live stock was delivered by the contracting carrier to defendant company, which carried the same to its destination, and collected all charges thereon. Rev. St. art. 4251, provides that every railroad company shall for a reasonable compensation draw over its road, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect

§ 3714. Initial Carrier Lessee of Connecting Road.—A contract for the shipment of live stock, executed by a railroad company as agent for two other roads whose lines it had leased, is a joint obligation of the three companies, and a stipulation relieving the contracting road from liability for injuries occurring beyond its road applies only to inquiries on a road not embraced in its system; and hence one of the leased roads is liable for injuries to the property occurring after leaving its own road, and on the line of the other leased road.[37]

§ 3715. Right of Initial Carrier to Stipulate on Behalf of Succeeding Carrier.—A railroad company, as an initial carrier, as a condition for an undertaking to deliver freight beyond the terminus of its line, may stipulate on its own behalf and that of the connecting carrier, that the liability of each shall terminate upon the arrival of the goods at the station of delivery, and that afterwards their liability shall be that of warehouseman only.[38]

Shipping Receipt Purporting to Inure to Benefit of Any Connecting Carrier.—A shipping receipt, limiting the carrier's liability, accepted by the owner or his agent, in consideration of a reduced freight rate, being not only a receipt, but also a special contract as to conditions of transportation is if it purports to inure to the benefit of any connecting carrier who in fact receives the goods, valid for that purpose.[39]

§§ 3716-3717. Power of Initial Carrier to Make Contract Limiting Liability of Succeeding Carrier—§ 3716. In General.—An intermediate carrier can not limit its liability by a special agreement with the carrier from whom it receives the goods, unless that carrier had authority from the owner to make the agreement.[40] The initial carrier has implied authority to act as the agent of the shipper in making a special contract limiting the liability of the connecting carrier, even in a degree not provided for in the original shipping contract.[41]

Delivery of Receipt by Intermediate to Initial Carrier.—The mere delivery by an intermediate carrier, to the initial carrier from whom the goods were received, of a receipt containing a condition that the value of the goods at the place of shipment shall govern in the event of loss, is not a contract made with the owner, and does not change the common-law rule as to the measure

with its road. Held, that the facts were insufficient to fix any liability upon defendant as member of a partnership or as joint contractor for injuries to the live stock while in the hands of the contracting carrier; its action in hauling such stock, as required by statute, not of itself amounting to a ratification of the contract. Ft. Worth, etc., R. Co. *v.* Fuller, 3 Tex. Civ. App. 340, 22 S. W. 1006.

37. **Initial carrier lessee of connecting road.**—International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

38. **Right of initial carrier to stipulate on behalf of connecting carrier.**—Kansas City, etc., R. Co. *v.* Sharp, 64 Ark. 115, 40 S. W. 781.

39. **Shipping receipt purporting to inure to benefit of any connecting carrier.**—Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

40. **Power of initial carrier to make contract limiting liability of succeeding carrier.**—Lamb *v.* Camden, etc., Transp. Co., 2 Daly 454; S. C., 46 N. Y. 271, 7 Am. Rep. 327.

41. **Initial carrier.**—Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394.

But see Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491 in which it is held that where a common carrier has transported freight under a special contract limiting its common-law liability, and by which it undertook for an agreed compensation to carry it to the terminus of its route, and then deliver it to another carrier, no authority results from the relation or from the contract empowering it to enter into a special contract on behalf of the owner with the next carrier restricting the liability of the latter.

In an action to recover for the loss of oil burned while being transported over defendant's railroad, it appeared that the oil was shipped on a connecting road without any specific agreement as to liability for loss, and that the connecting road delivered the oil to defendant, and took from it a receipt therefor, containing the clause, "Owners risk, F. & L." (meaning fire and leakage). Held, that the connecting railroad was plaintiff's agent to deliver such oil to defendant. Held, further that the condition in the receipt given to the connecting railroad

of damages in an action against the intermediate carrier for loss of the goods on its route.[42]

§ 3717. Driver of Local Transfer Company.—A driver for a local transfer company delivering goods to an express company for shipment is not the agent of the shipper, with whom the express company might make a special contract limiting its liability.[43]

§ 3718. Intermediate or Terminal Carrier.—Having Notice of Illegal Stipulation.—Where an unconditional release of a carrier from liability for loss or damage to goods in transit comes into the hands of a connecting line, together with the goods shipped, it is notice to the connecting line of the illegality of the transaction, and on loss its liability must be determined by the principles of the general law.[44]

Takes Subject to Through Bill of Lading—Issuance of Supplemental Bill.—Where a connecting carrier receives and forwards goods, which were shipped on a through bill of lading issued by the initial carrier, of which the connecting carrier is advised when it receives the goods, it takes them subject to the terms of such bill of lading; and where the original bill contains a provision for marine insurance on the shipment, the connecting carrier cannot limit its liability thereunder, as against the shipper, by the issuance of a supplemental bill of lading to the carrier from which it receives the goods, whatever its rights by subrogation may be against such carrier.[45]

§ 3719. Power of Intermediate Forwarder to Bind Initial Carrier.—Where a forwarder of freight, who is the agent of both carriers, to whom an initial carrier delivers goods to be by him delivered to a connecting carrier, gives a bill of lading limiting the latter's duty to delivering the goods to a third carrier, such bill of lading is binding on the first and second carriers, and the second carrier is not liable to the first carrier for the third carrier's failure to deliver the goods to the consignee.[46]

§ 3720. Express Company.—An express company which receives a package to be delivered to another carrier to complete the transportation may limit its liability by a stipulation in the receipt that its liability shall terminate on its delivery of the package to the subsequent carrier.[47]

§§ 3721-3724. Manner of Limiting—§ 3721. General Notice.—A common carrier may, by general notice, brought to the knowledge of the shipper, limit its responsibility for carrying certain commodities beyond the line of its general business.[48]

General Notice from Succeeding to Initial or Prior Carrier.—A common carrier can not, by a general notice, exonerate himself entirely from his legal duty and liability for property which is delivered to him for transportation, or fix the amount beyond which he will not be held responsible in case of injury or loss, although such property is delivered to him by another carrier, to whom the notice has been made known, and who received the same from the owner

was valid, and exempted the latter from liability for the loss. Hinkley *v.* New York, etc., R. Co. (N. Y.), 3 Thomp. & C. 281.

42. **Delivery of receipt by intermediate to initial carrier.**—Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

43. **Driver of local transfer company.**—Ferris *v.* Adams Exp. Co., 77 N. J. L. 19, 71 Atl. 683.

44. **Having notice of illegal stipulation.**—Woodburn *v.* Cincinnati, etc., R. Co., 40 Fed. 731.

45. **Takes subject to through bill of lading—Issuance of supplemental bill.**—Berwind-White Coal Min. Co. *v.* Metropolitan Steamship Co., 183 Fed. 257.

46. **Power of intermediate forwarder to bind initial carrier.**—Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

47. **Express company.**—Snider *v.* Adams Exp. Co., 63 Mo. 376.

48. **General notice.**—Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

under an agreement to carry it over his own line, and then, as agent of the consignor, to send it forward by a carrier.[49]

§ 3722. Usage or Custom.—Common carriers employed in the transportation of goods on the Hudson river, between New York and Albany, and giving an acceptance of the same, without limiting their responsibility to Albany, are liable for the loss of the goods happening after their delivery at Albany to other forwarders, although such delivery be comformable to the usage of the trade, if knowledge of such usage be not brought home to the owner of the goods.[50]

§ 3723. Stipulation in Bill of Lading or Receipt.—A common carrier may limit its liability for loss on connecting lines by a stipulation in the bill of lading that articles to be transported beyond its lines may be delivered to connecting lines for transportation to their destinations, and that its responsibility shall cease with such delivery.[51] Under the statutes of Georgia a railroad company can not limit its liability by a stipulation in the receipt for the goods to the effect that it shall not be liable for safe transportation of the goods after they are delivered to other parties for completing transportation or delivery.[52] And under the statute of Illinois prohibiting a carrier from limiting its common-law liability to safely deliver property, by any stipulation in the receipt given therefor, a limitation in a bill of lading acknowledging the receipt of property, which limits the liability of the carrier to loss on its own line, is invalid; but the common-law liability may be limited by the part of the bill constituting the contract on the shipper assenting to the restrictions.[53]

§ 3724. Express Contract.—In Georgia,[54] Illinois,[55] Kentucky,[56] Nebraska[57] and South Carolina,[58] a contract limiting the liability of the initial carrier to its own line must be an express contract agreed to by the shipper.

§§ 3725-3730. Form and Requisites, Contents and Legibility—§ 3725. Legibility.—Provision in Fine Print Obscured by Stamp.—In a bill of lading, providing for the carrying of the goods beyond the line of the carrier issuing the bill, a provision in fine print, somewhat obscured by the use of

49. **General notice from succeeding to initial or prior carrier.**—Judson *v.* Western R. Corp. (Mass.), 6 Allen 486, 83 Am. Dec. 646.

50. **Usage or custom.**—St. John *v.* Van Santvoord (N. Y.), 25 Wend. 660.

51. **Stipulation in bill of lading or receipt.**—Where the receipt on a bill of lading of goods marked to New York recited that the goods were to be transported, over the line of the defendant's road, to a certain station, and there delivered, in good order, to another company, whose line was a part of the route to the place of destination, and that the liability of defendant, as a common carrier, should cease when the goods were so delivered, at that station, to the other company, and the shipper accepted such receipt with knowledge of its contents, it became the contract of both parties. Field *v.* Chicago, etc., R. Co., 71 Ill. 458. See post, "Knowledge and Assent of Shipper," § 3730.

Kentucky.—Brunk *v.* Ohio, etc., R. Co., 32 Ky. L. Rep. 174, 105 S. W. 443.

Missouri.—Minter Bros. *v.* Southern Kansas R. Co., 56 Mo. App. 282.

Washington.—Allen, etc., Co. *v.* Canadian Pac. R. Co., 42 Wash. 64, 84 Pac. 620.

52. Southern Exp. Co. *v.* Barnes, 36 Ga. 532.

53. Illinois Match Co. *v.* Chicago, etc., R. Co., 250 Ill. 396, 95 N. E. 492.

54. Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817; Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281.

55. Coats *v.* Chicago, etc., R. Co., 239 Ill. 154, 87 N. E. 929.

56. Louisville, etc., R. Co. *v.* Cooper, 15 Ky. L. Rep. 496.

57. Fremont, etc., R. Co. *v.* New York, etc., R. Co., 66 Neb. 159, 92 N. W. 131, 59 L. R. A. 939.

58. Hill *v.* Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337.

stamps, that in case of injury to the goods only the carrier having custody of the goods at the time of the injury shall be liable, cannot be regarded as part of the contract.[59]

Name of Station Where Liability Ceases.—In a contract by a consignor and a railroad company that the liability of the company shall cease after the goods pass out of its possession, an omission in the name of the station where the liability ceases is immaterial.[60]

§ 3726. Reasonableness.—A stipulation in a bill of lading by one of a line of carriers that the company in whose possession the goods are at the time of loss or damage shall alone be liable is a reasonable one.[61]

Connecting Carrier Making Independent Contracts.—Where connecting carriers made independent contracts with a shipper to carry over their several lines, the stipulation in the contract of each that its liability shall be limited to its own line will be held reasonable, in the absence of evidence to the contrary.[62]

§ 3727. Consideration.—A stipulation that a carrier's liability shall cease on its delivery to a forwarding carrier is valid without regard to consideration, the carrier being under no obligation to carry beyond its own terminus,[63] but a contract between a railroad company contracting for through carriage of freight, and a shipper, limiting the liability of the carrier to loss or injury on its own line, is inoperative unless based on a valid consideration.[64]

Initial Carrier Receiving More than Local Rates.—An initial carrier, which in its bill of lading stipulates that it shall be liable only for loss occurring on its own line, is not liable for loss occurring on a connecting line, although by virtue of its through traffic arrangements it received more than the local rates for the haul, and although it contracted for the through rate, and provided in its bill of lading that the connecting lines should have the benefit of all exceptions and conditions contained therein.[65]

Exemption in Through Contract Where Carriers without Arrangement Inter Sese.—If otherwise unobjectionable, a limitation of the carrier's liability contained in a through bill of lading, stipulating for shipment at special rates over several distinct, independent connecting lines, is not void because the several carriers had no arrangement inter sese whereby the shipper could, upon demand, have obtained continuous through transportation upon terms of unrestricted liability of the carriers.[66]

New Contract by Succeeding Carrier.—Where goods are shipped under a through contract of shipment, a new contract made by the shipper with a connect-

59. **Provision in fine print obscured by stamp.**—Allen, etc., Co. *v.* Canadian Pac. R. Co., 42 Wash. 64, 84 Pac. 620.

60. **Name of station where liability ceases.**—Minter Bros. *v.* Southern Kansas R. Co., 56 Mo. App. 282.

61. **Reasonableness.**—*North Carolina.*—Phifer *v.* Carolina Cent. R. Co., 89 N. C. 311, 45 Am. Rep. 687.

Texas.—New York, etc., Steamship Co. *v.* Wright (Tex. Civ. App.), 26 S. W. 106.

62. **Intermediate carrier requiring separate shipping contract.**—Houston, etc., R. Co. *v.* Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318.

63. **Consideration.**—*Alabama.*—A limitation of liability of an initial carrier for injuries to a shipment of lumber to those occurring on its line requires no other consideration than the shipment itself. McNeill *v.* Atlantic, etc., R. Co., 161 Ala. 319, 49 So. 797.

Missouri.—Hance *v.* Wabash Western R. Co., 56 Mo. App. 476.

Tennessee.—Nashville, etc., Railway *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955.

64. *Arkansas.*—Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742.

Missouri.—Simmons Hardware Co. *v.* St. Louis, etc., R. Co., 140 Mo. App. 130, 120 S. W. 663.

Texas.—San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147.

Verbal contract—Written contract subsequently signed.—See post, "Verbal and Written Contract."

65. **Initial carrier receiving more than local rates.**—Hoffman *v.* Union Pac. R. Co., 8 Kan. App. 379, 56 Pac. 331.

66. **Exemption in through bill of lading—Where connecting carriers without arrangement inter sese.**—Deming *v.* Merchants', etc., Storage Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518, so holding as to a fire exemption.

ing carrier, after it has received the goods as a connecting carrier, merely limiting its liability, being without consideration, is void.[67]

§ 3728. Time of Contract.—Time of Delivery of Bill of Lading to Shipper.—A bill of lading, containing a clause which limits the liability of each connecting road or line, to loss or injury suffered while on its line, and until the goods are delivered to the next connecting line, should be tendered to the shipper at the time he offers his goods for shipment. If so tendered and accepted by him and the goods are shipped, this is a legitimate limitation of the measure of the carrier's liability, and becomes a part of the contract, binding on the contracting parties. If the shipper contemporaneously with the delivery of the goods to the carrier, does not receive a bill of lading from the carrier limiting its common-law liability, the carrier will be bound to deliver the goods safely, except as relieved at common law.[68] Where a shipper of goods over the lines of connecting carriers does not receive a bill of lading from the initial carrier limiting its common-law liability contemporaneously with the delivery of the goods to such carrier, the carrier assumes a common-law liability.[69]

§ 3729. Choice between Full and Limited Liability Contract.—Where the shipper is refused an opportunity to ship as instructed, a stipulation in the contract of carriage limiting the initial carrier's liability to its own line is void,[70] but a stipulation in a through bill of lading of nonliability for loss by fire throughout the whole distance, issued by a carrier having a line extending only part way to the destination, is valid, where it has a rate over its own line for which, if required, it assumes responsibility for such loss.[71]

§ 3730. Knowledge and Assent of Shipper.—Where the shipper accepts and acts upon a bill of lading containing an express agreement limiting each carrier's liability to its line, his knowledge of such agreement will, in the absence of fraud or mistake, be conclusively presumed and he will be bound thereby, and will not be permitted to show he was ignorant of its contents;[72] whether he read it or not,[73] certainly where he has been accustomed to ship under similar contracts.[74]

67. **New contract by succeeding carrier.**—Barnes *v.* Long Island R. Co., 93 N. Y. S. 616, 47 Misc. Rep. 318, reversed in 100 N. Y. S. 593, 115 App. Div. 44.

68. **Time of delivery of bill of lading to shipper.**—Southern R. Co. *v.* Levy, 144 Ala. 614, 39 So. 95; Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602; Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756.

69. Southern R. Co. *v.* Levy, 144 Ala. 614, 39 So. 95.

70. **Choice between full and limited liability contract.**—Plaintiff, a shipper of cattle, demanded an unrestricted liability contract of defendant railroad. After the cattle were loaded and accepted by defendant, to be delivered at a point beyond its own line, and the train was in the act of starting, plaintiff was compelled to sign a contract restricting liability to injuries on defendant's line, being refused an opportunity to ship on unrestricted terms. Held, that the restrictions were void, and no defense, where injury resulted. Chicago, etc., R. Co. *v.* Cotton, 87 Ark. 339, 112 S. W. 742.

71. Deming *v.* Merchants', etc., Storage Co., 90 Tenn. (6 Pickle) 306, 17 S. W. 89, 13 L. R. A. 518.

72. **Knowledge and assent of shipper.**—*Illinois.*—Merchants', etc., Transp. Co. *v.* Moore, 88 Ill. 136, 30 Am. Rep. 541.

Iowa.—Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322, 328.

Tennessee.—East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356.

73. *Alabama.*—Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321.

New York.—Where, on receiving a trunk for transportation, an express company gives the owner a receipt therefor, containing in explicit terms an agreement to forward the trunk to the agency of the company nearest to destination only, and that the company may there deliver the trunk to another express company, and in such case the company to which the trunk is so delivered shall be regarded as the agent of the owner, and liable for damages or loss thereafter, such contract is binding on the shipper whether he reads the receipt or not. Mills *v.* Weir, 81 N. Y. S. 801, 82 App. Div. 396.

74. **Habit of receiving like bills of lading.**—When a bill of lading, given by the

In such case the carrier need not call the shipper's attention to the stipulation[75] or read or explain it to him.[76]

Where Express Contract Required.—In jurisdictions in which a carrier can limit its liability by express contract only, a stipulation limiting its liability to losses or damage occurring on its own route, must be shown to have been brought to the notice of the consignor, and to have been accepted or acquiesced in by him.[77] The mere acceptance, however, of a bill of lading[78] or of an ex-

carrier on the acceptance of the goods, shows that they are to be forwarded to a particular place only, which is short of their place of destination, and the consignor has been a frequent shipper by the same line, and was in the habit of receiving like bills of lading, it will be presumed he was familiar with its contents, and knew that the carrier was not obliged to carry the goods to the place to which they were addressed, and if promptly carried to the place specified in the contract, and there safely stored, and they are burned without fault on the part of the carrier, no recovery can be had of the latter for the loss. Merchants', etc., Transp. Co. *v.* Moore, 88 Ill. 136, 30 Am. Rep. 541.

75. A special contract protecting a railroad company against liability for loss of or injury to freight not occurring on its own line will be presumed from the fact that a clause purporting to so limit liability is to be found printed in the bill of lading received by the shipper, even though his attention was not called to it, if it appears that he had previously shipped like articles and taken the same kind of bills of lading. East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356.

76. Where plaintiff had been accustomed for many years to ship live stock over the line of defendant railroad company under a form of contract making defendant liable only for loss occurring on its line, it must be presumed that, when plaintiff applied to defendant's agent for a car to ship his stock, he anticipated shipping it in the usual way; and though the contract, which was in the usual form, was not read to him or explained, it can not be inferred that there was any fraud or mistake. Richmond, etc., R. Co. *v.* Richardson, 66 S. W. 1035, 23 Ky. L. Rep. 2234.

77. Where express contract required.—*Alabama.*—Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

Georgia.—Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37; Atlantic, etc., R. Co. *v.* Henderson, 131 Ga. 75, 61 S. E. 1111.

78. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Where a shipper contracted with a railroad company to ship freight to a point beyond its terminus, over a certain route, at a given price, and delivered the freight to the railroad company, and afterwards a bill of lading was sent to the shipper, the liability of the railroad company was that of a common carrier to transport the freight from the initial point to its destination; and it could not limit its liability by inserting in the bill of lading a provision that for all loss or damage occurring in the transit the legal remedy should be sought and held only against the particular carrier in whose custody the freight might be at the time thereof, there being no express contract to that effect, the bill of lading being signed only by the agent of the company, and not having been agreed to by the shipper. Central R. Co. *v.* Dwight Mfg. Co., 75 Ga. 609.

When the agent of a carrier receipts for goods destined to a point beyond its line of transportation, such receipt containing the following words, "which it is mutually agreed is to be forwarded to our agents nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation," the company can not, in case of loss of the goods, protect itself from liability by showing that its line of transportation did not extend to the point for which the goods were destined, especially when the evidence shows that this fact was not known by or communicated to the shipper at the time he shipped the goods. Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37.

Plaintiff applied to an agent of the R. I. & P. R. Co., at one of its stations, to ship a stove to K. on the line of defendant's road. The agent informed plaintiff that the custom was for shippers to release stoves, but advised him not to do it, but to pay the additional expense of sending it at carrier's risk. To this plaintiff assented, and offered to pay the freight to said agent, who informed him that he could as well pay it at the end of the route. The agent placed the goods in a car of a freight train. Some hours afterwards the agent handed him a paper, saying that it was a receipt for the goods shipped. This paper plaintiff put in his pocket, without examining it, and which proved to be a bill of lading of the goods containing inter alia the condition, "Stoves at owner's risk of breakage." The goods were received at C. B. from the R. I. & P. R. Co. by defendant railroad company, and carried to K.

press receipt[79] does not, in such case, establish the shipper's assent to stipulations of this kind. And in Illinois a carrier accepting goods for shipment to a point beyond its own line can not limit its liability for their safe delivery at their destination by a stipulation in the bill of lading not signed by the shipper, nor assented to by him.[80]

Conflict of Laws.—A contract made by a railroad company in Georgia for the through carriage of freight from Savannah to Chattanooga, Tenn., is governed by the statutes of Georgia; and under Civ. Code 1895, § 2276, providing that a carrier can only limit its legal liability by express contract, as construed by the courts of the state, a provision of the bill of lading that the railroad should only be liable for the safe delivery of the goods to its connecting carrier is without effect to relieve it from liability for damage to the goods while in the possession of the connecting carrier, unless such bill of lading is signed by the shipper.[81]

§§ 3731-3743. Construction, Operation and Effect—§ 3731. Construction of Words and Phrases.—Term "Carrier."—Where a bill of lading provides that "no carrier shall be liable for loss or damage not accruing on its portion of the route, nor after said property is ready for delivery to the consignee;" the stipulation being intended to qualify or limit the common-law liability and therefore to be strictly construed against the carrier and in favor of the shipper, the term "carrier" should be taken as referring, not merely to the transportative capacity of the company, but to the contracting entity in its dual capacity of common carrier and warehouseman.[82] The stipulation so construed, being one undertaking to contract against liability for loss, however negligently it might be inflicted, was void.[83]

"**Forwarding Carrier.**"—In a bill of lading stipulating that the liability of a forwarding carrier for loss shall cease on delivery to the connecting carrier, and that of a delivering carrier on delivery at the station of delivery, the term "forwarding carrier" applies to all carriers who transport goods to the delivering carrier, and the term "delivering carrier" to the carrier who actually delivers the goods at their destination.[84]

"**Loss or Damage.**"—The words "loss or damage," in the provision in the contract of defendant railway company to carry goods to Boston by its own and specified connecting lines, and of a steamship company to carry the goods from Boston to Liverpool: "No carrier shall be liable for loss or damage not occurring on its road or its portion of the through route, nor after said property is ready for delivery to the next carrier. * * * The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the

Upon the arrival, the stove was found to have been broken en route. Held, in an action against the defendant for damages for injury to stove, that the stove was carried at carrier's risk. Union Pac. R. Co. *v.* Marston, 30 Neb. 241, 46 N. W. 485.

79. **Express receipt—Notice to shipper.**—The agent of defendant express company at Augusta, Ga., receipted for a package to the shipper, marked "C. A. Robinson, Cartersville, Ga.," and in the printed receipt given by the agent of defendant to the shipper, the following words were inserted: "Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation." It was held that in case of loss of the goods, the defendant express company was liable therefor, and could not protect itself from its legal liability by showing that its line of transportation extended only to the city of Atlanta, especially when the evidence in the record shows that such fact was not known to the shipper, or communicated to him, at the time of receiving the goods by the agent of defendant. Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37.

80. Illinois Cent. R. Co. *v.* Carter, 46 N. E. 374, 165 Ill. 570, 36 L. R. A. 527; Illinois Match Co. *v.* Chicago, etc., R. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment 153 Ill. App. 568.

81. **Conflict of laws.**—Central, etc., R. Co. *v.* Kavanaugh, 92 Fed. 56, 34 C. C. A. 203.

82. **Loss not accruing on carrier's own line.**—Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628.

83. Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628.

84. **Forwarding carrier.**—Brunk *v.* Ohio, etc., R. Co., 32 Ky. L. Rep. 174, 105 S. W. 443.

property at place and time of shipment"—and according to which claims for loss or damage must be made within a certain time after delivery or time therefor, are limited to loss of or injury to the property, and do not include damages for loss of a market because of delay in transportation.[85]

§ 3732. What Law Governs.—The liability of the several connecting carriers with respect to loss of freight en route are to be determined by the law as it was when the contract of shipment was made.[86]

§ 3733. Effect of Stipulation as to Character of Train Service.—There being no repugnancy between a provision in a freight contract limiting the carrier's liability to its own line and a stipulation therein for through passage train service, the fact that the first is printed, while the last is in writing, is immaterial in construing the contract.[87]

§§ 3734-3736. Carriers Entitled to Benefit—§ 3734. Liability Limited to Carrier's Own Line.—Destination on Line of Contracting Carrier.—Where the destination of the shipment is not beyond the line of the contracting carrier, a provision in the contract limiting the liability of the carrier after delivery to a succeeding carrier had no application, although the contracting carrier had to transport the shipment over another line before reaching its own.[88]

Goods to Be Carried Over Line Operated by Contracting Carrier.—Where a through bill of lading given by the R. & D. Ry. Co. provided that its liability for the safe carriage of the goods should be limited to the time the goods were on the line or at the stations of the R. & D. Co. and the C. & A. Co.'s railroad, on which line the delay happened, was operated by the R. & D. Co. and the goods were not to be carried over the R. & D. Co.'s line proper at all; the R. & D. Co. was liable for damages caused by the delay.[89]

§ 3735. Liability Limited to Line Having Custody of Goods.—A provision in a contract for the shipment of goods over several connecting lines, that in case of loss or damage that road in whose actual custody the goods are at the time of the loss or damage shall alone be responsible, inures to the benefit of an intermediate carrier which delivers the goods safely to the next succeeding carrier.[90]

85. **"Loss or damage."**—Johnson *v.* Missouri, etc., R. Co., 95 N. Y. S. 182, 107 App. Div. 374.

86. **What law governs.**—Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

87. **Effect of stipulation as to character of train service.**—Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

Under Civ. Code, § 2201, declaring that the liability of a carrier who accepts freight for a place beyond his route ceases on delivery to a connecting line, "unless he stipulates otherwise," a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through passenger train service. Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

88. **Destination on line of connecting carrier.**—A railroad company accepted several cars of stock for shipment from St. Louis, to a point on its line. As it had no line out of St. Louis, the stock was carried by another line part of the distance, and while being transported by the connecting line it was injured. The bill of lading provided that, if the destination of the cars should be beyond the line of the contracting carrier's road, it should deliver to a connecting carrier at the end of its line; that the duty and liability of the company, as well as that of each connecting carrier, should cease upon delivery to a connecting carrier; and that each succeeding carrier should only be liable for loss or injury occurring on its own line. Held that, the destination of the cars being not beyond the line of the contracting carrier, the provision as to limitation of liability had no application. St. Louis, etc., R. Co. *v.* Kilberry, 83 Ark. 87, 102 S. W. 894.

89. **Goods to be carried over line operated by contracting carrier.**—Van Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547.

90. **Liability limited to line having custody of goods.**—Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

§ 3736. Enurement to Benefit of Subsequent Carrier.—See post, "Right of Subsequent Carrier to Benefit of Limitations by First Carrier," §§ 3778-3786.

§ 3737. Losses Covered.—Liability Limited to Carrier's Own Line—In General.—A carrier receiving goods for shipment to a point off its own line is not, in the face of an express provision in the contract to the contrary, liable for damages beyond its own line,[91] but only for injuries to the property occurring on its line, or while the goods were in its possession,[92] whether the shipment is of goods[93] or live stock.[94] It has been so held where there was a stipulation providing that no connecting carrier shall be liable for any loss or damage except what occurred on its own line;[95] that only the carrier in whose custody the goods were at the time of the loss should be liable therefor;[96] that delivery of the shipment to another carrier to complete the transportation should terminate all liability of the first carrier;[97] that the carrier shall not be liable for loss after the property is ready for delivery to the next carrier.[98]

91. **Liability limited to carrier's own line.**—Louisville, etc., R. Co. *v.* Tarter, 19 Ky. L. Rep. 229, 39 S. W. 698.

92. *Kentucky.*—Louisville, etc., R. Co. *v.* Tarter, 19 Ky. L. Rep. 229, 39 S. W. 698.

South Carolina.—Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

Texas.—Gulf, etc., R. Co. *v.* Kimble, 49 Tex. Civ. App. 622, 109 S. W. 234.

Wisconsin.—Tolman *v.* Abbot, 78 Wis. 192, 47 N. W. 264.

93. **Shipment of goods.**—Gulf, etc., R. Co. *v.* Kimble, 49 Tex. Civ. App. 622, 109 S. W. 234; Gulf, etc., R. Co. *v.* Allcorn (Tex. Civ. App.), 23 S. W. 186.

94. **Live stock shipment.**—International, etc., R. Co. *v.* Heittner, 42 Tex. Civ. App. 617, 94 S. W. 189.

95. Where plaintiff shipped household goods over a route consisting of several connecting carriers, under a bill of lading limiting the liability of each to negligence occurring on its own line, the charging or delivering carrier was only liable for injuries to the property occurring on its line, or while the goods were in its possession. Walter *v.* Alabama, etc., R. Co., 39 So. 87, 142 Ala. 474.

Where a bill of lading contained a provision, in substance, that no connecting carrier should be held liable for any loss or damage to goods, except what occurred on its own route, and it was shown by proof that the damage occurred after the defendants had delivered the goods safely, and in good time, order, and condition, to a connecting company or carrier, any right of action which may have accrued to the plaintiff does not exist against the defendants. Schiff *v.* New York, etc., R. Co. (N. Y.), 52 How. Prac. 91.

96. **Carrier having custody of goods.**—Blount *v.* Pennsylvania R. Co., 119 N. Y. S. 65.

Perishables.—A carrier of perishable freight, under a bill of lading stipulating for through shipment and providing that only the carrier in whose custody the goods were at the time of the loss should be liable therefor, is liable only for negligence occurring on its own line. Blount *v.* Pennsylvania R. Co., 119 N. Y. S. 65.

Goods to be forwarded by a lake line.—Trustees in possession of a railroad, and of a dock and warehouse at the terminus of such road, had certain goods delivered at the dock to be shipped by a lake line, over which they had no control, and in the earnings of which they had no interest. On receiving the goods, they gave a shipping receipt, providing that their liability should cease at their depot at which freight was to be delivered to another carrier, and, "for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the trustees * * * assume no other responsibility for their safe carriage or safety than may be incurred on their own road." Held, that neither the trustees nor the road were liable for damages to the goods while in transit on the lake. Tolman *v.* Abbot, 78 Wis. 192, 47 N. W. 264.

97. **Delivery to succeeding carrier to terminate liability.**—A paper given by common carriers to the person sending a package acknowledged the receipt of the package addressed to a place beyond their route, and declared that it was received on the special agreement that they should forward it to their agent nearest or most convenient to destination only, and should then deliver it to other parties to complete the transportation, such delivery to terminate all liability of said carriers for the package. Held, that they were not liable for a loss occurring beyond their route. Pendergast *v.* Adams Exp. Co., 101 Mass. 120.

98. **Shipment ready for delivery to next carrier.**—Under a bill of lading providing that a carrier shall not be liable for loss not proved to have occurred on his own road, or after the property is ready

Injuries Sustained Through Negligence of Succeeding Carrier.—A valid stipulation by the initial carrier against liability for a loss occurring beyond its own line precludes a recovery against the initial carrier for damage to the goods occurring on the line of a succeeding carrier and by reason of the negligence of such succeeding carrier according to the doctrine which prevails in most states, among which are Georgia,[99] Kentucky,[1] Missouri [2] and New York.[3] But where the exemption in the contract of shipment is merely for the purpose of fixing liability as between the several carriers and not restricting liability to the shipper, the initial carrier is liable for a loss not occurring on its own line and caused by the negligence of a succeeding carrier.[4]

Damages Resulting from Negligence at Inception of Shipment.—Though the carrier's contract be only over its own line, and contains an exemption from negligence beyond its own line, yet it is liable for damages resulting from its negligence at the inception of the shipment, though such damages occur beyond its line;[5] as, for instance, where the loss results from failure to furnish a suitable car for the entire trip;[6] from unskillful, improper and negligent load-

to deliver to the next carrier, the carrier is not liable for damages to freight on a connecting line. Dunbar *v.* Charleston, etc., R. Co., 40 S. E. 884, 62 S. C. 414; Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

99. Injuries sustained through negligence of succeeding carrier.—Savannah, etc., R. Co. *v.* Austin, 101 Ga. 629, 29 S. E. 11; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78.

Where a special contract was made and signed between a railroad company and a consignor for a shipment of watermelons in which it was stipulated that the liability of each company over whose lines shipments should be made should cease as a common carrier at the station where delivered to the next carrier or to the consignee, such a contract was binding; and where the evidence showed that the melons were delivered by the first railroad to the next road in the connecting line in good condition and were transferred by another railroad in the connecting line from the cars in which they were shipped to other cars, and were tendered to the consignee in a bruised and damaged condition, the first road in the line was not liable therefor; especially where one of the stipulations of the contract was, that the railroad company should not be liable for "losses occurring from the perishable nature of inherent defects of the property shipped." Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78.

1. Louisville, etc., R. Co. *v.* Chestnut & Bro., 72 S. W. 351, 115 Ky. 43, 24 Ky. L. Rep. 1846.

2. McLendon *v.* Wabash R. Co., 119 Mo. App. 128, 95 S. W. 943; State Nat. Bank *v.* Chicago, etc., R. Co., 72 Mo. App. 82.

3. A railroad company received freight for shipment to a point beyond its line, giving a receipt therefor containing a provision that it should not be liable for loss by any other carrier after the freight left the warehouse at its terminus. Held, that it was not liable for damages to a shipment caused by the negligence of a connecting carrier. Irwin *v.* New York Cent. R. Co., 1 Thomp. & C. 473, affirmed in 59 N. Y. 653.

4. Exemption clause to fix liability to several carriers.—Eckles *v.* Missouri Pac. R. Co., 112 Mo. App. 240, 87 S. W. 99.

5. Damages resulting from negligence at inception of shipment.—Popham *v.* Barnard, 77 Mo. App. 619.

6. Furnishing unsuitable cars.—Where the damage to goods was caused by negligence in furnishing an unsuitable car, the fact that the damage actually occurred on another line will not enable the first carrier to escape liability to its own line. Hunt *v.* Nutt (Tex. Civ. App.), 27 S. W. 1031; International, etc., R. Co. *v.* Aten (Tex. Civ. App.), 81 S. W. 346.

Where a carrier's agent was informed that plaintiff desired the use of a car for the shipment of bees, but furnished a car which was unsuitable therefor, and so defective that the bees were injured after the car had left defendant's road and was in the possession of a connecting carrier the carrier was liable therefor. International, etc., R. Co. *v.* Aten (Tex. Civ. App.), 81 S. W. 346.

Leaky roof.—Defendant railroad contracted to transport a car load of potatoes for plaintiff, the car to be sent over defendant's road to a certain point, and thence forwarded over connecting roads. The shipping order provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route, nor after the property was ready for delivery to the next carrier. After the car was transferred to a connecting road the potatoes were injured by rain, by reason of the defective condition of the car roof. Held, that defendant was not absolved from liability by the shipping order, as by its contract it was bound to furnish a suita-

ing;[7] or from its negligent misdirection[8] or billing[9] the goods, although the negligence of a succeeding carrier concurred in causing the delay and incurred the damages.[10]

Damage from Delay Generally.—One of several carriers, over whose line goods were shipped on a through bill of lading, restricting the liability of each to damages occurring on its own line, held liable only for delay in transportation on its line.[11]

Delay in Delivery to Succeeding Carrier.—A railroad company chargeable with unreasonable delay in holding a shipment is liable for the natural consequences thereof, even beyond its own line,[12] although it has limited its liability

ble car for the entire trip and deliver the car and cargo to the connecting line in good condition. Kibby *v.* Michigan Cent. R. Co., 105 N. W. 769, 142 Mich. 313.

7. Where the bill of lading contained a stipulation that no carrier should be liable for loss or damage to the described property not occurring on its own road or its portion of the through route, held, that if the injury or damage resulting from the unskillful, improper, and negligent manner in which the initial carrier piled the boxes in the cars in which they were transported to their destination, it would be liable for the total injury or damage. Davis *v.* New York, etc., R. Co., 72 N. W. 823, 70 Minn. 37.

Where the damage to goods was caused by negligence in furnishing an unsuitable car, the fact that the damage actually occurred on another line will not enable the first carrier to escape liability to its own line. Hunt *v.* Nutt (Tex. Civ. App.), 27 S. W. 1031.

8. **Loss by negligent misdirection or billing of initial carrier.**—Exemption in the contract of carriage from loss or damage beyond the line of the forwarder will not relieve the latter where such damage is brought about by his own negligent misdirection. Hoffman *v.* Delaware, etc., R. Co., 39 Pa. Super. Ct. 47.

Where the terms of a bill of lading limited the liability of connecting carriers to the line on which a loss or injury might occur, defendant, as initial carrier, was liable for a delay in delivery caused by its failure to properly direct the goods. Illinois Cent. R. Co. *v.* Southern, etc., Cabinet Co., 58 S. W. 303, 104 Tenn. 568, 50 L. R. A. 729.

9. A railway company limiting its liability to its own line in a contract of shipment of freight is liable for the negligence of its agent in billing the freight to a different place on the line of the connecting carrier from that called for in the contract. Gulf, etc., R. Co. *v.* Harris (Tex. Civ. App.), 72 S. W. 71.

10. **Concurring negligence of succeeding carrier.**—An initial carrier, by whose negligence goods have been misdirected and thereby delayed in delivery, can not escape any part of the resulting loss or damage by reason of a limitation of its liability in the bill of lading, to loss or damages occurring on its own line, although the negligence of a connecting carrier concurred and contributed to cause the delay and increase the damages. Illinois Cent. R. Co. *v.* Southern, etc., Cabinet Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

11. **Damage from delay generally.**—St. Louis, etc., R. Co. *v.* Cohen (Tex. Civ. App.), 55 S. W. 1123.

Damages from delay of live stock.—International, etc., R. Co. *v.* Earnest (Tex. Civ. App.), 77 S. W. 29; St. Louis, etc., R. Co. *v.* Stokes, 44 Tex. Civ. App. 220, 99 S. W. 120.

12. **Delay in delivery to succeeding carrier.**—San Antonio, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 66 S. W. 792.

Plaintiff shipped over defendant's railroad certain wool for transportation to New York in connection with a steamship line, under a bill of lading limiting defendant's liability to its own line. Had the wool been transported with reasonable dispatch to the port where the water transportation was to begin, it would have arrived before 10 o'clock a. m., October 20, 1900, but did not in fact arrive until October 26th, when it was transported by steamer to New York, and delivered on November 21, 1900. From October 19, to November 14, 1900, the market value in wool in New York was 20 cents per pound, but thereafter the price continually declined until after delivery. Held that, in the absence of explanation, the long delay on defendant's line constituted negligence which at least concurred with the negligence of the steamship line, if any, and hence defendant was liable for damages resulting therefrom. Butterick Pub. Co. *v.* Gulf, etc., R. Co., 39 Tex. Civ. App. 640, 88 S. W. 299.

Where goods were delivered to a carrier for shipment to a point beyond the terminus of its road, under a bill of lading containing a provision that the carrier should not be liable after the property was ready for delivery to the next carrier, it is nevertheless liable for withholding for seven days delivery to the lighters which were to transfer the goods to their destination. Judgment, 98 N. Y. S. 609, 112 App. Div. 612, affirmed in Isham *v.* Erie R. Co., 85 N. E. 1111, 191 N. Y. 547

to its own line.

Loss by Fire While Awaiting Transhipment.—But where a carrier transported goods to a seaport under a bill of lading providing that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier, and deposited them in its warehouse to await the arrival of the boats of the next carrier which had no warehouse, and they were delayed by fire not caused by the first carrier's negligence, the first carrier was not liable.[13]

Loss Caused by Delay on Connecting Lines.—Where a bill of lading stipulates against liability for negligence of connecting lines, the carrier is not responsible for delay in delivering goods in time for a particular market, where it is not shown that the delay occurred on its own line.[14]

Deviation or Diversion.—Where a carrier issues a through bill of lading to a point beyond its line and contracts that it shall not be liable for damage not occurring on its line, and the route is designated in the contract and the carrier selects another carrier to complete the transportation and damage occurs, the initial carrier is responsible.[15]

Deviation from Prescribed Route to Terminus of Initial Carrier's Line.—Where an initial carrier unnecessarily deviated from the route prescribed in the bill of lading by delivering them to another company at an intermediate common point to be carried to the initial carrier's terminus, the initial carrier was liable for damages to the goods on the other company's line, though the contract of shipment provided that it should be liable only for losses occurring on its own line, since it was in the wrong, and it would be impossible to determine that the loss would have occurred had there not been a deviation.[16]

Failure of Connecting Carrier to Ice Perishables.—Where a bill of lading, providing that the carrier should not be liable for loss or damage not accruing on its route or in its proportion of the through route, etc., contained, after the description of the property, which was perishable, the statement, "Ice when needed," the carrier did not thereby obligate itself to see that the goods were properly iced on all connecting routes.[17]

Reloading Goods to Be Forwarded without Change of Cars.—A rail-

13. **Loss by fire while awaiting transhipment.**—A bill of lading provided that goods should be delivered to successive carriers, and that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier. A railroad company transported the goods to a seaport with proper diligence. The goods were deposited in the railroad company's warehouse ready for shipment when the boats of the connecting carrier should arrive. The connecting carrier had no warehouse or dock. While the goods were awaiting transportation, they were destroyed by fire, not caused by defendant's negligence. Held, that the railroad company was not liable. Courteen *v.* Kanawha Dispatch, 86 N. W. 176, 110 Wis. 610, 55 L. R. A. 182.

14. **Loss caused by delay on connecting lines.**—Mobile, etc., R. Co. *v.* Francis (Miss.), 9 So. 508.

15. **Deviation or diversion.**—Southern R. Co. *v.* Frank & Co., 5 Ga. App. 574, 63 S. E. 656.

Damages caused by abuse of shipment.—A contract limiting the liability of a company to damages occurring on its own lines does not exempt the company from liability for damages caused by the abuse of the shipment while in the hands of a connecting road other than that over which it had contracted to ship Texas, etc., R. Co. *v.* Boggs (Tex. Civ. App.), 40. S. W. 20.

Contract to forward by all rail route—Delivery to steamboat.—A contract by the first of several carriers in a route to forward goods by railroad, in good order, to the terminus of the whole route, at a stipulated price, is an entirety. If, at the end of his own line, he changes their route by delivering them to a second carrier, to go on by steamboat, he assumes the risk of transportation, and is liable for any loss or damage, in the subsequent transit, notwithstanding a stipulation that he shall not be responsible for any damage if receipted for in good order at the end of his own line. Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152.

16. **Deviation from prescribed route to terminus of initial carrier.**—St. Louis, etc., R. Co. *v.* Caldwell, 89 Ark. 218, 116 S. W. 210.

17. **Failure of connecting carrier to ice perishables.**—Farnsworth *v.* New York, etc., R. Co., 84 N. Y. S. 658, 88 App. Div. 320.

way company, which in receiving freight, stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to destination in the cars in which they were loaded, by changing the cars after they left the road of the company, assumes the risk of the safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line.[18]

Escape of Animal from Defective Cars.—Where a railway company undertakes to transport live stock, it is its duty to furnish good and sufficient cars in which to carry the same, and if it does not, and animals escape, from defects in its cars, beyond the terminus of its road, it will be liable for the loss, even though there be a special contract limiting its liability to the end of the road.[19]

Reloading Stock into Defective Cars.—Where a contract for the shipment of live stock stipulates that the carrier shall be relieved from all liability after the delivery of the stock to its connecting line, no action will lie against the first carrier for injuries to the stock after it has been reloaded on the cars of the connecting carrier, caused by a defect in such cars.[20]

Refusal to Unload Live Stock within Twenty-Eight Hours.—A contract to ship cattle made with defendant railroad company, relieving it of all liability beyond the line of its own road, does not permit defendant to escape the consequences of its failure to comply with the shipper's request to unload the cattle after being kept in the cars for more than 28 hours, contrary to Rev. St. U. S. § 4386, though after the connecting carrier had refused to take the cars; and it is immaterial that the shipper has a remedy against the connecting carrier for refusing to accept and unload the cattle.[21]

Delay in Delivery after Arrival at Destination.—Where an initial connecting carrier's liability was limited to its own line, and it appeared that the injury to the goods resulted in delay in delivery after reaching destination, the shipper could not recover against the initial carrier,[22] as, for instance, where a connecting carrier delivered goods received to the next connecting carrier without negligence on its part and there is delay because of a subsequent transaction between the last connecting carrier and the consignee, whereby the goods were stored at the terminus, by his request, until he could communicate with his consignor, which resulted in the absolute refusal of the consignee to receive the goods five weeks later.[23]

Injuries Developing after Shipment Has Passed from Carrier's Line.—Though a stock shipment contract relieves the carrier "from liability of every kind," after the stock shall have left its road the shipper may recover for injury to the stock while on such carrier's line, though such injury developed or became apparent after the animals had left that line.[24] As, for instance, where injury results from failure to properly bed cattle car,[25] or where a car of live

18. **Reloading goods to be forwarded without change of cars.**—Galveston, etc., R. Co. *v.* Allison, 59 Tex. 193.

19. **Escape of animal from defective cars.**—Indianapolis, etc., R. Co. *v.* Strain, 81 Ill. 504.

20. **Reloading stock into defective cars.**—Gulf, etc., R. Co. *v.* Tennant (Tex. Civ. App.), 22 S. W. 761.

21. **Refusal to unload live stock within twenty-eight hours.**—Texas, etc., R. Co. *v.* Birchfield, 19 Tex. Civ. App. 228, 46 S. W. 900.

22. **Delay in delivery after arrival at destination.**—Coats *v.* Chicago, etc., R. Co., 239 Ill. 154, 87 N. E. 929.

23. **Delay caused by transactions between terminal carrier and consignee.**—Harris *v.* Minneapolis, etc., R. Co., 73 N. Y. S. 159, 36 Misc. Rep. 181.

24. **Injuries developing after shipment has passed from carrier's line.**—Ft. Worth, etc., R. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525; Texas, etc., R. Co. *v.* Stephens (Tex. Civ. App.), 86 S. W. 933.

25. **Failure to properly bed cattle cars.**—A contract for the shipment of cattle, limiting the initial carrier's liability to damages for loss or injury occurring on its own line, does not preclude the shipper from recovering from the initial carrier damages resulting from its negligence in failing to properly bed the cars in the first place, although the injuries occasioning such damages did not develop until after the cattle had left such carrier's line, and were in the hands of a connecting carrier. Texas Cent. R. Co. *v.* O'Loughlin, 84 S. W. 1104, 37 Tex. Civ. App. 640.

Where the cars in which the cattle

stock is transferred to a connecting line, without affording any opportunity for feeding or watering the stock, though requested to by the shipper.[26]

Part of Injuries Occurring Before Delivery to Succeeding Carrier.—Though the bill of lading issued by the first of two connecting carriers exempted it from liability for damages not occurring on its own line, it can not complain that it was held jointly liable with the other connecting carrier for all the damage to freight, which was shown to be injured at the time it was delivered to the second connecting carrier, where the first carrier did not offer to show what proportion of the damage was sustained on its own line.[27]

Nondelivery by Connecting Carrier.—An initial carrier issuing a bill of lading stipulating for the carriage of goods to their destination if on its road, otherwise to deliver the same to another carrier on the route to said destination, and providing that no carrier shall be liable for loss not occurring on its own road, nor after the property is ready for delivery to the next carrier or consignee, is not liable for the failure of the connecting carrier to deliver the goods.[28]

Conversion of Shipment by Connecting Carrier.—A railroad company which contracts for the shipment of goods to a point beyond its own line with one who knows that the goods must be delivered to a connecting line, with the agreement that, after the goods leave its road, it is to be held as a forwarder only, is not liable for a conversion of the goods by the connecting road.[29]

Liability Limited to Protection of Through Rate of Freight for Cattle.—Where a contract for the transportation of cattle by defendant railroad company over its own and connecting lines for a through freight exempts defendant from liability "for anything beyond" its line, "excepting to protect the through rate of freight named therein," defendant is not liable for conversion of the cattle, on refusal of a connecting carrier to deliver the cattle unless a greater freight rate is paid.[30]

§ 3738. Effect of Specific Exceptions to General Exemptions.—A carrier remains liable as at common law for a loss of cotton by fire while in its possession, although it was "ready for delivery" to the next carrier, or was awaiting further conveyance within the meaning of clauses in the bill of lading modifying its common-law liability for the loss of goods under such circumstances, where such bill of lading also declares that "cotton is excepted from any clause herein

were originally loaded were not to be rebedded until they reached a point beyond the initial carrier's terminus, the fact that the connecting carrier accepted the cars from the initial carrier in the condition they were in with reference to bedding did not make the cars part of the connecting carrier's means of transportation, so as to render it liable for damages thereafter occurring by reason of improper bedding, in such sense as to relieve the initial carrier from liability for its negligence in failing to properly bed the cars. Texas Cent. R. Co. *v.* O'Loughlin, 84 S. W. 1104, 37 Tex. Civ. App. 640.

26. Galveston, etc., R. Co. *v.* Ivey (Tex. Civ. App.), 23 S. W. 321.

Failure to afford opportunity to feed and water stock.—In a contract for shipment of stock, defendant company limited its liability to occurrences on its own line, which terminated at H. The evidence showed that the stock was negligently switched around in cars for several hours before being started; that, before reaching H., plaintiff notified defendant's agents that the stock would need food and water at that place, which was a feeding point, but the stock was immediately transferred to the connecting carrier, as had been previously agreed on by the two lines. Before reaching the next station, the animals had suffered so greatly that their value was permanently lessened. The evidence showed that, if they had been cared for at H., they would not have suffered. Held, that defendant was liable, though the injury did not develop until after the stock had passed from its line. Galveston, etc., R. Co. *v.* Herring (Tex. Civ. App.), 24 S. W. 939.

27. **Part of injuries occurring before delivery to succeeding carrier.**—Gulf, etc., R. Co. *v.* Edloff (Tex. Civ. App.), 34 S. W. 410.

28. **Nondelivery by connecting carrier.**—American Hay Co. *v.* Bath, etc., R. Co., 85 N. Y. S. 341.

29. **Conversion of shipment by connecting carrier.**—McEacheran *v.* Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612.

30. **Liability limited to protection of through rate of freight for cattle.**—Little Rock, etc., R. Co. *v.* Odom, 38 S. W. 339, 63 Ark. 326.

on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," since this specific clause takes effect to the exclusion of general clauses containing matters of general exemption.[31]

§ 3739. Liability of Succeeding Carrier.—Injuries Occurring before Shipment Delivered to Defendant Carrier.—If the property is shipped under a contract limiting each carrier to its own line, a carrier is not liable for any injury thereto inflicted before it reached its line.[32]

§§ 3740-3743. Termination of Liability of Initial or Prior Carrier—§ 3740. Delivery to Succeeding Carrier.—Where a bill of lading limited the carrier's liability to its own line, and required delivery to another carrier on the route to destination, if the destination was not on the initial carrier's own line, such carrier's duty might be discharged by delivery to the connecting carrier designated in the bill,[33] in the same order in which the preceding carrier received them,[34] or, if none be designated and there were several, by a delivery to a proper connecting carrier on the route "in the usual and customary way."[35] Where a railroad or other common carrier receives goods consigned beyond the terminus of its own road, with the agreement to deliver to a connecting line, the contract of shipment imposes not only the duty to transport safely over its own road, but to safely deliver to the next connecting carrier. The duty assumed, in other words, is both to safely carry and to safely deliver.[36] This duty is performed and the liability of the company, as a common carrier, ceases upon the delivery, with proper instruction, to the next carrier at the end of its route.[37]

31. Effect of specific exceptions to general exemptions.—Judgment, Texas, etc., R. Co. *v.* Callendar, 98 Fed. 538, 39 C. C. A. 154, affirmed in 22 S. Ct. 257, 183 U. S. 632, 46 L. Ed. 362.

32. Injuries occurring before shipment delivered to defendant carrier.—*Georgia.*—Bell Bros. *v.* Western, etc., R. Co., 125 Ga. 510, 54 S. E. 532.

Pennsylvania.—Goods were shipped at New Orleans for Pittsburg, with privilege of transshipment on the way, and provision was made in the bill of lading that the owners of the second boat should not be liable for damages on board the first. The goods were injured on board the first boat, but the owners of the last boat refused to deliver them until the whole freight was paid. Held, that they were not thereby made liable, in an action of tort, for damage caused on board the first boat. Wilson *v.* Harry, 32 Pa. 270.

Texas.—Gulf, etc., R. Co. *v.* Malone (Tex. Civ. App.), 25 S. W. 1077.

33. Delivery to succeeding carrier.—*Alabama.*—Southern R. Co. *v.* Goldstein Bros., 146 Ala. 386, 41 So. 173.

Where the receipt or bill of lading of goods marked to a certain point contains a valid contract to the effect that the goods are to be transported over the line of the defendant's road, to a certain station, and there delivered, in good order to another company, to be transported to the place of destination, and that the liability of defendant, as a common carrier, shall cease when the goods are so delivered at that station to the other company, the responsibility of the company, as a common carrier, ends with the delivery of the goods to the next carrier at the station named in the receipt. Field *v.* Chicago, etc., R. Co., 71 Ill. 458.

New York.—Where a shipment is made over connecting lines under a bill of lading reciting that "the shipper, in accepting it, agrees to all its terms and conditions," and that in case of loss "that company shall alone be held answerable therefor in whose actual custody the goods may be at the time of the happening of such loss," the initial carrier is not liable after a delivery of the goods at the end of its line. Ricketts *v.* Baltimore, etc., R. Co., 61 Barb. 18, 4 Lans. 446, affirmed in 59 N. Y. 637.

34. Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

35. Southern R. Co. *v.* Goldstein Bros., 41 So. 173, 146 Ala. 386.

36. Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; S. C., 83 Ala. 343, 3 So. 802; Wells *v.* Thomas, 27 Mo. 17, 72 Am. Dec. 228.

37. Where an express company agrees to forward a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of a forwarder, and through charges not having been paid, the liability of the company, as a common carrier, ceases upon its delivery, with proper instructions, to the next carrier, at the end of its route. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Reed *v.* United States Exp. Co., 48 N. Y. 462, 8 Am. Rep. 561.

Degree of Care Required.—In so far as the carrier acts as a mere forwarder, assuming as agent of the consignor to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care, or such care as persons of ordinary prudence exercise in reference to their own property under like circumstances.[38]

Transportation over Intermediate Short Line.—Where goods are received by a carrier under a contract restricting the liability of the company to their delivery at its terminus, it is then bound to deliver them there with all convenient speed, according to the usual course of business, to the next carrier; but if there be none ready at the terminus to receive the goods and forward them along the proper route, the company is not bound to transport the goods beyond its terminus upon any link, however short, of the connecting route, unless its established usage imply such undertaking.[39] But where a railroad company receives goods consigned beyond its own line, with an agreement to deliver to a connecting line, the liability of the first road or carrier does not necessarily terminate with the arrival of the goods at its own terminal depot, although its responsibility as carrier may terminate there, if there is no further duty of carriage, in order to make the connection with the other road over which the goods are to be transported. If there be any duty to carry the goods over an intermediate short line, connecting its own terminal depot with the other connecting road, in order to complete the act of delivery, its liability on the intermediate line obviously is that of a carrier, and not of a forwarder, especially if this line be a part of its own road.[40]

Notice to Succeeding Carrier of Arrival.—A shipment unloaded by a connecting carrier at its pier without giving any notice of its arrival to the succeeding carrier does not await further conveyance, within the meaning of a clause in the bill of lading relieving the carrier from liability other than as a warehouseman "while the said property awaits further conveyance."[41]

38. **Degree of care required.**—Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510; Hooper *v.* Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Story, Bailm., § 444.

39. **Transportation over intermediate Short Line.**—Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

Defendant, who, as a connecting carrier, received goods under a contract restricting its liability to a delivery at its terminus, was not liable to the consignee for failure to deliver, if the goods were received at the terminus of defendant's line, and there held because there was no carrier to haul them a few hundred feet from its warehouse to the boat landing of the next connecting carrier. Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

40. *Alabama.*—Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119.

New York.—Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

A railroad company, which, without giving the shipper an opportunity to attend to the loading, puts cattle carried over its own line in cars furnished by another company, hauls them over a connecting track, and then delivers to it, is liable, in tort for breach of duty growing out of the contract of shipment, for injuries in transit over the second line, caused by negligence at the time of the transfer in not supplying bedding and partitions, and in overcrowding, though the contract of shipment limits the carrier's liability to "gross or wanton negligence," and to that of a forwarding agent only in delivering to the next line, and provides that the shipper is to load and unload and care for the cattle. Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119.

41. **Notice to succeeding carrier of arrival.**—Plaintiffs delivered cotton to defendant railroad company at a point in Texas for carriage over its line to New Orleans, and from there over a connecting steamship line to a foreign port. Defendant maintained a wharf at New Orleans, upon which it unloaded from its cars and piled cotton for export, and from which such cotton was taken by the steamship companies, being checked out from the piles, and receipted for at the time it was loaded on the vessel. It was defendant's custom to notify the several steamship companies of the arrival at its wharf of cotton billed for shipment over their lines. After plaintiff's cotton had arrived and had been piled on the wharf, but before the steamship company had been notified of its arrival, it was destroyed by fire. The conditions of the

Notice to Succeeding Carriers of Character of Transportation.—Where a railroad company receives freight for shipment under an agreement to forward it to its destination, and the stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," the duty of the company as forwarding agent continues till the goods arrive at their ultimate destination, and it is therefore liable for any delay caused by its failure to notify each successive connecting road of the conditions of the contract in respect to the manner of transportation.[42]

Disregard of Shipping Instructions.—The carrier, in undertaking to forward goods beyond the terminus of its own route, is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract of shipment, and if he disregard such instructions, and the goods be lost by reason of this act of negligence, he will be liable for their value, although the loss may occur in the possession of another carrier or person. If, in forwarding, shipments are made in a manner prohibited by the sender, the carrier so forwarding is liable as an insurer for the safe delivery of the articles so sent.[43]

What Constitutes Delivery to Steamship Company.—A railroad company does not, by unloading a shipment on a pier under its sole and absolute control and possession, and notifying a steamship company, the succeeding carrier, of its arrival, deliver the shipment "to the steamship company or on the steamship pier," within the meaning of a clause in the bill of lading providing that its liability shall terminate on such delivery, even assuming that such pier was the place agreed upon between the railroad and steamship companies to make delivery of freight to be thereafter carried by the steamship company, where the railroad company still continues to retain full control of the shipment, and could, under certain contingencies, and at any time before delivery to the steamship, send it by another steamer, and by agreement between the parties the steamship company was not to take the property until it sent a steamer to the pier for that purpose.[44] But there is a delivery of freight by a railroad

bill of lading for such cotton were divided into two classes, one relating to the service until, the other to the service after, delivery at the port of New Orleans. Among the former was a clause providing that "no carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance." Held, that under such provision defendant's liability as carrier was not changed to that of warehouseman prior to notification of the steamship company that the cotton was ready for delivery; that both the exemption from liability for delay and the substitution of liability as warehouseman must be construed as taking effect only after the service of defendant had been completed and the property awaited the action of the connecting carrier. Reiss *v.* Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149; S. C., 99 Fed. 1006, 39 C. C. A. 608, affirmed in 22 S. Ct. 253, 183 U. S. 621, 46 L. Ed. 358.

42. Notice to succeeding carriers of character of transportation. — Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

43. Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Johnson *v.* New York Cent. Transp. Co., 33 N. Y. 610, 88 Am. Dec. 416, and cases cited in note; Maghee *v.* Camden, etc., Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124.

44. What constitutes delivery to steamship company.—Judgment, Texas, etc., R. Co. *v.* Callendar, 98 Fed. 538, 39 C. C. A. 154, affirmed in 22 S. Ct. 257, 183 U. S. 632, 46 L. Ed. 362.

A railroad bill of lading for cotton shipped from Texas to Liverpool provided that responsibility on the part of such railroad should cease "upon delivery of said cotton to its next connecting carrier," and, in case of loss or damage, "that carrier alone shall be held liable therefor in whose actual custody" the cotton shall be at the time of such damage or loss. The railroad transported the cotton to New Orleans, and unloaded it on its own wharf, from which it was to be loaded upon the steamship of a connecting carrier, and gave notice to such carrier that the cotton was ready to be taken by it. The cotton was destroyed by fire while on the wharf, and before the arrival of the vessel. Held, that such loss occurred while the cotton was in the "actual custody" of the railroad company, and it was liable therefor, under the bill of lading. Texas, etc., R. Co. *v.* Clayton, 19 S. Ct. 421, 173 U. S. 348, 43 L. Ed. 725.

Where a carrier receives lumber for

company to a steamship company, so as to relieve the railroad company from further liability, as stipulated in its bill of lading on the happening of such event, though it is unloaded on a wharf belonging to the railroad company; the railroad company having given the steamship company notice by letter, which was unanswered, and seemingly acquiesced in, that unloading of steamship freight at that place constituted delivery by the railroad company, and that thereafter it assumed no liability therefor.[45]

Stock Shipments.—Where the contract of transportation of cattle by defendant over its line and connecting lines limits defendant's liability to damage occurring on its own line, the carrier is not liable for damage resulting from negligence on the connecting line after delivery of the cattle to such connecting line.[46]

Right to Deliver Immediately upon Arrival at Terminus.—Where a contract for shipment of cattle by a railroad terminated on delivery of the stock to a connecting carrier, on arrival at the junction the carrier had the right to deliver to the connecting line at once, and could not be held liable for damages for not holding the cattle to give the shipper an opportunity to water and feed.[47]

Delivery According to Earliest Schedule Time.—Where a carrier forwarded live stock according to the earliest practicable schedule time, which, as the shipper previously knew, involved a delay of four hours at one point, and the animals were delivered in good condition to a forwarding carrier, and the first carrier had stipulated that its liability should cease when they were delivered to the forwarding carrier, it was not liable for the injured condition of the animals when delivered to the consignee.[48]

§ 3741. Refusal of Succeeding Carrier to Receive Shipment.—Where a traffic association composed of several carriers issues a through bill of lading for freight, the shipper is entitled to an uninterrupted continuous carrier's duty from the shipping point to destination; and a stipulation in the bill of lading that in case of loss, detriment, or damage whereby liability should be incurred, the carrier alone should be liable in whose actual custody it should be at the time of the loss, can not be construed as absolving carrier which actually has the custody of the property from its common-law duty and obligations, because one of its associates has unreasonably neglected or refused to receive and forward the shipment. Such a construction would permit loss to occur while freight was being transported by several carriers, under a through delivery agreement, without a carrier's duty resting upon them at all times. The carrier in possession could escape liability because it had tendered the goods to another, and the latter could escape because it had neglected and refused to become an actual custodian. The language in question must be construed as an affirmation or a guaranty that there shall continually be a carrier in actual custody, and that connecting carriers will receive at the proper time and place. It makes the carrier which transports the goods to a point where another is to assume the custody and control a surety that the latter will receive. Whatever may be the relation between the two carriers, as between the carrier who actually retains custody and the shipper the duty and liability of the former continues. It has

shipment to Europe under a contract terminating its liability on delivery to the steamship company or on the steamship pier, the placing of the lumber on the pier owned by such carrier is not sufficient to relieve it of liability for loss of such lumber. Lewis *v.* Chesapeake, etc., R. Co., 35 S. E. 908, 47 W. Va. 656, 81 Am. St. Rep. 816.

45. Washburn-Crosby Co. *v.* Boston, etc., Railroad, 180 Mass. 252, 62 N. E. 590.

46. **Stock shipments.**—Chicago, etc., R. Co. *v.* Slaughter, 84 Ark. 423, 106 S. W. 208.

47. **Right to deliver immediately upon arrival at terminus.**—Texas, etc., R. Co. *v.* Stribling (Tex. Civ. App.), 34 S. W. 1002.

48. **Delivery according to earliest schedule time.**—Nashville, etc., Railway *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955.

not become a warehouseman by the refusal and neglect of another carrier. The real meaning of the language in question is simply that one carrier will not be held liable or responsible for the loss or damage done by another.[49]

Carrier Guilty of Breach of Contract to Ship by Specified Steamer.—Where a railroad company agreed to transport a shipment of freight to the terminus of its own line and to ship the same on a specified date by a specified steamer, the railroad company is liable for a breach of contract where it tendered the shipment to the steamship company but the master refused it under an alleged custom authorizing him to say what freight he would take or refuse to take on any particular trip, notwithstanding the issuance of a bill of lading, that it should only be liable for damages occurring to freight on its own line.[50]

Duty to Notify Initial Carrier or Shipper.—A connecting carrier, on being notified by the ultimate carrier to whom it delivers goods, which require rapid transportation, that the goods will not be forwarded until all freight charges are paid, is guilty of such negligence as will render it liable for the loss of the goods from a failure to forward them, in failing for eighteen days to notify the initial carrier or the shipper of the refusal to forward them, although the contract of shipment provides that the road in whose actual custody the goods are at the time of any loss or damage shall alone be responsible.[51]

§ 3742. Delivering Stock to Stockyard Company.—Where the contract of shipment of stock limits the liability of the railroad to deliver to a connecting line, and the stock is delivered to a stockyard company, to be redelivered to the connecting line, the railroad is liable for injuries to the stock while in the hands of the stockyard company.[52] If a carrier of live stock binds itself by contract to deliver such stock to a connecting railway, it can not transfer such duty to another, so as to free itself of liability for a failure to so deliver.[53] Such company's possession is that of initial carrier, which is liable until stock is delivered or tendered to connecting line.[54] And where animals escape or are killed before delivery to the connecting line, if the stockyard company captures two escaped horses, and proposes to return them to the shipper, charged with yard expenses, the shipper is not bound to receive them so charged, and such facts are no defense in suit for value.[55] Evidence in an action against carriers for injuries to a shipment of cattle considered, and held sufficient to authorize an instruction that it was the duty of the initial carrier to transport the cattle to a

49. **Refusal of succeeding carrier to receive shipment.**—Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442.

50. **Carrier guilty of breach of contract to ship by specified steamer.**—Defendant's railroad line connected at P. with a line of steamers for Liverpool. Plaintiff's agent, desiring to ship 100 bales of cotton for plaintiff, applied to defendant railroad company for a rate for such amount to be shipped on a specified date by a specified steamer. Defendant, before answering, ascertained whether the steamship company would accept the cotton for that steamer, and, being informed that it would, named the rate, and agreed by telegraph to ship the cotton on that date by the steamer named. Defendant company transported the cotton to the dock, and tendered the same to the steamship company, but the master refused it, under an alleged custom authorizing him to say what freight he would take or refuse on any particular trip, and the cotton was thereafter shipped on a different vessel, to plaintiff's damage. Held, that defendant railroad company was liable for breach of contract, notwithstanding the issuance of a bill of lading, providing that it should only be liable for damages occurring to freight while on its own line, and that its liability as a common carrier ceased on tendering the freight to its connecting carrier, etc. Louisville, etc., R. Co. *v.* Williams, 5 Ala. App. 615, 56 So. 865.

51. **Duty to notify initial carrier or shipper.**—Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

52. **Delivery to stockyard company.**—Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

53. Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

54. Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

55. Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

certain point, and there deliver them to a connecting carrier.[56]

§ 3743. Duty to Notify Shipper of Inability to Deliver.—Where goods are received under a contract restricting the liability of the initial carrier to their delivery at its terminus, it is then bound to deliver them there with all convenient speed, according to the usual course of business, to the next carrier; and if there is none ready at the terminus to receive the goods and forward them along the proper route, then it ought to retain them and notify the owner.[57]

§ 3744. Breach of Contract by Initial Carrier.—Where an initial carrier refuses to perform its contract it has no right to claim the advantage of a stipulation limiting its liability to its own line. In such case it has forfeited such right and becomes liable to the full extent of the law the same as if there had been no special contract.[58]

Violation of Shipping Directions.—Where the bill of lading limits the liability of connecting carriers to the road inflicting the injury, the initial carrier is liable to the shipper for damages caused by its violation of his express directions given at the time of delivery.[59]

Failure to Follow Directions in Bill of Lading.—It is the duty of a succeeding carrier to follow the shipping directions in the bill of lading rather than those marked on the package or article shipped and its failure to do so deprives it of the benefit of stipulation in the bill of lading limiting its liability.[60]

Breach Caused by Mob.—Nonperformance of a special contract to ship live stock to an extraterminal point is not excused by a mob's having prevented it, although liability for extraterminal loss was expressly stipulated against; because, having failed to transport it, no such loss could occur.[61]

Restraint of Princes, Rulers or People.—The mistaken refusal of the deputy collector of a port to grant a clearance while certain freight was on board because it was contraband of war does not constitute a "restraint of princes, rulers, or people," within the meaning of a clause in the bill of lading, so as to excuse nonperformance of the agreement to forward the shipment by that vessel.[62]

56. Texas, etc., R. Co. *v.* Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

57. **Duty to notify shipper of inability to deliver.**—Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

58. **Breach of contract by initial carrier.**—Plaintiff shipped a lot of sheep from Arkansas to Texas, over connecting lines of railroad, defendant's line being one of said connecting lines. The contract of shipment, made in Arkansas, contained a limitation in favor of the carrier, restricting the common-law liability of carriers. It also stipulated that the owner of the sheep might be transported on the same train, which conveyed the sheep, free of charge, and also that said owner had the privilege of having the cars containing his sheep side-tracked. Defendant refused to transport plaintiff free of charge, and refused to side-track the cars containing the sheep when requested to do so by plaintiff. Held, that defendant could not claim the advantages stipulated for in the contract, but was liable as a common carrier, without regard to the contract. Texas, etc., R. Co. *v.* Davis, 2 Texas App. Civ. Cas., § 191.

59. **Violation of shipping directions.**—Atlantic, etc., R. Co. *v.* Richardson, 121 Tenn. 448, 117 S. W. 496.

60. **Failure to follow directions in bill of lading.**—Plaintiff desiring to ship an automobile to Miami, Fla., shipping receipt and the shipping order gave Miami as the destination, via defendant's steamship line to Key West, with direction to notify M., and the automobile was so marked; but defendant sent a bill of lading, in which Brunswick was stated as the port, instead of Key West, where it was to be delivered to a connecting carrier at the owner's risk, and it also contained the direction to notify M. at Miami. Plaintiff sent the bill of lading to the port of destination, with draft attached for collection. Defendant carried the automobile to Key West and delivered it to a sailing vessel, the master of which took it to Miami and delivered it to M. without requiring the bill of lading or other authority. Held, that defendant's duty was to follow the directions in the bill of lading rather than those marked on the automobile and in the shipping receipt, and its failure so to do rendered it liable for the value of the automobile. Waltham Mfg. Co. *v.* New York, etc., Steamship Co., 90 N. E. 550, 204 Mass. 253, 17 Am. & Eng. Ann. Cas. 837.

61. **Breach caused by mob.**—White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

62. **Restraint of princes, rulers or people.**—Decree, Farmers' Loan, etc., Co. *v.*

§ 3745. Modification or Rescission.—Special Contract as Prevailing over General Stipulation in Bill of Lading.—A special contract for liability over the whole route made by the shipper with the general agent of the road is not affected or altered by the fact that the bill of lading issued for the goods and delivered to and received by a clerk of the shipper contains the usual stipulation that the carrier is not to be liable beyond its own line.[63]

Effect of Bill of Lading of Initial Carrier on Contract of Terminal Carrier.—A verbal agreement to furnish refrigerator cars for the transportation of milk over the whole route, made by the terminal carrier to induce plaintiff to send it to the terminal carrier for transportation to its destination, is not superseded by a subsequent written contract expressed in the bill of lading issued by the initial carrier, by which the latter sought to limit its liability.[64]

Receipt Given by Connecting Carrier a New Contract.—Where an express company receives goods under a contract exempting it from liability, except for fraud or gross negligence, with a stipulation that the contract shall inure to the benefit of any connecting carrier, the fact that a connecting carrier makes a new and different contract, evidenced by a new receipt, precludes it from claiming under the original contract.[65]

§ 3746. Merger of Verbal Contract by Subsequent Written Agreement.—Where a verbal contract for a shipment to a certain point for a specified sum was made several days before the shipment, a subsequent written contract signed by the consignor, and limiting the liability of the shipper to its own line, is without consideration; and it need not be shown that the written contract was entered into by the consignor through fraud, mistake, or duress.[66] But such verbal contract must be shown by competent proof.[67]

Written Contract Contemplated by Parties.—Where, at the time of a parol contract between a shipper and the carrier, the shipper expected to sign a written contract, and he subsequently did so, he was not in a position to avoid the force of provisions in the written contract limiting the liability of the carrier to damages occurring on its own line.[68] And the doctrine that a subsequent

Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

63. **Special contract as prevailing over stipulations in bill of lading.**—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

64. **Effect of bill of lading of initial carrier on contract of terminal carrier.**—St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619, 13 Am. & Eng. R. Cas., N. S., 112.

65. **Receipt given by connecting carrier a new contract.**—Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415.

66. **Merger of verbal contract by subsequent written agreement.**—McManus *v.* Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919; San Antonio, etc., R. Co. *v.* Wright, 49 S. W. 147, 20 Tex. Civ. App. 136.

67. In an action against a carrier for damages to a shipment over the lines of defendant and a connecting carrier, where a written contract limited defendant's liability to its own line, in the absence of competent proof sustaining an oral agreement for through shipment, defendant was not chargeable with damages on a connecting line. McManus *v.* Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919.

68. **Written contract contemplated by parties.**—Chicago, etc., R. Co. *v.* Halsell, 81 S. W. 1243, 36 Tex. Civ. App. 522.

Where plaintiff, who was in the habit of shipping stock over defendant's line, for which he always signed written contracts, made a verbal contract with defendant's agent as to the rate, and plaintiff's agent signed a written contract limiting the liability of the company to its own line, it was error to refuse to instruct "that if, from previous dealing with defendant, plaintiff or his agent knew that it was the regular rule for the shipper to sign such a written contract, and that if when plaintiff inquired the rate he contemplated entering into such written contract at the time of shipment, and that if he knew or could have known from previous dealing what stipulations were in such contract, the verdict should be for defendant." Ft. Worth, etc., R. Co. *v.* Wright, 58 S. W. 846, 24 Tex. Civ. App. 291.

written contract must be taken as merging all previous understandings between the parties prevails.[69]

§ 3747. Parol Evidence to Explain Ambiguity.—Where a receipt, given by a railroad company for goods to be transported to a consignee at a point beyond the terminus of its line, contained the words, "Care R. R. agt., Callahan," this was an ambiguity which could be explained by parol; and if it appeared that the words meant that the goods were to be delivered to the agent of another road at Callahan, and that the first company was bound only for such delivery, there would be no liability upon the first company beyond that point.[70]

§ 3748. Waiver and Estoppel.—Where written contracts for the transportation of cattle, executed en route, limited the carriers' liability to their own lines, but did not purport to cover shipments beyond M. by virtue of an oral agreement made at the instance of the carrier's agent to conceal the real destination of the cattle, such carrier was estopped to contend that its liability was limited to injuries occurring on its own line.[71]

§§ 3749-3754. Enforcement—§ 3749. Plea or Answer.—The allegations of a plea showing nothing more than the ordinary and usual relations between connecting carriers in a contract of shipment over several lines does not charge such a partnership as makes each responsible for the acts of the other, although the contract provides against such liability. If the agent of the initial carrier was also the agent of the succeeding carrier and authorized to bind it by the terms of the contract, that fact would not alter the essential terms of the contract which limited its liability to damage on its own line.[72]

Denial of Allegation on Oath.—Where a partnership between connecting carriers is alleged in a petition in an action against a railroad for damages for negligence and delay in transporting stock, and is not denied on oath, the defendant railroad will be liable for damages, whether they occurred on its own or connecting carrier's road.[73]

69. **Merger of previous contracts.**—In an action against a railroad company for damages to cattle received during their carriage over its own and a connecting line, defendant introduced written contracts for the shipment of the cattle to a point on defendant's line, and which limited its liability to damage occurring on its own line. Plaintiff claimed that the cattle had been loaded under a verbal agreement for through carriage, and that he had been forced to execute the written contracts in order to get the cattle moved, and that, although the written contracts called for delivery at a point on defendant's line, the real contract was for through shipment. The only evidence as to the written contracts showed that they were executed by plaintiff's direction in order to secure free transportation for his helpers. Held that, in the absence of any evidence of fraud, compulsion, or want of time to read the written contracts, they must be taken as merging all previous understandings between the parties. San Antonio, etc., R. Co. *v.* Barnett, 66 S. W. 474, 27 Tex. Civ. App. 498.

70. **Parol evidence to explain ambiguity.**—Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

71. **Waiver and estoppel.**—Chicago, etc., R. Co. *v.* Carroll, 36 Tex. Civ. App. 359, 81 S. W. 1020.

72. **Plea or answer.**—Kessler *v.* First Nat. Bank, 21 Tex. Civ. App. 98, 51 S. W. 62; Texas, etc., R. Co. *v.* Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125.

"The language of the plea in International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, is not set out in full, and there seems not to have been any question made that it did sufficiently charge a partnership, so that upon this point it is not authority. It is to be noted that in that case there was no provision in the bill of lading limiting the liability of each carrier to its own line." The case is not in point or to any extent, controlling the decision of the present case. Texas, etc., R. Co. *v.* Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125. See Western Union Tel. Co. *v.* Lovely (Tex. Civ. App.), 52 S. W. 563.

73. **Denial of allegation on oath.**—Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

In the case of Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530, which is very similar to the present case, by the terms of the shipping contract the issuing carrier expressly limited its own liability to damages occurring on its own line, but there was no such express

§ 3750. Nonsuit.—In an action against a carrier for injuries to freight shipped, where the evidence showed that under the special contract of affreightment the liability of each of the connecting carriers was limited to loss occurring on its line of road, and also that the delay which caused the loss occurred before the shipment was turned over to the carrier sued, a nonsuit was properly granted.[74]

§ 3751. Presumption and Burden of Proof.—Limitation Not Presumed.—When, in an action against a common carrier, it appeared that goods had been delivered to an initial carrier, and by it delivered to the defendant carrier, to be transported to the point of destination, and that the goods were lost while in defendant's custody, and there was no proof as to the terms on which either carrier received them, in the absence of any proof to the contrary, the defendant carrier should be presumed to have received them for transportation to the owner under such obligations as to diligence, etc., as the law imposes on common carriers, who do not, by contract, limit their liability.[75]

Place of Loss.—In order to recover from a carrier who has by contract limited its liability for injury to goods to its own line, the shipper must show that damage took place before the goods left its hands.[76] Where property has been transported by successive carriers, under a through bill of lading, limiting each carrier liable to damages occurring on its own line, and is damaged, and the evidence fails to show on what line the damage occurred, it will be presumed that it was through the negligence of the terminal carrier.[77]

Proof of Partnership.—Where the receipt given by a carrier on accepting a shipment of cattle relieved it from liability for injuries on connecting lines, and, in an action by the shipper against it and the connecting carriers, the complaint alleged partnership and agency between the carriers, which allegation was denied by the initial carrier's plea, and not sustained by evidence, it was not jointly liable for the negligence of connecting carriers.[78]

Contract Executed by Authority of Defendant Carrier.—A carrier is liable for delay in the transportation of live stock on a connecting road without

limitation of liability as to the connecting carriers, as in the present case. There was a plea of partnership. Such contract was, however, held to be inconsistent with the holding that the contract was one made by a member of a partnership. If by the failure to deny the special plea under oath, its allegations are to be taken as true, together with every reasonable inference deducible therefrom, still the contract itself was introduced in evidence by appellee, and the terms thereof are inconsistent with a holding of partnership between the connecting lines. Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471; Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 13 S. W. 637; Texas, etc., R. Co. *v.* Gray, 45 Tex. Civ. App. 208, 99 S. W 1125.

74. **Nonsuit.**—Bell Bros. *v.* Western, etc., R. Co., 125 Ga. 510, 54 S. E. 532.

75. **Limitation not presumed.**—Southern Exp. Co. *v.* Urquhart, 52 Ga. 142.

76. **Place of loss.**—New York, etc., Steamship Co. *v.* Wright (Tex. Civ. App.), 26 S. W. 106.

77. Texas, etc., R. Co. *v.* Adams, 78 372, 14 S. W. 666, 22 Am. St. Rep. 56.

A car of goods was delivered in good condition to an initial carrier, no rain fell on the car while in its possession, and the car was delivered by it to the next succeeding carrier in good condition. The second carrier delivered the car to the third connecting carrier, and after the third carrier took possession no rain fell on the car, and, when opened by it to transfer the goods the sacks in which the goods were contained were wet and muddy. No damage was shown to have been done to the goods while on the third carrier's road, and they were turned over by it to the terminal line. Held, where the through bill of lading on which the goods were consigned provided that each company should be liable only for damages occurring on its line, the third connecting carrier was not liable for any damage resulting from the condition of the goods when they arrived at their destination. St. Louis, etc., R. Co. *v.* Cohen (Tex. Civ. App.), 55 S. W. 1123.

78. **Proof of partnership.**—Judgment, 74 S. W. 1118, reversed in International, etc., R. Co. *v.* Startz, 77 S. W. 1, 97 Tex. 167.

proof that it received part of the freight, when the contract of shipment is executed by its authority.[79]

§ 3752. Weight and Sufficiency.—See ante, "Presumption and Burden of Proof," § 3751.

§ 3753. Questions for Jury.—When a contract limiting a carrier's liability for freight to such damages as result from its negligence prior to delivery to a connecting carrier has been made, it is for the jury to determine from the evidence, under proper instructions from the court, whether or not the damage or injury complained of occurred while the freight was in its possession or upon its line of road.[80]

§ 3754. Instructions.—Where a railroad company's contract for the shipping of stock limited the liability of the carrier to its own line, an instruction should be given, in an action for injury to the stock, that defendant would not be liable for injuries resulting after the stock passed out of its possession,[81] and it is prejudicial error to give and refuse instructions whereby its liability is extended beyond its own line.[82] But an instruction, liable to mislead the jury into believing that the defendant carrier would not be liable for damages occasioned by its negligence where the injuries which occasioned the damages did not develop until they were delivered to a connecting carrier, should be refused.[83]

Evidence Showing Damage after Delivery to Succeeding Carrier.—Under a contract stipulating that after defendant's delivery of the goods to a connecting line it should not be liable for injuries, the evidence showing that a large part of the damages were sustained after such delivery, the court should have instructed that the defendant was not liable therefor.[84]

§ 3755. Damages.—Value at Destination an Element of Damage.—Although there may be a stipulation in the contract limiting the liability of the carrier to its own line of road, a contract of shipment made under such circumstances contemplates that the market value of the animals shipped at the place of final destination is considered by the parties and enters into the contract as one of its elements.[85]

79. **Contract executed by authority of defendant carrier.**—International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

80. **Questions for jury.**—Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

81. **Instructions.**—International, etc., R. Co. *v.* Young (Tex. Civ. App.), 72 S. W. 68; International, etc., R. Co. *v.* Earnest (Tex. Civ. App.), 77 S. W. 29.

82. Where cattle were carried by two lines, under a contract limiting the liability of each carrier to the damage done on its own line, it is prejudicial error, in an action against the initial carirer, to give and refuse instructions whereby its liability was extended beyond its line; there being evidence that after the cattle were delivered to the connecting line some delay occurred, which the shipper testified injured the cattle. St. Louis, etc., R. Co. *v.* Stokes, 99 S. W. 120, 44 Tex. Civ. App. 220.

83. In an action against an intial carrier for damages to cattle, where the negligence alleged was defendant's failure to properly bed the cars, a charge, on the issue raised by a plea of a contract limiting the carrier's liability to damages for loss occurring on its own line, that if all the damage did not result from defendant's negligence, and the jury were unable to determine what amount of the damage accrued while the cattle were in its hands, they should return a verdict for defendant, was properly refused, as it was liable to mislead the jury into believing that defendant would not be liable for damages occasioned by its negligence, where the injuries which occasioned the damage did not develop until the cattle were delivered to a connecting carrier. Texas Cent. R. Co. *v.* O'Loughlin, 84 S. W. 1104, 37 Tex. Civ. App. 640.

84. **Evidence showing damage after delivery to succeeding carrier.**—Gulf, etc., R. Co. *v.* Allcorn (Tex. Civ. App.), 23 S. W. 186.

85. **Value at destination an element of damage.**— Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 374; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

§§ 3756-3760. Limiting Liability to That of Forwarder or Warehouseman—§§ 3756-3757. Power to Limit and Validity—§ 3756. In General.—In many jurisdictions a common carrier may by special contract limit its liability to that of "forwarder"[86] but in others such carrier can not relieve itself from its liability, by inserting in its bill of lading a clause to the effect that it shall be held liable only as a forwarder.[87] This is the rule under the statutes of Texas.[88]

§ 3757. Carriers Which May Limit.—Transportation Company Not Owning Any Road.—A transportation company which does not own any railroad, and which undertakes to deliver goods at their final destination, can not relieve itself from liability for loss through negligence by a stipulation in the bill of lading that in case of loss the railroad shall be responsible in whose actual custody the goods are at the time of the loss, the railroad being merely its agent.[89]

Express Company.—The fact that the contract of any express company for transportation of goods styles it an express forwarder, and stipulates to forward the goods, without liability for loss or damage except as forwarder only, does not relieve it from liability as a common carrier for negligence,[90] and the negligence of the railroad company over whose road the package is carried is imputed to the express company. But it was held in an early New York case that expressmen who forward goods from place to place for hire, in conveyances owned by others, are not liable as common carriers, but as bailees for hire to forward goods by the ordinary modes of conveyances, and have a legal right to define the extent of their liability.[91]

§ 3758. What Constitutes an Agreement "to Forward."—Forwarding merchants usually combine in their business the double character of warehousemen and agents for a compensation to ship and forward goods to their destination. When these businesses are thus combined it becomes a question, often a difficult one, to determine in which capacity the person held goods at the time of the injury or loss.[92] When a forwarding merchant is both a carrier and a warehouseman, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to orders of the owners, or if they are deposited for the purposes of being carried further, the liability of the party having them in charge is that of a carrier.[93] But when the goods are deposited in the warehouse subject to the further order of the owner, the case is otherwise.[94] Where a forwarding merchant has held himself out as a carrier,

86. Power to limit and validity.—*Kansas.*—Kallman *v.* United States Exp. Co., 3 Kan. 205.

New Hampshire.—Merrill *v.* American Exp. Co., 62 N. H. 514.

87. Blaikston *v.* Davies, Turner & Co., 42 Pa. Co. Ct. 390.

88. Under Texas statute.—Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

89. Transportation company not owning any road.—Merchants' Despatch Transp. Co. *v.* Bloch, 86 Tenn. (2 Pickle) 392, 6 S. W 881, 6 Am. St. Rep. 847.

90. Express company.—Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

A stipulation in the contract of an express company for carriage of a package that the negligence of the railroad company over whose road the package shall be carried shall not be imputed to the express company is in violation of public policy. Southern Exp. Co. *v.* Marks, etc., Co., 40 So. 65, 87 Miss. 656, 112 Am. St. Rep. 466.

91. Hersfield *v.* Adams (N. Y.), 19 Barb. 577.

92. What constitutes an agreement to "forward."—Stannard *v.* Prince, 64 N. Y. 300.

93. Ladue *v.* Griffin, 25 N. Y. 364, 82 Am. Dec. 360; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

94. Ladue *v.* Griffin, 25 N. Y. 364, 82 Am. Dec. 360.

Plaintiffs, forwarding merchants at T., were employed by the defendant to ship certain marble to him at P. The marble was shipped on a canal boat, which was delayed at A. One of the plaintiffs went to A., where he learned that the only towboat company it was practicable to employ to tow the boat down the river had declined to take it unless the captain would pay the towing charges in advance and would also pay an existing bill. The captain had gone home to pro-

or where the facts disclose that he assumed the carriage of the property himself, he is liable as a carrier.[95]

Agreement "to Forward" to Designated Destination.—An agreement by a carrier to "forward" goods to a designated place for an agreed freight is not a contract for forwarding, but for carrying, and the carrier is liable as a common carrier, and not as a forwarder, for the loss of the goods after delivery to it.[96] The word "forward" is not used in its technical meaning[97] but where goods are consigned to an agent of a railroad to be forwarded, the company is liable only as a bailee.[98]

§ 3759. Nature and Extent of Liability as Forwarder.—For the loss of goods in transit, the liability of common carriers, and forwarders, independent of any express stipulation in the contract, is different; one is an insurer, the other is not.[99] Forwarders are not insurers, but are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees;[1] in other words, they are liable as bailees for negligence.

cure the money. Plaintiffs thereupon advanced the money, and the boat was put into a tow, but, by the negligence or unskillfulness of the employees of the tow company, was injured and sunk. In an action to recover for advances and charges, the loss was set up as a counterclaim. Held, that by the transactions of the plaintiffs at A. they did not assume the carriage of the property, but had acted simply as forwarders, and not as carriers, and were therefore not liable for the loss. Stannard *v.* Prince, 64 N. Y. 300.

95. Stannard *v.* Prince, 64 N. Y. 300; Teall *v.* Sears (N. Y.), 9 Barb. 317.

A warehouseman at Buffalo was also a carrier on the Erie canal, and used to receive freight from the west and forward it to the east by the first boat going, whether his own or that of other carriers. He received goods shipped from Detroit, addressed to his care at Buffalo, and marked, "To go from Buffalo to East Albany, at 30 cents per 100 lbs." The presumption from these facts alone was held to be that the goods came to his possession as a carrier, and, having been burned without his fault while in his warehouse awaiting transportation, he was liable for their value. Ladue *v.* Griffin, 25 N. Y. 364, 82 Am. Dec. 360.

96. Agreement "to forward" to designated destination.—Krender *v.* Woolcott (N. Y.), 1 Hilt. 223.

97. Technical meaning.—A., being at once warehouseman, forwarder, and carrier, made a parol contract to carry all B.'s goods to New York, and a good deal had already been sent from time to time when some delivered by B. at A.'s warehouse were there accidentally burned. A receipt given for the goods burned stated that they were "to be forwarded." Held, that the technical meaning of the writing was changed by the previous parol agreement, and that A. was liable as a common carrier. Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

98. Where machinery was consigned to the agent of a railroad, to be forwarded to the plaintiff over such road, and it was negligently detained for a time, the railroad was not liable as a common carrier for this neglect, but only as bailee. Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277.

Where several pieces of machinery were shipped to the defendant's agent to be forwarded to plaintiff, and they were described in the bill of lading as "three pipes in one bundle, and two single pipes," and they were delivered by the ship's agent to the defendant's agent, who had a copy of the bill, and by some means the direction on one of the single pipes became illegible, and it was not forwarded, it was held that these facts were sufficient to subject the defendant for negligence as a bailee. Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277.

99. Nature and extent of liability as forwarder.—Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

1. Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Kallman *v.* United States Exp. Co., 3 Kan. 205.

Common carriers, whose liability is limited by special contract "as forwarders only," are simply depositories of goods arrived at their destination and awaiting delivery to the consignee, and are liable only for gross negligence. Merrill *v.* American Exp. Co., 62 N. H. 514.

Mistake as to consignee.—Where a consignee delivered goods to a forwarding merchant, marked "J. F., Galena," the goods being, in fact, intended for J. Frysinger, at Galena, and the forwarding merchant erroneously entered the goods on his bill of lading, "J. Flanagan, Galena, Ill.," in consequence of which they were seized and sold by the sheriff as the property of J. Flanagan, it was held that the forwarding merchant was liable to the real owner of the goods. Forsythe *v.* Walker, 9 Pa. 148.

Negligence of Steamboat Owned and Controlled by Other Carriers, but Generally Used by Initial Carrier.—If a common carrier, who undertakes to transport goods, "and deliver to address," inserts a clause in the receipt for the freight, signed by it alone, and given to the person intrusting it with goods, stating that the carrier is "not to be responsible except as forwarder," such clause does not exempt the carrier from liability for loss of the goods occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than such carrier, but ordinarily used by him in his business of carrier, as a conveyance; the managers and employees of the steamboat being, in law, for the purpose of the transportation of such goods, the managers and employees of the carrier.[2]

"Perils of Navigation and Transportation" Excepted.—The language in a contract for transportation, "Only perils of navigation and transportation excepted," does not exempt an express company, which styles itself a forwarder, but is a common carrier, from liability for perils such as could be foreseen or avoided in the exercise of care and prudence by those intrusted by the company with the carriage of the Articles forwarded.[3]

Loss by Fire—Refusal of Consignee to Accept.—Where a carrier by stipulation limited his liability to that of forwarder only, and was not to be liable for loss by fire or negligence of any connecting carrier, it was not liable for loss by fire while the goods were in a warehouse of a connecting carrier because of the consignee's refusal to accept them, and this though the goods were marked "C. O. D."[4]

Notice to Consignee in Case of Inability to Forward.—Where a connecting carrier permitted flour to remain in its warehouse for 49 days before forwarding the same because of a shortage of cars, without notifying the shipper, knowing that the detention would be unusual, thereby preventing the shipper from protecting itself by insurance, and the flour was totally or partially destroyed by the burning of the warehouse, the carrier was chargeable with such negligence as made it responsible for the loss of the flour, notwithstanding a provision in the bill of lading that no carrier should be liable for the loss of the goods or damage thereto by fire.[5]

Effect of Limitation as to Amount.—Limitation of Liability.—A stipulation limiting the liability of a mere forwarder to a stated sum for the loss of goods is not a stipulation exempting such forwarder from loss due to his own negligence.[6]

§ 3760. Termination of Liability.—Delivery to Succeeding Carrier.—See ante, "Delivery to Succeeding Carriers," § 3740.

Necessity for Notice to Consignee of Arrival of Goods.—A contract stipulating that the carrier shall not be liable for loss after the goods are ready for delivery to the consignee, and that goods not removed by the consignee within 24 hours after arrival may be kept by the carrier at the risk of the consignee, etc., does not terminate the liability as carrier, on the carrier checking up the car containing the goods, and making up a record thereof within a few minutes after the arrival of the car, thereby making the goods ready for delivery to the consignee; but until notice is given to the consignee, or until a reasonable time has elapsed,

2. **Negligence of steamboat owned and controlled by other carriers, but generally used by initial carrier.**—Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

3. **Perils of navigation and transportation" excepted.**—Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

4. **Loss by fire—Refusal of consignee to accept.**—Gibson *v.* American Merchants' Union Exp. Co. (N. Y.), 1 Hun 387, 3 Thomp. & C. 501.

5. **Notice to consignee in case of inability to forward.**—Erie R. Co. *v.* Star, etc., Mill. Co., 162 Fed. 879, 89 C. C. A. 569.

6. **Effect of limitation as to amount—Limitation of liability.**—Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

within which he may receive the goods, the liability continues.[7]

§ 3761. Goods Carried at Owner's Risk.—Application to Part of Route as to Which Carrier Forwarder.—A limitation of a carrier's common-law liability applies only to that portion of the route on which it acts as carrier and not to that with reference to which it is a forwarder.[8]

§ 3762. Exemption from Loss by Delay.—Exemption from Delay of Connecting Line in Receiving Property.—Where a connecting carrier, after being notified by the initial carrier that the property to be transported had arrived, failed to send an engine to move the cars, there was nothing to show that the negligence of the initial carrier in failing to give notice in advance that the train was late caused the delay in moving the property, the initial carrier could not be held liable for injury to the property resulting from such delay, it being expressly provided by the contract that the initial carrier should not be liable for injuries caused by the delay of the connecting line in receiving the property after notice.[9]

Exemption from Delay on Connecting Lines.—Where an initial carrier agreed to carry goods to point beyond its own lines, and the contract provided that the carrier should not be liable for delays occurring on connecting lines, it was not exempt from damages for delays on connecting lines resulting from their negligence.[10]

Shipment Misdirected by Shipper.—Where by mistake of the shipper a consignment of goods is misdirected and damaged by delay in delivery, the initial carrier is not liable therefor, where the owner released the carrier from liability for delay, unless negligence is shown on part of the connecting carrier.[11]

§ 3763. Exemption from Liability for Insufficient or Defective Car.—A bill of lading exempting a connecting carrier from liability for damage to horses arising from the insufficiency or defective condition of the body of the car in which they were received or from injuries from suffocation, does not relieve the carrier from liability for failure to inspect and ventilate the car by removing slats therefrom.[12]

7. **Necessity for notice to consignee of arrival of goods.**—Podrat *v.* Narragansett Pier R. Co., 32 R. I. 255, 78 Atl. 1041.

8. **Application to part of route as to which carrier forwarder.**—The Pennsylvania Railroad Company gave a receipt for oil to be delivered "at the company's freight station, Philadelphia." Annexed to the receipt was, "Rate to Red Hook, 65 cents," etc. "This oil is carried only on open cars, and entirely at the owner's risk from fire and leakage while in possession of the railroad company or carriers, while standing or in transit." The freight was paid to Red Hook. Held, that the limitations as to liability applied only to that portion of the route on which reference to which they were forwarders. Camden, etc., R. Co. *v.* Forsyth Bros. & Co., 61 Pa. 81.

9. **Exemption from delay of connecting line in receiving property.**—Louisville, etc., R. Co. *v.* Bourne, 15 Ky. L. Rep. 445.

10. **Exemption from delay on connecting lines.**—Jennings *v.* Grand Trunk R. Co., 5 N. Y. S. 140, 23 N. Y. St. Rep. 15, 52 Hun 227.

Defendant gave a bill of lading for two car loads of goods "to the order of C., Detroit, Mich. Notify H. & Co.," which bill contained a provision that defendant should not be liable for delay after delivery to a connecting carrier. Defendant delivered the cars to another carrier, who separated and sent them to their destination over different lines, whereby one car was delayed for a month. Held, that the initial carrier was not liable for the delay. Hope *v.* Delaware, etc., Canal Co., 69 N. W. 487, 111 Mich. 209.

11. **Shipment misdirected by carrier.**—Goods were shipped under a reduced rate in consideration of the owners releasing the company from liability for delay or loss, but by mistake of the shipper were marked "Eckley," instead of "Ackley." The first carrier delivered the goods to a connecting carrier, but, there being no such station as Eckley on its line, it held the goods, telegraphed for shipping orders, and, pending a reply, the goods were destroyed by fire. Held that, since the evidence did not show negligence on the part of the connecting carrier, the first carrier was not liable for the loss. Erie R. Co. *v.* Wilcox, 84 Ill. 239, 25 Am. Rep. 451.

12. **Exemption from liability for insufficient or defective cars.**—Kime *v.* Southern R. Co., 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617.

§ 3764. Stipulation against Loss by Suffocation.—See ante, "Exemption from Liability for Insufficient or Defective Car," § 3763.

§ 3765. Limiting Amount of Liability.—See ante, "Limitation of Amount of Liability," §§ 1328-1383; post, "Instances of Particular Limitations," § 3783.

§ 3766. Condition as to Filing Claims or Giving Notice of Loss.—See ante, "Requirement of Notice of Loss and Presentation of Claim," §§ 1384-1470; post, "Instances of Particular Limitations," § 3783.

§ 3767. Conditions as to Time of Bringing Suit.—See ante, "Stipulations Limiting Time within Which Suit Must Be Brought," §§ 1451-1466.

§§ 3768-3777. Carriers of Passengers—§§ 3768-3770. Power to Limit—§ 3768. In General.—A railway company may by the express terms of the contract limit its liability for carrying passengers over connecting lines. In such case it may limit its liability to negligence on its own line, the contract for the transportation of the passengers over the connecting line being by the first carrier only as the agent of the corporation operating the connecting line.[13] In principle, there is no difference between the liability of a receiving carrier under a contract to transport goods over connecting lines and a similar contract to transport passengers.[14]

§ 3769. Lines under One Management.—Where two railroad companies enter into an arrangement by which practically a continuous system is formed under one management, and one of them sells a ticket under a condition limiting its liability to its own line, it is nevertheless responsible for the safe carriage of passengers over the other line, and such condition must be limited in its operation to such other lines as have their own separate and independent management.[15] The initial company must have such control over or controlling interest in the connecting company as to vest it with power to secure transportation over the connecting line, and to make it its duty to see that such transportation is effectuated.[16] The fact that the passage money is divided equally between the two carriers does not constitute such control.[17]

13. *Georgia.*—Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952.

Pennsylvania.—Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. 208, 84 Am. Dec. 490.

Texas.—Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777; St. Louis, etc., R. Co. *v.* Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741, affirmed in 93 Tex. 738, no op.; Davis *v.* Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844, affirmed in 94 Tex. 690, no op.; Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

14. Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777.

15. Lines under one management.—Howard *v.* Chesapeake, etc., R. Co., 11 App. D. C. 300.

Where different railways forming a continuous line run cars, sell tickets and check baggage over the entire line, an action for loss or injury to baggage lies against either company, regardless of a stipulation limiting liability to own line. M. P. R. Co. *v.* Ryan, 2 Texas App. Civ. Cas., § 430.

16. Kirk *v.* Kimball Co., 152 Cal. 180, 92 Pac. 84.

17. Freedom from liability of C., the initial carrier, for noncarriage by Y., the connecting carrier, the ticket sold by C., on behalf of itself and Y., consisting of two coupons, and providing that the passage from F. to M. shall be over the line of C., and that from M. to D. over the line of Y., and that in selling tickets or coupons over other lines this company acts as agent, and shall not be responsible beyond its line, is not affected by testimony that the contract between the carriers was modified by parol, whereby the two carriers became "jointly" interested in the transportation, witness, testimony as a whole showing that by "jointly" he meant "equally," and that there was no other change in their contract other than that it was agreed each should receive 50 per cent. of the freight and passage money, whereas it had before been agreed C. should receive 45 per cent. thereof, and T. the rest. Kirk *v.* Kimball Co., 152 Cal. 180, 92 Pac. 84.

§ 3770. Ticket Agent Acting as Agent for Connecting Carrier.—Where the contract sued on limited a connecting railroad's liability to injuries resulting on its own line, it was not liable for injuries to baggage caused by other carriers, although the agent of the initial carrier, who made the contract with the passenger, may have also been the agent of such connecting road.[18]

§ 3771. Mode, Form and Requisites.—Stipulation in Through Ticket.—A railroad company which sells and issues tickets to passengers over its own lines of road of other companies (known as through tickets), is liable for the sure and safe transportation of such passengers to the point of destination, notwithstanding there may be indorsed or pointed on the tickets so sold and issued a notice that the company issuing and selling such tickets shall not be liable, except as to its own lines of roads.[19]

Stipulation in Coupon Ticket.—A railway company which sells a limited coupon ticket or an excursion ticket to be used within a certain time, although it must see that the time agreed upon is reasonable, from the standpoint of the then-existing circumstances and conditions, and that the passenger, by the exercise of reasonable diligence, may complete his journey within the time agreed upon, may limit its liability to its own line by the terms of the ticket.[20]

Conditions in Mileage Tickets.—Plaintiff, buying a 1000-mile ticket, was bound by express condition on the ticket that the seller assumes no responsibility beyond its own lines.[21]

Contract for Live Stock Shipment as Including Drover's Pass.—Where a railroad company makes a contract to transport live stock over its own and a connecting line, by the terms of which its liability for damage to the stock is limited to its own line, and at the same time, as incident to such contract, issues to the shipper a drover's pass to and from the point of destination of such stock, the liability of the contracting company for a wrongful ejection of the shipper is not limited to its own line, in the absence of an express limitation to that effect.[22]

§§ 3772-3775. Operation and Effect—§ 3772. In General.—Baggage.—Where the initial carrier limits its liability for injury to the passenger or his baggage or for the loss thereof to its own line, the passenger must look to the connecting line to recover for injuries or losses occurring on such connecting line.[23] A railroad company which sells a coupon ticket over its own and connecting lines, containing the condition, referred to in each coupon, that the company, in issuing the ticket, acted for itself over its own line, and as agent of the connecting lines, but assumed no responsibility beyond its own line, and would not permit stop-over privileges, is not liable for injuries received by the holder while riding on the connecting line.[24]

§§ 3773-3774. Injuries Covered—§ 3773. Injuries to Persons.—Ticket Limited as to Time.—Where a ticket limited as to time shows a joint undertaking between several lines to transport passenger to a certain point, the carrier refusing to take the ticket after expiration of the stated time is liable in damages, where the delay was caused by one carrier party to agreement.[25]

18. **Ticket agent acting as agent for connecting carriers.**—Askew *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 73 S. W. 846.

19. **Stipulation in through ticket.**—Central R. Co. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582.

20. **Stipulation in coupon ticket.**—Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

21. **Conditions in mileage tickets.**—Spiess *v.* Erie R. Co., 71 N. J. L. 90, 58 Atl. 116.

22. **Contract for live stock shipment as including drover's pass.**—Gulf, etc., R. Co. *v.* Cole, 8 Tex. Civ. App. 635, 28 S. W. 391, distinguishing Gulf, etc., R. Co. *v.* Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

23. **Baggage.**—Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952.

24. Kerrigan *v.* Southern Pac. R. Co., 81 Cal. 248, 22 Pac. 677.

25. **Ticket limited as to time.**—Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

Where a railroad company sells plaintiff a first-class railroad ticket over its own and other lines, containing a provision that in selling the ticket the company acted only as agent, and was not responsible, beyond its own lines, plaintiff can not recover against such company for being ejected from a train [26] or being ejected from the first-class car[27] on a road other than its own.

No Change of Cars—Failure to Use Heating Appliances.—Where a carrier advertised to run an excursion without change of cars from a point on its own line over the lines of connecting carriers to a certain destination, and the transportation contract provided that the initial carrier acted only as agent for the connecting carriers, and was not responsible beyond its own line, if such initial carrier provided a car intended to be transported through to the destination, which was properly equipped with heating appliances, such initial carrier was not liable for the negligence of connecting carriers in failing to use the highest degree of care to properly use such appliances in order to preserve the comfort of the passengers while passing over such connecting lines.[28]

Delay Occasioning Expiration of Limited Coupon Ticket.—Where a coupon ticket, issued by a certain carrier for limited passage over its own and other lines, expressly provides that the issuing carrier acts only as agent of the others, and is not to be responsible beyond its own line, each coupon becomes the separate contract of the company for which it is issued, and a purchaser who misses his connection through fault of one of the carriers, and does not present himself for transportation to the succeeding carrier until after the time limited, is not entitled to transportation by that carrier, but can only claim against the carrier occasioning the delay.[29]

§ 3774. Injuries to Baggage.—A connecting railroad is not liable for injuries to baggage caused by other carriers, where the contract sued on limited its liability to injuries on its own line.[30]

§ 3775. Termination of Liability.—Where a railway company sells to a passenger a through ticket over its own and connecting lines, stipulating that it acts only as agent for the other lines, its contract of carriage is complete when it has safely transported the passenger and delivered him at its depot at the point of connection with the next line, and it can not, after a reasonable time has been allowed the passenger for departing from the depot, be held liable on its contract of carriage for any act occurring thereafter.[31]

Initial Carrier Operating Part of Connecting Line.—A railroad company which sold a ticket for itself and as agent of a connecting line, limiting its liabil-

26. International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845, following Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777; Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

27. Ejection from first class car.—Where defendant sells plaintiff a first-class railroad ticket over its own and other lines, containing a provision that in selling the ticket defendant acted only as agent, and was not responsible, beyond its own lines, plaintiff can not recover against defendant for being ejected from a first-class car, and being compelled to travel in a smoking car, on one of the other lines. Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777.

28. No change of cars—Failure to use heating appliances.—Missouri, etc., R. Co. *v.* Harrison, 80 S. W. 1139, 97 Tex. 611, reversing judgment 77 S. W. 1036; Missouri, etc., R. Co. *v.* Foster, 80 S. W. 1197, 97 Tex. 618, reversing judgment 78 S. W. 1134.

29. Delay occasioning expiration of limited coupon ticket.—Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471. See Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501, affirmed in 93 Tex. 662, no op.; Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

30. Injury to baggage.—Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. 208, 84 Am. Dec. 490; Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862; Askew *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 73 S. W. 846.

31. Termination of liability.—Davis *v.* Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844, affirmed in 94 Tex. 690, no op.

ity for any injury to a passenger to its own line, is responsible to a passenger for an injury caused by negligence on a track of a connecting line, over which it was accustomed to run its cars for a short distance before turning them over to the connecting line.[32]

§ 3776. Modification or Rescission.—Charging for Excess of Baggage.—When a passenger buys a ticket from a carrier to a point beyond its line, which limits the carrier's liability to its own line, and the passenger procures her baggage to be checked, and pays for the excessive weight the carrier is not liable for property stolen from the baggage before reaching its destination, but while on a connecting line. All tickets for baggage on railroads are bought with the knowledge that, the railroad company has the right to be paid for extra weight of baggage and a demand for and the receipt of pay for extra baggage is neither a violation, change, nor substitute for the original contract made in the purchase of the ticket.[33]

Modification of Contract between Carriers.—See ante, "Lines under One Management," § 3769.

§ 3777. Enforcement.—Instructions.—In an action to recover for discomfort, fright and exposure, where a passenger on a through ticket after arrival at defendant's depot, where he was informed he would have to wait until morning for a train of the connecting carrier, was several hours thereafter placed on one of defendant's trains by defendant's depot master, it was proper to apply the rule of ordinary care to the act of defendant's depot master, since the relation of carrier and passenger had ceased at the time of such act.[34] An instruction that the contract of carriage by defendant was complete when it had safely transported plaintiff to its depot, and it could not be held liable on its contract of carriage for any act occurring thereafter, was proper, since, after a reasonable time for departure from the depot, the relation of carrier and passenger had ceased.[35] And it was not error to refuse an instruction that defendant was bound to exercise towards plaintiff the duty of a carrier to a passenger from the time they boarded its train until it had delivered them to its connecting line, and so long as its servants and employees exercised control of them, since he had been delivered to the connecting carrier before the act complaind of occurred, and defendant's servants, as such, had no care or control over them, the requested charge was not applicable to the facts.[36]

§§ 3778-3786. Right of Subsequent Carrier to Benefit of Limitations by First Carrier—§§ 3778-3785. Contract for Through Shipment —§ 3778. General Rule.—The general rule is that a carrier, over whose road the freight has to be carried in order to reach the point of destination, is entitled to the benefits of a contract, stipulating for immunity from liability in general terms, entered into by the carrier receiving the freight for through transportation over connecting lines to a point beyond its own terminus, or when, by the contract, the compensation for the entire distance is fixed by authority of the carriers over whose roads the freight has to be transported, and the contract has respect to and provides for such other carriers. This is the rule although such contract is silent on the subject of the connecting carrier's liability, or does not expressly deprive it of the advantage of conditions limiting the initial carrier's liability. This doctrine prevails in the United States courts[37] and in the courts

32. **Initial carrier operating part of connecting line.**—Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

33. **Charging for excess of baggage.**—Gulf, etc., R. Co. *v.* Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

34. **Instructions.**—Davis *v.* Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844.

35. Davis *v.* Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844.

36. Davis *v.* Houston, etc., R. Co., 59 S. W. 844, 25 Tex. Civ. App. 8.

37. **General rule.**—Deming *v.* Norfolk, etc., R. Co., 21 Fed. 25, 16 Am. & Eng. R. Cas. 232; Evansville, etc., R. Co. *v.* Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724; Fairbanks & Co. *v.* Cincinnati, etc., R. Co., 66 Fed. 471; Woodward *v.* Illinois Cent. R. Co., 1 Biss. 447, Fed. Cas. No. 18,007.

of Alabama,[38] Arkansas,[39] Georgia,[40] Kansas,[41] Indiana, Missouri,[42] New York,[43] Pennsylvania,[44] South Carolina,[45] Tennessee,[46] Texas,[47] and other states. But in Iowa,[48] Michigan,[49] and Wisconsin,[50] it is held that where the

38. Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

39. St. Louis, etc., R. Co. *v.* Lesser, 46 Ark. 236; St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104; Taylor & Co. *v.* Little Rock, etc., R. Co., 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

A railroad company which takes freight from another company for transportation over its line, under an agreement between the latter road and the consignor, is liable to the consignor for failure to perform the contract so far as its line is concerned, and is entitled to the benefit of any limitation of liability contained therein. St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635.

40. Susong *v.* Florida, etc., R. Co., 115 Ga. 361, 41 S. E. 566; Central R. Co. *v.* Bryant, 73 Ga. 722; Southern Exp. Co. *v.* Palmer, 48 Ga. 85; Western, etc., R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

41. Kiff *v.* Atchison, etc., R. Co., 32 Kan. 263, 4 Pac. 401, 18 Am. & Eng. R. Cas. 618.

42. A connecting carrier may avail itself of a limited liability contract entered into by the initial carrier. Adams Exp. Co. *v.* Byers, 177 Ind. 33, 95 N. E. 513; Halliday *v.* St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433.

A connecting carrier, receiving property for transportation from the first carrier, the original contract contemplating such employment, is entitled to all limitations in the original contract. Halliday *v.* St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433.

43. Maghee *v.* Camden, etc., Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Manhattan Oil Co. *v.* Camden, etc., Transp. Co., 54 N. Y. 197; Ricketts *v.* Baltimore, etc., R. Co., 61 Barb. 18, 4 Lans. 446; Robinson *v.* New York, etc., Co., 75 App. Div. 431, 78 N. Y. S. 359; Schiff *v.* New York, etc., R. Co., 52 How. Prac. 91; White *v.* Weir, 33 App. Div. 145, 53 N. Y. S. 465; Whitworth *v.* Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; Manhattan Oil Co. *v.* Camden, etc., Transp. Co., 52 Barb. 72, 5 Abb. Prac., N. S., 289; Lamb *v.* Camden, etc., Transp. Co., 2 Daly 454; S. C., 46 N. Y. 271, 7 Am. Rep. 327.

44. Fairchild *v.* Philadelphia, etc., R. Co., 148 Pa. 527, 24 Atl. 79.

45. Levy *v.* Southern Exp. Co., 4 S. C. 234; Harby *v.* Southern R. Co., 75 S. C. 321, 55 S. E. 760.

46. Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

Where a contract of shipment is for through transportation over a designated route, and beyond the lines of the initial carrier, each of the companies on that route accepting the freight under the contract becomes subject to the initial carrier's liabilities, and entitled to its legal exemptions under the contract. Bird *v.* Railroads, 42 S. W. 451, 99 Tenn. (15 Pickle) 719, 63 Am. St. Rep. 856.

47. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; International, etc., R. Co. *v.* Mahula, 1 Tex. Civ. App. 182, 20 S. W. 1002, citing McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

A connecting carrier receiving a shipment is entitled to the benefits of the original contract, if its terms can be given legal effect. International, etc., R. Co. *v.* Vandeventer, 107 S. W. 560, 48 Tex. Civ. App. 366.

48. Bancroft & Co. *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

A carrier, receiving goods from a connecting line, is not entitled to any limitation upon its common-law liability contained in the contract between the shipper and the line from which the goods are received, entered into for the sole protection of the latter line. Bancroft & Co. *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

Goods marked to indicate that they were to be carried by the H. Co. to New York, thence by the M. Co. to Chicago, and there delivered to the C. Co. to be carried to San Francisco, were delivered to the H. Co. at Springfield, Mass., the H. Co. stipulating not to be liable beyond its own line, nor for injury from accidents, or "frost, heat, or the elements." The M. Co. carried the goods from New York to Chicago, but, instead of delivering them to the C. Co., placed them in a warehouse, and they were burned in the great fire of 1871. Held, in an action by the consignee against the M. Co., that the M. Co. was bound to deliver the goods to the C. Co., and was not relieved from liability by storing them. Bancroft & Co. *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

49. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

A second carrier is not exempted from

50. Limiting value of express package. —Martin *v.* American Exp. Co., 19 Wis. 336.

contract limits the liability of the initial carrier, but is silent on the subject of the liability of any connecting carrier, no connecting carrier is entitled to the benefit of the restrictive clause of such contract.

§ 3779. What Law Governs.—The company on whose road the loss occurred, when sued for damages, must allege and prove, in order to get the benefit of an exemption from liability in the bill of lading given by a different company and in a different state, that the exemption is allowed by the law of the state where the goods were shipped.[51]

§ 3780. Contract on Behalf of Connecting Line.—Specific exemptions in a contract for carriage enures to the benefit of connecting lines when the initial carrier, while limiting its liability to its own road, contracts also for its "connecting lines," and it is declared that the exemptions shall inure to the benefit of the connecting lines, "unless they shall otherwise stipulate on receiving the goods."[52] If a connecting railroad company, is designated as such in the initial carrier's bill of lading, or if the bill provides that all stipulations shall inure to the benefit of all the carriers, then, having accepted the goods thereunder, without any separate agreement, it becomes virtually a party to the contract, bound by the undertaking therein, and benefited by the limitations.[53] A bill of lading may provide that its stipulations shall extend to and inure to the benefit of each and every company or person to whom the carrier issuing it may intrust or deliver the property, in which case its terms will define and limit the liability of every succeeding carrier.[54]

§ 3781. Invalidity of Condition Apparent on Its Face.—Where a bill of lading shows upon its face the invalidity of clauses purporting to limit the carrier's liability, a connecting carrier can claim no more under it than the carrier who issued it.[55]

§ 3782. What Constitutes a Through Contract, Form and Requisites. —Contract Must Make Intermediate or Terminal Carrier Agent of Initial Carrier.—To entitle a connecting carrier to the benefit of a special contract between the shipper and the receiving carrier limiting liability in case of loss, it must appear that the contract was such as to bind the receiving carrier for full performance, so as to make the connecting carrier its agent, unless the reduced

liability to a shipper for damages to goods in transit by the fact that the first carrier had an agreement with the shipper by which it was exempted from such loss, in the absence of authority in the first carrier to make such agreement. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Bill of lading issued at Cincinnati conditioned to deliver at "Toledo for Detroit."—Where a bill of lading was issued at Cincinnati conditioned to deliver certain goods "at Toledo for Detroit," the contract was to carry to Toledo and forward from there to Detroit, and when the defendant railroad company received the goods at Toledo they received them, in the absence of any clause limiting the liabilities beyond that point, under its common-law liability, irrespective of the terms of the bills of lading applicable during the transit from the initial point to Toledo, except that it would not be authorized to collect of plaintiffs any larger freights than the sum specified. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Loss by frost, heat or elements.—Goods were shipped under a bill of lading providing that the first carrier should not be liable for injury or loss occasioned by "frost, heat, or the elements," but after delivery to a connecting carrier the goods were frozen. Held, that the contract with the first carrier was not available as a defense in an action against the second carrier to recover for the loss. Burroughs *v.* Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875.

51. Laws governing—Burden of proof of legality.—International, etc., R. Co. *v.* Moody, 71 Tex. 614, 9 S. W. 465.

52. Contract on behalf of connecting line.—Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

53. Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

54. Lawrence on Con. Cars., § 243; Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

55. Invalidity of condition apparent on its face.—St. Louis, etc., R. Co. *v.* Spann, 57 Ark. 127, 20 S. W. 914.

rate forming the consideration of the special contract was not confined to the line of the receiving carrier, but extended and applied to the connecting line also.[56]

Bill of Lading Regulating Entire Transportation.—Where a bill of lading by its terms regulates the entire transportation, and is not limited to the first carrier, the succeeding and last carrier is entitled to the benefit of its terms limiting liability.[57]

Connecting Carrier Not Specially Named or Designated.—The limitation of the liability of the carrier for the loss of or injury to freight shipped under a through bill enures to the benefit of a connecting line, even though the connecting line is not mentioned in the bill,[58] particularly where the contract stipulates that no carrier shall be liable for damage not due to its own negligence.[59] But where a railway company, having printed blanks for receipts for transporting goods over its road, and by other companies, to one place, received goods to be carried to a different place, and at its terminus to be delivered to a different company, receipted for the goods, and, without erasing the names of the other companies, used words of exemption from liability, they being, "between the shipper and the above-named companies," the company receiving the goods from the railway company, not being one of "the above-named companies," could not take the benefit of the exemptions in the receipt given.[60]

Steamboat Bill of Lading Signed by Agents of Connecting Railroads.—A steamboat bill of lading for the shipment of goods to be delivered to a connecting railroad, specifying the rate of freight through to destination, and signed by the agents of the connecting railroad company, is a contract for through shipment; and the railroad company is entitled to the benefit of the exemptions or limitations of liability for loss or damage to the freight contained in the bill of lading.[61]

Express Receipt.—A bill of lading given by an express company, upon receipt of goods addressed to a consignee in another city, and containing the company's agreement to forward them to its agency most convenient to the destination, and there deliver them to other parties to complete the transportation, payment for the entire transportation to be collected from the consignee upon final delivery, is a through contract, and the final carrier is entitled to an exemption given by the bill of lading from liability for damages.[62]

Naming Destination of Shipment.—The fact that a contract for transportation of freight to be delivered to a subsequent carrier names the ultimate

56. **Contract must make intermediate or terminal carrier agent of initial carrier.**—Central R., etc., Co. *v.* Bridger, 94 Ga. 471, 20 S. E. 349.

57. **Bill of lading regulating entire transportation.**—Garvan *v.* New York, etc., R. Co., 210 Mass. 275, 96 N. E. 717.

58. **Connecting carrier not specially named or designated.**—Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81.

59. Where a shipping receipt, entered into in consideration of a reduced rate of shipment, stipulates that no carrier shall be liable for damage by water not due to its own negligence or that of its servants, a connecting carrier, though not especially named in the receipt, is entitled to the benefit of such provision. Mears *v.* New York, etc., R. Co., 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192.

W. shipped cotton at Memphis for Liverpool under through contracts with certain dispatch companies to carry to Jersey City and with certain steamboat companies. Under the bills of lading, the companies "and their connections" were not to be liable for loss or damage by fire to the cotton while in transit or deposit, or places of transshipment, or at depots or landings at points of delivery. Held, that the E. Ry. Co., which was not a member of the dispatch companies, and in whose freight house at Jersey City part of the cotton was, without any negligence on its part, destroyed by fire, was entitled to the benefit of said restrictive clauses. Whitworth *v.* Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349, affirming 45 N. Y. Super. Ct. 602.

60. **Contract between shipper "above named (railroad) companies" as excluding unnamed company.**—Merchants' Despatch Transp. Co. *v.* Bolles, 80 Ill. 473.

61. **Steamboat bill of lading signed by agents of connecting railroad.**—Woodward *v.* Illinois Cent. R. Co., 1 Biss. 417, Fed. Cas. No. 18,007.

62. **Express receipt.**—White *v.* Weir, 53 N. Y. S. 465, 33 App. Div. 145.

destination of the shipment, does not make it a through contract so as to entitle the subsequent carrier to benefit of the limitations of the initial carrier's liability.[63]

Through Rate of Freight.—To entitle a connecting carrier to the benefit of a special contract between the shipper and the receiving carrier limiting liability in case of loss, it must appear that the reduced rate forming the consideration of the special contract was not confined to the line of the receiving carrier, but extended and applied to the connecting line also, unless the contract was such as to bind the receiving carrier for full performance, so as to make the connecting carrier its agent.[64] Where the shipper signed a contract purporting to be made with the receiving carrier "and its connecting lines," releasing the carriers from liability for any damage not caused by their negligence, and providing that its terms shall inure to the benefit of connecting lines, unless they stipulate otherwise, a connecting carrier, which receives and transports the same shipment under this contract, is entitled to the benefit of its exemptions, notwithstanding no rate for the entire distance is fixed by it.[65] The fact that the carrier is not interested in the rate contracted for as to the part of the route beyond its own terminus, but receives only its regular local rate from the connecting line, is not sufficient to show that goods shipped under a through bill of lading, for which the carrier took from the shippers a guarantee of the freight charges for the entire route, were not in fact shipped under a through bill, but that the carrier had limited its liability to its own line.[66]

§ 3783. Instances of Particular Limitations.—An exception in a contract by a railroad for the carriage of goods to a point beyond its own line of "unavoidable accidents of the railroad and of fire in the depot," [67] of "any loss from fire;" [68] a stipulation that the freight is shipped "at owner's risk;" [69] a

62. **Ultimate destination mentioned in receipt—Payment of freight for entire distance at destination.**—In Camden, etc., R. Co. *v.* Forsyth Bros. & Co., 61 Pa. 81, is appeared that the Pennsylvania R. Co. gave a receipt for oil to be delivered "at the company's freight station, Philadelphia." Appended to the receipt as, "Rate to Red Hook, 65 cents. * * * This oil is carried only on open cars and entirely at owner's risk from fire and leakage while in possession of the railroad company or carriers, while standing or in transit." The freight was to be paid at Red Hook. It was held that mentioning Red Hook as the ultimate destination and payment of the freight there, was at most no more than an engagement to forward to that place; that the limitations in the contract as to the liabilities of the Pennsylvania R. Co. applied only to that portion of the route on which they acted as carriers, not to that with reference to which they were forwarders; and that the exemption from liability as to oil affected only the Pennsylvania R. Co.

64. **Through rate of freight.**—Central R., etc., Co. *v.* Bridger, 94 Ga. 471, 20 S. E. 349.

65. Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; S. C., 97 Ala. 341, 11 So. 781.

66. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

67. An exception in a bill of lading given by a railroad corporation for goods to be transported beyond its own line, of "unavoidable accidents of the railroad and of fire in the depot," extend to every other connecting carrier who received a share of the freight under the bill of lading, and with whom no other contract was made. Maghee *v.* Camden, etc., Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124.

68. **Fire clause.**—Evansville, etc., R. Co. *v.* Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724; Manhattan Oil Co. *v.* Camden, etc., Transp. Co. (N. Y.), 52 Barb. 72, 5 Abb. Prac., N. S., 289;

69. **Freight to be transported "at owner's risk."**—Where a railroad company received freight to be transported to a point beyond its own line of railroad, over its own and other lines of railroad connecting with it, and gave the shippers its receipt stating the freight was shipped "at owner's risk," such receipt is a special contract limiting the liability of the carrier, and connecting railroads are entitled to the benefits of the exemption of liability specified in it; and neither of the companies owning such connecting lines is liable for damages to the freight, unless it is shown that such damages arose from the negligence of the railroad company sought to be charged therewith. Kiff *v.* Atchison, etc., R. Co., 32 Kan. 263, 4 Pac. 401, 18 Am. & Eng. R. Cas. 618.

stipulation that the liability of the railroad companies as common carriers "shall terminate on the arrival of the goods at the station of delivery;"[70] a stipulation that the road in "whose actual custody the goods are at time of the loss shall alone be responsible;"[71] a provision limiting liability to losses upon its own line;[72] and a limiting value clause,[73] especially where it is provided that it shall

Whitworth *v.* Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349.

A railroad company, accustomed to take merchandise for transportation over its own road and connecting lines between Boston and Columbus, received goods at Columbus to be carried to Boston, and gave a bill of lading therefor, agreeing to forward the property to its destination upon certain conditions, one of which was that the company should be exempt from liability by any loss from fire. Held, that the exemption applied to the whole route between Columbus and Boston, and not to the road of the contracting company only; and, the cotton having been burned between Columbus and Evansville without fault of the railroad company, the exemption applied, and absolved the company from liability. Evansville, etc., R. Co. *v.* Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724.

Loss by fire while in terminal carrier's freight house.—In Manhattan Oil Co. *v.* Camden, etc., Transp. Co. (N. Y.), 52 Barb. 72, 5 Abb. Prac., N. S., 289, it appeared that freight was delivered to a company at C., under a contract between such company and the owner, to receive it and carry it to New York; that such contract contained a provision that the company receiving the freight should not be liable for damage or loss by fire or other casualty, while the property was in depots or places of transshipment; that the property, after being carried by said company to P., was delivered to defendant carrier, to be carried to New York, and there delivered; and that the freight, having been carried to New York and stored in defendant's freight house, was there, on the evening of its arrival, destroyed by fire, without any negligence on the part of defendant, and before any notice of its arrival had been given to the owner. It was held that defendant was entitled to the benefit of all the restrictions of liability contained in the shipping contract, as much so as the initial carrier, and, therefore, was not liable for the destruction of the goods.

A through contract made by a transportation company exempted it from liability "for loss or damage by fire while in the depots" of the goods carried. The goods while in the depot of a connecting carrier, who had received them, were destroyed by fire, without negligence of the latter. Held, that the latter was entitled to the benefit of the exemption from liability by fire. Manhattan Oil Co. *v.* Camden, etc., Transp. Co., 54 N. Y. 197, affirming 5 Abb. Prac., N. S., 289, 52 Barb. 72.

Right of intermediate railroad to benefit of contract made with steamboat companies—Cotton shipped from Memphis to New York and Liverpool.—Whitworth *v.* Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349.

Fire clause in red ink applicable to whole route—Where contracting carrier's road only formed intermediate link in chain.—Evansville, etc., R. Co. *v.* Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724.

70. Termination of liability on arrival at station of delivery.—Where goods are shipped over connecting lines of railroad, and the contract with the intial carrier provides that the liability of the railroad companies as common carriers shall terminate on the arrival of the goods at the station of delivery, and that afterwards they shall be liable as warehousemen only, such contract inures to the benefit of the connecting carrier. Kansas City, etc., R. Co. *v.* Sharp, 40 S. W. 781, 64 Ark. 115.

71. Limiting liability to road in whose custody goods are when lost, etc.—A stipulation in a contract for the shipment of goods over several connecting lines, that in case of loss or damage that road in whose actual custody the goods are at the time of the loss or damage shall alone be responsible, inures to the benefit of an intermediate carrier which delivers the goods safely to the next succeeding carrier. Bird *v.* Railroads, 99 Tenn. (15 Pickle) 719, 42 S. W. 451, 63 Am. St. Rep. 856.

72. Liability limited to carrier's own line.—International, etc., R. Co. *v.* Mahula, 1 Tex. Civ. App. 182, 20 S. W. 1002.

Refusal to deliver at destination initial lessee of intermediate carrier.—The M. P. Ry. Co., holding a lease upon the I. & G. N. Ry. Co., contracted to carry stock from a point in Texas, and safely deliver the animals at a certain point in Missouri; the shipping contract restricted the liability to losses upon its own line; and the stock was carried to its destination, but not delivered to the shipper. It was held, in an action against the I. & G. N. Ry. Co., that such limitation in the contract would inure to the benefit of each carrier over whose line the horses were carried, and defendant was not liable for the refusal to deliver the stock at its destination. International, etc., R. Co. *v.* Mahula, 1 Tex. Civ. App. 182, 20 S. W. 1002.

73. Limiting value clause.—Where a

have the benefit of such valuation, extends to every other connecting carrier which received a share of the freight under the original contract and with which no other contract was made. But a stipulation in a bill of lading for notice of claim within a stated number of days is restricted to claims against the initial carrier, and can not inure to the final carrier's benefit.[74]

Stipulation Applicable to Water Carrier Only.—Where a water transportation company, forming, with several railroads, a continuous line under a joint arrangement, receives goods to be transported over the whole line, and the bill of lading excepts damages of navigation, fire, and collisions on lakes, rivers, and canals, such exceptions do not extend to losses by fire on the railroads.[75]

§ 3784. Refusal of Subsequent Carrier to Perform Contract.—The refusal of a connecting carrier to perform part of a contract of through shipment deprives it of the benefit of stipulations limiting the initial carrier's liability.[76]

§ 3785. Pleading and Proof.—The last of a series of connecting lines over which freight is transported, is liable for loss or damage, subject to the

railroad company issues a through bill of lading, in which its liability is limited to an agreed valuation, and which contains a clause declaring that this carrier's responsibility is to cease upon delivery in good order at its terminus in the direction of the destination to a connecting carrier, and an accident results while the property is in the hands of the connecting carrier, the limitation of liability applies in favor of the carrier in whose control the property is injured. Fairchild *v.* Philadelphia, etc., R. Co., 148 Pa. 527, 24 Atl. 79.

Where a shipper enters into a special contract with the initial carrier for transportation, the connecting carrier is entitled to the benefit of the limiting value clause, where it is provided in the contract that it shall have the benefit of such valuation. Harby *v.* Southern R. Co., 55 S. E. 760, 75 S. C. 321.

Aliter in Texas and Wisconsin.—The principle upon which contracts limiting a carrier's common-law liability as to measure of damages are sustained should not be applied in behalf of an intermediate carrier in any case where the property is wholly unconcealed and is shipped over several independent lines of railway upon a through freight rate and consists of a common merchantable article destined for sale on an open market and only having a well-known and easily ascertained market value. St. Louis, etc., R. Co. *v.* Moon, 47 Tex. Civ. App. 209, 103 S. W. 1176.

The United States Express Company received a package at New York to be delivered at Madison, in this state, and transferred the same to the defendant, at Buffalo, N. Y., that being the most western point to which the United States Company then carried packages destined for Wisconsin. The receipt given by said last-named company declared that it would not be liable for any loss or damage of any package for over $150, unless the just and true value thereof was stated in said receipt. Held, that the defendant was not a party to this contract, and could not avail itself of the conditions thereof. Martin *v.* American Exp. Co., 19 Wis. 336.

Express company limiting value of package.—Under the rule that a shipper having authority to ship must be regarded as authorized to bind the owner by a contract containing special terms of shipment, in an action to recover the value of a lost trunk and contents the defendant express company is entitled to the benefit of the receipt given by the express company first receiving the same, restricting liability to $50, unless a greater value be specified. Levy *v.* Southern Exp. Co., 4 S. C. 234.

74. **Notice of claim.**—Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

75. **Stipulation applicable to water carrier only.**—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

76. **Refusal of subsequent carrier to perform contract.**—Plaintiff shipped a lot of sheep from Arkansas to Texas, over connecting lines of railroad, defendant's line being one of said connecting lines. The contract of shipment, made in Arkansas, contained a limitation in favor of the carrier, restricting the common-law liability of carriers. It also stipulated that the owner of the sheep might be transported on the same train which conveyed the sheep, free of charge, and also that said owner had the privilege of having the cars containing his sheep side-tracked. Defendant refused to transport plaintiff free of charge, and refused to side-track the cars containing the sheep when requested to do so by plaintiff. Held, that defendant could not claim the advantages stipulated for in the contract, but was liable as a common carrier, without regard to the contract. Texas, etc. R. Co. *v.* Davis, 2 Texas App. Civ. Cas., § 191.

limitations, stipulated for in the contract of shipment with the first line, unless it appears that the loss did not occur on the road sued. The burden is upon said road to show that the loss did not occur on its line.[77]

§ 3786. Contract Not for Through Shipment.—Where the initial company transports the freight for an agreed compensation to its terminus, under a contract limiting its own liability, the freight to be delivered at its terminus to a connecting line, the duty of the receiving carrier ceases with the delivery in a safe condition to such connecting line, and there is no privity between the shipper and the second carrier in respect to the special contract. In such case, the second carrier is not entitled to the benefit of the exemptions of the contract, and the liability fixed by law attaches upon the acceptance and receipt of the freight.[78] As, for instance, where the provisions of the contract apply only to the carrier with whom it was directly made and leave to it the selection of the carrier from the terminus of its line to the destination of the shipment;[79] where the initial carrier undertook to carry merely to its terminus and deliver to another carrier at an agreed compensation;[80] where the bill of lading stipulated that the first carrier should merely transport the goods, and deliver them to the connecting carrier, and should not be liable for loss as by fire,[81] not guarantying a through rate of freight,[82] or expressly excluded any guaranty of a rate,[83] although it mentions a price for the entire transportation;[84] where the

77. **Pleading and proof.**—Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

78. **Contract not for through shipment.**—Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; S. C., 43 How. Prac. 317.

79. A contract under which goods are delivered to a carrier for shipment, which does not provide that its stipulations shall inure to the benefit of any other carrier, nor designate any other carrier, does not inure to the benefit of an intermediate carrier. Adams Exp. Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214.

80. In an action against a connecting carrier for the loss of goods, it appeared that the initial carrier transported the goods under a special contract limiting its common-law liability, and by which it undertook to carry merely to its terminus, and deliver to another carrier, at an agreed compensation. Held, that the stipulations of such contract did not extend to, or affect, the carriage beyond such point, and that the common-law liability of the connecting carrier attached on receipt of the goods, though the goods were marked to a consignee beyond such terminus. Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; S. C., 43 How. Prac. 317.

81. Where a bill of lading issued by an initial carrier for foods consigned to a point beyond its route stipulated that such carrier should merely transport the goods, and deliver them to the connecting carrier, and should not be liable for loss by fire, it was held that a subsequent carrier was liable for loss occurring by fire while the goods were on its pier at the point of destination. Edsall *v.* Camden, etc., Transp. Co., 50 N. Y. 661.

82. Where goods were shipped under a bill of lading given by the first of several connecting lines of carriers, with a stipulation against liability for loss by fire, but not guarantying a through rate of freight. The stipulation did not inure to the benefit of a carrier beyond the place to which the rate of freight was guarantied. Taylor & Co. *v.* Little Rock, etc., R. Co., 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

83. A special contract expressed in a bill of lading and in the written assent of the shipper to its term, which relates to a consignment of goods from a given point on one railway to a given point on another, and which purports on its face to be a through bill of lading but expressly limits the undertaking of the first company to performance on its own line, with no further duty on its part but to deliver to the connecting line, and which names no rate of freight further than the terminus of the first line, but expressly excludes any guaranty of a rate beyond that point, does not bind the first company, to one with which the contract was made, to complete, either by itself or by the second company as its agent, the whole transportation. Central R., etc., Co. *v.* Bridger, 94 Ga. 471, 20 S. E. 349.

84. **Mere fact that contract mentions price for entire transportation.**—Where a common carrier contracts for the transportation of freight over its route, and for the delivery thereof to another carrier to be forwarded over connecting lines to its ultimate destination, the fact that the contract fixes the price for the transportation does not make the con-

bill of lading provided for the delivery to the consignee or a connecting carrier at the terminus of the initial carrier's road, but the bill was headed "to be used for shipments to any part of the United States;"[85] and where the bill of lading is issued by a steamboat company which is an intermediate carrier.[86]

Acceptance or Ratification by Subsequent Carrier.—The general rule that, where the initial carrier transports the freight for an agreed compensation to its terminus, under a contract limiting its own liability, the freight to be delivered at its terminus to a connecting line, there is no privity between the shipper and the second carrier in respect to the special contract and that the second carrier is not entitled to the benefit of the exemptions of the contract, but the liability fixed by law attaches upon the acceptance and receipt of the freight, may be qualified by the circumstances and the terms and character of the contract. Though it may not be for through transportation, and though no rate for the entire distance is fixed, if the contract refers to and embraces connecting lines, the carriers, over whose roads the freight must be transported, may adopt and act upon it, and thereby become entitled to the benefit of the valid exemptions created by the terms and conditions of the contract.[87]

Allegation of Ratification.—In an action against a connecting carrier for an injury to a shipment while in its possession, a plea that the waybill showed that the shipment was "at a release rate, which was a reduced rate of freight," is not equivalent to an allegation that defendant accepted and ratified a contract made by the original carrier releasing it and connecting carriers at their option from liability for damages not caused by negligence.[88]

Burden of Showing Acceptance.—Where the initial carrier is not authorized to bind the succeeding carrier to the terms of the contract, but, on the contrary, it was by the contract itself expressly left open for the connecting lines to accept the terms made for them or not, at their option, the law raises no presumption that a connecting carrier accepted or ratified the contract, and carried the freight under it. Where it relies upon exemptions contained in the contract, it must show its ratification by some act or course of conduct on its part, developed at some period from its receipt of the shipment to the delivery to the consignee, and such act or course of conduct should have been alleged.[89]

tract a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract. Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616, affirming 5 Lans. 480.

85. Freight was carried by a railroad under a bill of lading providing for its delivery to the consignee or a connecting carrier at the terminus in a certain city in Texas. The bill was headed, "To be used for shipments to any part of the United States," and provided for a through rate of freight to the place of destination in Massachusetts indicated on the margin, the freight to be there delivered. Held not a through bill of lading, but the contract of the first carrier, which ended at its terminus, so that any exemption of such carrier from liability for loss by fire did not extend to defendant steamship company, to which it was delivered by the first carrier, and it was, therefore, liable as a common carrier for loss of the freight by fire while stored in its freight house awaiting transportation by its steamer. Robinson *v.* New York, etc., Steamship Co., 71 N. Y. S. 424, 63 App. Div. 211.

86. Bill of lading issued by intermediate water carrier.—The trustees operating the road gave to the consignors a written memorandum stating the quality, character, condition, and value of the property shipped, with agreement to deliver the same at Brazos, to the steamship company. Before the shipment, the consignors delivered this writing to the agent of the steamship company, who took it up and gave the consignors bills of lading, the terms of which excused the steamship company from liability for loss by robbers or thieves. The train was robbed on the way to Brazos, and the money shipped was never delivered to the steamship company. The limitation of liability in the bill of lading was held to apply to carriage by ship, and not to carriage by the railway company. Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

87. Acceptance or ratification by subsequent carrier.—Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491.

88. Allegation of ratification.—Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781.

89. Burden of showing acceptance.—Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781.

The contract made between a shipper of a car load of mules and the receiving

Though the contract provides on its face for extension to the second company, at the option of the latter, of the benefits secured to the former in consequence of the reduced rate, yet, it not appearing that the second company availed itself of this privilege by shipping the goods over its line at a reduced rate, and the goods having been destroyed by fire upon that line, presumably by reason of negligence on the part of this company, the latter is liable to account therefor to the owner at full value, there being, so far as appears, no consideration to uphold any agreement with it, express or implied, to accept the conventional value agreed upon with the first company and specified on the face of the bill of lading.[90]

carrier for transportation from C. to M. and from M. to O. by connecting lines released the carriers from liability for any damage not caused by their negligence, and provided that its terms should inure to the benefit of connecting lines, unless stipulated otherwise. On arriving at O., one of the animals was found to be injured. The evidence showed that defendant received the mules at M., and forwarded them to O. in the same car in which they were shipped from C., and under the same waybill; that the waybill showed that O. was the destination of the car; that the shipment was at owner's risk, and at a reduced rate of freight. Defendant's agent testified that the freight charged was the established release rate when stock was shipped at owner's risk. Defendant's printed tariff in force at the time showed that the release rate was much lower than that charged when stock was shipped at carrier's risk. There was no evidence that plaintiff made any contract with defendant other than the one made by the receiving carrier. Held, that defendant accepted the terms of the contract made by the receiving carrier, and was entitled to the benefit thereof. Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781.

90. Central R., etc., Co. *v.* Bridger, 94 Ga. 471, 20 S. E. 349.

CHAPTER XXXIII.

Action.

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§ 3787. Rights of Action.—An action will lie by a shipper against the initial carrier for failure or refusal to transfer its cars to a connecting line in accordance with the terms of a contract of through shipment made with the shipper.[1] While a competing and connecting carrier may sue for damages to its general business by reason of the refusal of another carrier to forward cars of the former containing shipments destined to points on the latter's line the shipper who is damaged by the wrongful requirement of unshipping, draying and reshipping, and by the consequent waste, delay and injury, also has a right of action against the latter therefor.[2] A statute conferring upon a shipper the right to demand of a first carrier proof that loss of or injury to freight addressed

1. **Action for refusal to transfer cars to connecting line.**—Coles *v.* Central R., etc., Co., 82 Ga. 149, 9 S. E. 127.

2. **Rights of action where a carrier refuses to forward cars of another carrier.**—Logan & Co. *v.* Central Railroad, 74 Ga. 684, 694.

to a point beyond its line, where it has been delivered to a connecting carrier, did not occur on its line, does not prohibit the shipper in the first instance without such demand from bringing an action for damages for an alleged loss or injury.[3] Where a shipper agrees with a common carrier for the carriage of goods, and the carrier without the direction of the shipper agrees for the carriage with another carrier, who, without the knowledge or direction of the shipper, agrees for the carriage of the goods with a third carrier, the shipper may maintain an action against the last carrier for not delivering the goods, and by bringing such action he affirms the contract made with such carrier.[4]

§ 3788. Jurisdiction and Venue.—Where live stock is injured by the negligence of any of the carriers having it in charge between the points of reception and destination, an action may be brought against the initial crrier in the county where the contract of shipment was made.[5] Where a connecting carrier receives live stock from the initial carrier or an intermediate carrier without limiting its liability, it must be assumed to have accepted the stock under the terms of the original contract made with the initial carrier on behalf of itself "and connecting lines," and, having thus ratified the contract, may be sued on it in the county in which it was made, as if it had originally signed the contract.[6] A railroad company in partnership with another company may be sued with the latter for delay in transporting cattle, in a county in which the latter operates its road, though the former does not operate a road in such county, nor have an agent there.[7] Decisions interpreting the peculiar provisions of certain statutes prescribing the jurisdiction or venue of actions against connecting carriers will be found in the appended note.[8]

3. Effect of statute upon shipper's right of action.—St. Louis, etc., R. Co. *v.* McGivney, 19 Okla. 361, 91 Pac. 693, construing St. 1893, § 511.

4. Right of shipper to sue last carrier.—Sanderson *v.* Lamberton (Pa.), 6 Bin. 129.

5. Action may be brought in county where contract of shipment was made.—Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513.

6. Pittsburgh, etc., R. Co. *v.* Viers, 113 Ky. 526, 68 S. W. 469, 24 Ky. L. Rep. 356.

7. Where suit may be brought where carriers are partners.—San Antonio, etc., R. Co. *v.* Graves (Tex. Civ. App.), 49 S. W. 1103.

8. Statutes prescribing jurisdiction or venue interpreted.—In Georgia the venue of a suit against a railroad company, under Civ. Code 1895, §§ 2317, 2318, for damages for failure to trace freight which is to be conveyed by two or more common carriers, and to give the shipper, consignee, or their assigns written information as to when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of facts set out in the information can be established, is under the Constitution, Civ. Code, 1895, § 5874, the county where the principal office or place of business of the initial carrier is located. McCall *v.* Central, etc., R. Co., 48 S. E. 157, 120 Ga. 602.

In Texas, jurisdiction over a foreign railway company operating a part of its road in the state in an action against it and a domestic company for damages to live stock delivered to the domestic corporation for through transportation over it and the lines of the foreign company, can not be sustained under Rev. St. 1895, art. 1194, subd. 4, providing that no person who is an inhabitant of the state shall be sued out of the county of his domicile, except that, where there are two defendants residing in different counties, the suit may be brought in any county where any of the defendants reside, where the suit was not brought in the county of the domicile of the domestic company within article 4378, declaring that the public office of a railroad corporation shall be considered its domicile. St. Louis, etc., R. Co. *v.* McKnight, 99 Tex. 289, 89 S. W. 755.

The Texas statute, Laws 1899, p. 214, c. 125, provides that, when any freight has been transported over two or more railroads operating any part of their roads in Texas and having an agent there, suit may be brought in any county in which either of the roads extends or is operated. A foreign railway company refused to receive, as connecting carrier, a shipment of live stock delivered to a domestic company as initial carrier under a contract for through shipment. Held, in a suit against the domestic and foreign companies for damages to the shipment, brought in a county in which the domestic company operated a line of road, that the court did not have juris-

§§ 3789-3791. Parties—§ 3789. By Whom or in Whose Name Action May Be Brought.—The owner of a ship can not recover from a connecting railway carrier for the detention of his vessel at the railway's terminal wharf, in consequence of the latter's refusal for some days to receive the cargo, where he discloses by his declaration that such ship was under charter with a third person, not a party to the suit, to deliver her cargo to defendant, and that the latter was under contract with such third person there to receive the cargo, and to carry it further, as in such case the charterer alone can sue for the breach of duty.[9] An action against a common carrier for failure to comply with an application to trace freight and give the information required by the Georgia "Tracing Act" brought in the name of the shipper is well brought, even though it appears that the shipper is not the owner of the goods.[10]

§ 3790. Against Whom Action May Be Brought—Joinder.—An action for loss of a part of a shipment may be properly brought in tort jointly against a connecting and terminal carrier of the goods.[11] In an action against an initial carrier for injuries to live stock, all the connecting carriers against whom it is sought to recover damages may be made parties defendant.[12] Where a contract provides for the carriage of live stock from the point of shipment to destination at a stipulated price, but it also specifies that the initial carrier shall carry the stock over its line to C., and thence forward it by connecting carrier to destination, the two carriers participating in the shipment are properly joined in one action for damages caused by the negligent manner in which the stock is handled during transportation, though the liability of each carrier is limited to its own line.[13] The Texas statute does not authorize a suit against two railroad companies not acting under a joint contract for the distinctly separate wrong of one merely because property has been transported over the connecting lines of the two.[14]

§ 3791. Necessary Parties.—Where an intermediate carrier is sued for

diction over the foreign company, though it operated a part of its road in Texas, within the statute, by operating its passenger trains into Texas to the passenger depot of a domestic company; the jurisdiction of the court being not alone dependent on the fact that it operated a part of its road in Texas, but also on the fact that the shipment had been transported by the foreign company. St. Louis, etc., R. Co. *v.* McKnight, 99 Tex. 289, 89 S. W. 755.

Where a passenger is carried over two railroad lines, and injured on the second thereof, the cause of action therefor arises out of the transportation or contract in relation thereto, so that under the provision of the Texas statute, Act March 13, 1905 (Laws 1905, p. 29, c. 25), the action therefor may be brought against the companies in a county in which either company operates or has an agent. Texas Cent. R. Co. *v.* Marrs, 100 Tex. 530, 101 S. W. 1177.

An action against a connecting carrier, refusing to honor a return ticket and ejecting passenger from train, is a suit for personal injuries within the Texas statute, act of 1901, p. 31, ch. 27, prescribing the venue of such actions. Texas, etc., R. Co. *v.* Lynch, 97 Tex. 25, 75 S. W. 486, reversing 73 S. W. 65.

9. By whom or in whose name action may be brought.—Freeman *v.* Louisville, etc., R. Co., 32 Fla. 420, 13 So. 892.

10. Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817, construing "Tracing Act," Civil Code, §§ 2317, 2318.

11. Against whom action for loss of part of goods may be brought.—New York, etc., Transp. Line *v.* Baer & Co., 84 Atl. 251, 118 Md. 73.

12. Connecting carriers may be joined in action against initial carrier.—Illinois Cent. R. Co. *v.* Curry, 32 Ky. L. Rep. 513, 106 S. W. 294.

13. Contract authorizing joinder of carriers participating in shipment.—Cincinnati, etc., R. Co. *v.* Greening, 100 S. W. 825, 30 Ky. L. Rep. 1180.

14. Texas statute construed.—Texas, etc., R. Co. *v.* Lynch, 97 Tex. 25, 75 S. W. 486, construing Act May 20, 1899 (Laws 1899, p. 214, c. 125), which provides that, whenever any freight or other property has been transported over two or more railroads operating any part of their roads in Texas, suit for loss or damage thereto, or other cause of action connected therewith or arising out of such transportation or contract in relation thereto, may be brought against any one or all of such railroads in any county in which either of such railroads extends or is operated.

loss of freight on its line, it can not complain because the initial carrier also liable is not made a party defendant.[15] Where suit is brought against a railroad company which operates another railroad under lease for a refusal to receive goods and transport them over the line so operated by it, there is no necessity to make the lessor a party defendant to the action; and there is no error in refusing to dismiss the case because service has not been perfected on the lessor company.[16]

§§ 3792-3797. Pleading—§§ 3792-3795. Declaration, Petition, or Complaint.—§ 3792. Essential Averments.—In an action against a connecting carrier, or against connecting carriers, the declaration, petition or complaint must aver facts sufficient to show a cause of action against the defendant or defendants.[17] In suing the last of several connecting carriers for a loss, it

15. **Initial carrier not a necessary party to suit against intermediate carrier for loss of freight.**—Lacey *v.* Oregon R., etc., Co., 63 Ore. 596, 128 Pac. 999.

16. **In action against lessee of railroad lessor not a necessary party.**—Central R. Co. *v.* Logan & Co., 77 Ga. 804, 2 S. E. 465.

17. **Pleading must aver facts sufficient to show a cause of action.**—Hempstead *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 485.

To enable a plaintiff to recover against a railroad company under the New York Railroad Act, § 53 (1 Rev. St. [4th Ed.] p. 1240), providing that, "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place, against a company not otherwise liable, his complaint must aver the facts required to constitute the liability. Hempstead *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 485.

Pleadings held to state a cause of action.—Plaintiff alleged delivery of a car load of sheep to defendant, a common carrier, for transportation under a live stock contract requiring safe delivery to defendant's connecting carrier; that defendant did not safely carry the stock, but, by reason of defendant's negligence and that of its connecting carrier, plaintiff's stock was not delivered, but that another car load containing other and less valuable sheep was delivered to the consignee as and for plaintiff's stock. Plaintiff also alleged that the bill of lading required the shipper to be at his sole risk and expense of caring for the stock during transportation, but that defendant waived such provision by refusing to permit plaintiff to perform such service and assuming such duty itself, and that after notice defendant made no proof that the loss did not occur while the sheep were in defendant's care. Held, that such declaration stated a cause of action. Norfolk, etc., R. Co. *v.* Sutherland, 54 S. E. 465, 105 Va. 545.

A petition alleged that plaintiff purchased a through ticket over connecting lines; that upon arrival at the junction point, she was obliged to await the connecting train, and was told by the employees of both companies to enter the waiting room, which she did; that it was necessary to wait several hours, and that while so waiting the employees in charge of the waiting room ordered and forced her to leave it at night, and closed and locked it; that she was thereby exposed to a storm and made sick. Held, that the petition set out a cause of action in tort against both companies. Riley *v.* Wrightsville, etc., R. Co., 65 S. E. 890, 133 Ga. 413, 24 L. R. A., N. S., 379, 18 Am. & Eng. Ann. Cas. 208.

Under the Gerogia statute, Civ. Code, §§ 2317, 2318, providing that, when freight to be conveyed by several carriers is lost, any connecting carrier, on application by shipper or consignee, shall trace such freight, and inform the applicant by which carrier it was lost, and making it liable, on failure to trace such freight, as if the loss had occurred on its line, a petition averring the loss of freight shipped by certain carriers, and the failure of the carrier at destination to trace it after verbal application of the shipper, states a cause of action against such carrier for the value of such loss of freight. Savannah, etc., R. Co. *v.* Hardin, 35 S. E. 681, 110 Ga. 433.

A complaint against a common carrier, alleging that plaintiff claimed of defendant $1,000 for loss and injury to goods delivered to a connecting carrier, operating with defendant a through route to destination; that defendant did not deliver the goods to plaintiff, who was consignee, in good and proper condition, or in the condition they were in when received by it; and that such goods, when delivered to plaintiff, were badly broken, injured, and damaged, and a large part thereof wholly unfit for use, etc.—was substantially in the form prescribed by the Alabama statute, Code 1896, p. 946, No. 15, and was not, therefore, demurrable. Walter *v.* Alabama, etc., R. Co., 39 So. 87, 142 Ala. 474.

Pleadings held not to state a cause of action.—A petition in a suit against a

is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant.[18]

§ 3793. Alternative Averments.—Where the complaint in an action against a carrier for injuries to live stock charges alternatively that it was either the duty of defendant, the initial carrier, to transport the stock to destination on its own lines, or to deliver the stock at some unidentified point to a connecting carrier having a direct route from the junction point to destination, and

railroad company alleged that the goods of plaintiff had been delivered to another carrier, who delivered them to defendant, and that the time consumed in the transportation from the initial point was so unreasonable that the goods were damaged by delay. It was not alleged that the delay occurred on the line of the defendant, or that the goods were received by it in good order. Held, that the petition was defective, whether attempting to set forth a cause of action under the common law or under the statutory liability imposed on the last carrier in a line of connecting carriers. Southern R. Co. *v.* Gardner, 56 S. E. 454, 127 Ga. 320. See, also, Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

In an action against a railroad company for the detention of a car of furniture after tender of freight charges, the petition alleged that the furniture was delivered to a certain railroad company, and that such company executed a bill of lading therefor, by which it agreed to transport the furniture to a specified place on defendant's road; that such company and defendant were engaged in the business of transporting freight for hire; and by the contract, as set out in the bill of lading, both agreed to transport the furniture from the place of shipment to its destination. Held, that such complaint was insufficient, in that it did not allege a partnership, or that defendant executed the bill of lading, or authorized any one to do so for it. Miller *v.* Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954.

A carrier by railroad made a written contract with a shipper for the transportation of horses over its own and a connecting line, of which it was not the agent, and in making up the total freight, which the shipper prepaid, allowed less for the carriage over the connecting line than by the tariff of the latter it should have done; and the connecting carrier, upon the arrival of the horses at their destination, refused to deliver them unless the additional freight was paid to it by the shipper. Held, in an action against the connecting carrier that the shipper was not entitled to go to the jury on allegations of unreasonable delay in the transportation, and of detention of the horses upon the cars, there being no evidence of such delay after their arrival, and the consequences of their subsequent detention being alleged only as a matter of aggravation of a wrongful refusal to deliver them, and that, the refusal to deliver the horses being rightful, negligence, if any, in the care of them while detained, could not be relied upon as a substantive cause of action. Crossan *v.* New York, etc., R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

Petition insufficient to support an action against last carrier.—Sheep shipped from a state quarantined for scabies in sheep under Act Cong. March 3, 1905, c. 1496, § 1, 33 Stat. 1264 [U. S. Comp. St. Supp. 1905, p. 617], were before shipment inspected by a government inspector and certified to be free from the disease, pursuant to section 2 and a rule of the Secretary of Agriculture; and such certificate was delivered to the railroad company to accompany the sheep as required by that rule. The sheep, after being transported by two connecting companies, were delivered to a stockyards company where, the certificate being lost, they were detained and subjected to a certain treatment. In an action to recover for damage to the sheep from this detention and treatment, the petition alleged that plaintiffs did not know by which of the companies the certificate was lost, but "that it was lost by the negligence of all of the defendants;" and, though it was alleged that the sheep were delivered to the company delivering them to the stockyards company, yet it was not alleged that the certificate was delivered to it. Held, that the petition must be taken to charge that the certificate was lost before it reached the railroad company delivering the sheep to the stockyards company, and hence failed to show that the railroad company was in any way chargeable for its loss. Wakefield *v.* Chicago, etc., R. Co., 104 S. W. 778, 31 Ky. L. Rep. 1108.

The charge that the loss of the certificate was due to the negligence of all defendants was insufficient to support an action against the railroad company delivering the sheep to the stockyards company; for, by its contract, it was not responsible for the negligence of other railroad companies. Wakefield *v.* Chicago, etc., R. Co., 104 S. W. 778, 31 Ky. L. Rep. 1108.

18. **Essential allegations in suit against last carrier.**—Chesapeake, etc., R. Co. *v.* Stock & Sons, 104 Va. 97, 105, 51 S. E. 161.

that the loss resulted from defendant's failure to perform the carriage itself, or from its failure to forward the consignment by a connecting carrier having a direct route, such alternative averments do not constitute a statement of either cause of action, and the complaint is demurrable.[19]

§ 3794. Correspondence between Allegations and Proof.—In an action against a connecting carrier, or against connecting carriers, the proof must correspond with the allegations in the declaration or complaint, and a material variance is fatal.[20]

§ 3795. Amendment.—In an action against a connecting carrier the plaintiff can not by an amendment to his pleading add a new and distinct cause of action.[21] Where a declaration in an action against a railroad company for damages to property shipped over the railroad of another company, and thence over the defendant's railroad, alleges that they are "connecting roads run and managed" by the initial carrier, it is amendable by striking such allegation.[22]

§§ 3796-3797. Plea or Answer—§ 3796. Sufficiency.—Certain pleas in actions against connecting carriers which have been held sufficient as against a demurrer, or to have been erroneously overruled by the court, will be found in the appended note.[23]

19. **Alternative averments.**—Louisville, etc., R. Co. *v.* Duncan, 34 So. 988, 137 Ala. 446.

20. **Fatal variance between allegations and proof.**—Where the complaint, in an action against an intermediate carrier, alleges that it contracted to carry goods to their destination, and that proof shows that the initial carrier contracted to carry them there, and made arrangements with the intermediate carrier to carry them to the end of its line only, there is a fatal variance. Alabama, etc., R. Co. *v.* Mount Vernon Co., 84 Ala. 173, 4 So. 356.

Where the complaint claims damages of a carrier for injuries to cattle transported over its road under a written contract, which bound defendant to deliver safely at the terminus of its road to the next connecting company, while the proof shows that the cattle, having been safely carried to the terminus of defendant's road, and there delivered to the next connecting road, were then put into unfit cars, in violation of the promise of defendant's depot agent that the cars should not be changed, and were afterwards injured before reaching their destination, even if defendant is liable for the promise of its agent, there is a fatal variance between allegations and proof. Alabama, etc., R. Co. *v.* Thomas, 83 Ala. 343, 3 So. 802.

No variance between allegation and proof.—Where the declaration in an action against a carrier for delay in the delivery of a car load of corn referred to the initial carrier's car 19588, to give a correct description of the bill of lading, there was no variance between the declaration and the evidence disclosing that the corn was transported in the connecting carrier's car 24734. Johnson & Co. *v.* Central Vermont R. Co., 84 Vt. 486, 79 Atl. 1095.

21. **Amendment properly rejected as seeking to add a new and distinct cause of action.**—The original declaration being for damages to plaintiff's property shipped over defendant's railroad, with no allegation that defendant received the same from a connecting railroad as in good order, and this court having held that evidence to show that the property was damaged on a connecting railroad before defendant received it, was admissible, an amendment to the effect that defendant had received it as in good order from the connecting railroad was properly rejected as seeking to add a new and distinct cause of action. The original action was upon a common law liability, the amendment upon a statutory liability. Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113.

22. **Declaration held amendable.**—Southwestern Railroad *v.* Bryant, 67 Ga. 212.

23. **Plea not demurrable for failure to allege performance of duties not specified in contract.**—Two counts in a complaint charged the failure to deliver a car load of lumber shipped over the carrier's line, and another count charged failure to deliver within a reasonable time. Defendant in a special plea alleged that the lumber was shipped to a place not on its line, that it was agreed between the parties that defendant's liability should cease on delivery of the lumber to a connecting carrier, which it did to a carrier specified, and that the shipment sustained no damages while in possession of defendant. Held, that the plea was not demurrable for failure to show that the connecting carrier carried the lumber to its destination, or that defendant was noti-

§ 3797. Effect of Failure to Deny a Partnership Alleged in Petition.—Where in an action against connecting carriers, a defendant, in its answer, does not deny a partnership with its codefendant, alleged in the petition, it can not object to the joinder, nor to any judgment against it which is warranted by the evidence against its codefendant.[24]

§§ 3798-3805. Evidence—§§ 3798-3801. Presumptions and Burden of Proof—§ 3798. In General.—Where Shipper Alleges Contract

fied of the delivery of the lumber to the connecting carrier or of its arrival, as no duties of that kind were specified in the contract alleged. McNeill *v.* Atlantic Coast Line R. Co., 161 Ala. 319, 49 So. 797.

Plea not demurrable for failure to set out specific contract of shipment.—A carrier was charged in one count in the complaint with a failure to deliver a car load of lumber shipped by plaintiff, and in another count was charged with a failure to deliver within a reasonable time. Defendant alleged that the shipment was to a point not on its line, and that it was agreed in a contract of shipment that defendant's liability should cease when it delivered the lumber to the connecting carrier, and that it so delivered the lumber to the connecting carrier. Held, that defendant's plea was not demurrable for failure to attach as an exhibit or set out the specific contract of shipment alleged, as the contract was not alleged to be in writing, and it was not necessary for the contract to be in writing. McNeill *v.* Atlantic Coast Line R. Co., 161 Ala. 319, 49 So. 797.

Plea not demurrable for failure to allege delivery of bill of lading contemporaneous with receipt of goods.—Where, in an action against the delivering carrier for injuries to goods, defendant specially pleaded that the goods were delivered to a transportation company in B. for transportation to M., and that the receiving carrier issued its bill of lading for the goods, stipulating for exemption from liability for fire, and that the property was damaged or destroyed by fire through no fault or negligence on defendant's part, such plea was not demurrable for failure to allege the receipt of the bill of lading by the shipper prior to, or contemporaneous with, the receipt of the goods by the carrier; such contemporaneous delivery of the bill of lading being presumed, in the absence of an allegation to the contrary in a replication to the plea. Southern R. Co. *v.* Levy, 39 So. 95, 144 Ala. 614.

Plea held a practical denial that defendant acquiesced in or acted on alleged contract of shipment.—In an action against several alleged connecting carriers for breach by the last carrier of the conditions of a contract of shipment requiring the carriers to furnish plaintiff, a shipper, return transportation, defendant filed a plea of privilege setting up that it was not a resident of the county where the suit was brought; denying that any partnership existed between it and the other roads, or that it acted jointly with any other company in the transportation of the stock, and specifically averred that it undertook and contracted to transport the same from the connecting point to its destination, and nothing further. Held a practical denial that it acquiesced in or acted on the alleged contract, and that it was error to overrule the plea, and force defendant to trial. Texas, etc., R. Co. *v.* Lynch, 75 S. W. 486, 97 Tex. 25.

24. Effect of failure to deny partnership alleged in petition.—Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Baylor County *v.* Craig, 69 Tex. 330, 6 S. W. 305.

Where petition in an action against a railroad company for damages for negligence and delay in transportation of stock alleges partnership between connecting carriers and such partnership is not denied on oath as required by statute, partnership will be taken as admitted. Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

Plea held not to deny a partnership.—Allegations of defendant's plea that "this defendant * * * is a separate, distinct, and independent line of what is known as the 'S. F. Route,' and the rights, liabilities, and earnings of this defendant are entirely distinct and independent from the rights, liabilities, and earnings of co-defendant. This defendant says, furthermore, * * * that its undertaking, obligation, and liability with respect to plaintiff's shipment involved in this suit is altogether separate, distinct, and independent from that of its co-defendant; * * * that defendant received no part whatever of the freight charges accruing in consequence of said shipment from * * * to * * *; that it delivered the said car of fixtures to its co-defendant, * * * and that thereafter it had nothing further to do with said shipment,"—do not deny the existence of a partnership with its co-defendant at the date of the contract of shipment. Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144.

for Through Transportation.—Where a shipper, in an action to recover for delay in the shipment alleges the making of special contracts by the terms of which the initial carrier obligated itself to transport the freight within a reasonable time to its destination beyond the terminus of its line, the burden is on the shipper to prove his case as laid, especially where it appears that the delay complained of occurred on one of the connecting lines.[25] But where in an action against a carrier for injuries to a shipment of live stock, the shipper alleges that the carrier, in co-operation with another carrier, operated a line of railway from the place of shipment to the point of destination, and testifies to an agreement with the agent of the carrier for a through shipment to the point of destination, and the agent does not deny the testimony, a presumption arises that the carrier had control of the line for purposes of shipment to the point of destination.[26]

Presumption of Receipt of Entire Shipment from Receipt of Portion Thereof.—A connecting carrier which has received a portion of a single shipment is presumed to have received the entire shipment.[27]

Presumption That Last Carrier Received Goods under Obligations Imposed by Law on Common Carriers.—Where goods are delivered to an express company, who delivers them to another express company to be transported to the place of destination, and while in custody of the last company they are lost, in the absence of any proof to the contrary, the last company will be presumed to have received them for transportation to the owner under such obligations as the law imposes on common carriers who do not, by contract, limit their liability.[28]

§ 3799. As to Line on Which Delay Occurred.—Where in the course of the carriage of goods by connecting carriers there is delay, in an action for the damages resulting therefrom, or for the statutory penalty prescribed therefor, the burden is upon the initial carrier to show that the delay did not occur on its line, or that it occurred on the line of a subsequent carrier.[29] In an action against an intermediate connecting carrier for delay in transportation, the burden of proof is on complainant to show that the delay occurred on defendant's road.[30]

§ 3800. As to Notification of Connecting Carriers by Initial Carrier as to Conditions of Shipping Contract.—Where a railroad company receives

25. **Burden on shipper to prove contract for through transportation alleged by him.**—Central, etc., R. Co. *v.* Felton, 110 Ga. 597, 36 S. E. 93.

26. **Facts raising presumption that carrier had control of entire line.**—St. Louis, etc., R. Co. *v.* Keys, 6 Indian T. 396, 98 S. W. 138.

27. **Presumption of receipt of entire shipment from receipt of portion thereof.**—McMeekin *v.* Southern Railway, 85 S. C. 381, 67 S. E. 745.

28. **Presumption that last carrier received goods under obligations imposed by law on common carriers.**—Southern Exp. Co. *v.* Urquhart, 52 Ga. 142.

29. **Burden of proof as to line on which delay occurred.**—Where, in the course of carriage of goods by connecting carriers, there is an unreasonable delay, the initial carrier has the burden of showing delivery, without such delay, to the next carrier. Allen-Fleming Co. *v.* Southern R. Co., 58 S. E. 793, 145 N. C. 37. See, also, Meredith *v.* Seaboard, etc., R. Co., 137 N. C. 478, 50 S. E. 1.

Where a shipment of lumber delivered to a carrier for transportation to a certain point beyond such carrier's line, and by it turned over to a connecting carrier, was delayed in reaching its destination, the initial carrier alone was liable for such delay, in the absence of a showing that the delay did not occur while the goods were in its possession. Norfolk, etc., R. Co. *v.* Wilkinson, 56 S. E. 808, 106 Va. 775.

Where a delay in the transportation of freight was due to the negligence of a connecting carrier, the burden was on the initial carrier, in a suit against it for a statutory penalty for such delay, to prove such fact. Watson *v.* Atlantic Coast Line R. Co., 59 S. E. 55, 145 N. C. 236.

Where an initial carrier, in an action for the penalty for delay, did not prove that the delay or a portion thereof occurred on the line of a connecting carrier, it would be presumed that the entire delay occurred on the initial carrier's line. Watson *v.* Atlantic Coast Line R. Co., 59 S. E. 55, 145 N. C. 236.

30. Shockley *v.* Pennsylvania R. Co., 109 Md. 123, 71 Atl. 437.

freight for shipment under an agreement to forward it to its destination, and a stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," and the shipper sues the company for damages caused by its alleged delay as forwarding agent to notify each successive connecting road of the conditions of the contract respecting the manner of transportation, the burden is on defendant to show that it notified each successive connecting road of the conditions regarding the manner of transportation, or, if it did not, that the delay was not attributable to its default.[31]

§ 3801. As to Line on Which Injury or Loss Occurred and the Responsibility Therefor.—Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier,[32] the burden being upon the plaintiff in an action against such carrier to show that the injury occurred on its line.[33] The presumption is that each of the several connecting carriers received the goods in the same condition in which they were when delivered to the initial carrier for transportation, and if they are damaged or part of them are lost, in an action against a connecting carrier therefor, the burden is upon it to show that the damage or loss had occurred when it received the goods.[34] It follows that in an action for injury to, or loss of, goods

31. Burden of proof as to notification of connecting carriers by initial carrier as to conditions of shipping contract.—Colfax Mountain Fruit Co. *v.* Southern Pac. Co. (Cal.), 46 Pac. 668.

32. No presumption that injury occurred on line of initial carrier.—Farmington Mercantile Co. *v.* Chicago, etc., R. Co., 166 Mass. 154, 44 N. E. 131; St. Louis, etc., R. Co. *v.* McGivney, 19 Okla. 361, 91 Pac. 693; Atchison, etc., R. Co. *v.* Rutherford, 29 Okla. 850, 120 Pac. 266.

33. St. Louis, etc., R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125.

But in Alabama it has been held that in a suit against the initial carrier for the loss of or injury to goods, if such loss or injury is shown, the burden rests upon the defendant to prove that the goods were not lost or injured while in its possession. Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

And in Michigan it has been held that in an action against a carrier for injuries to goods shipped and ordered returned, where defendant's theory is that the goods were injured while in the hands of a connecting carrier before they were returned to defendant, the burden of proof is on defendant to show that it safely shipped the goods and delivered them to the connecting carrier in good condition, and the burden then changes, and plaintiff must show by a preponderance of the evidence that the goods were in a good condition on their return to defendant on the journey back. Reason *v.* Detroit, etc., R. Co., 113 N. W. 596, 150 Mich. 50.

34. Presumption that connecting carriers received goods in condition in which delivered to initial carrier.—*Alabama.*—Southern Exp. Co. *v.* Hess, 53 Ala. 19; Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

Arkansas.—St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21.

Florida.—Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457, 23 Am. St. Rep. 551.

Georgia.—Central R., etc., Co. *v.* Bayer, 91 Ga. 115, 16 S. E. 953; Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Paramore *v.* Western R. Co., 53 Ga. 383.

Illinois.—Great Western R. Co. *v.* McDonald, 18 Ill. 172; Lake Erie, etc., R. Co. *v.* Oakes, 11 Ill. App. 489.

Indian Territory.—Gulf, etc., R. Co. *v.* Jones, 1 Indian T. 354, 37 S. W. 208.

Iowa.—Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

Massachusetts.— Bullock *v.* Haverhill, etc., Dispatch Co., 187 Mass. 91, 72 N. E. 256; Cote *v.* New York, etc., R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. Rep. 656.

Minnesota.—Leo *v.* St. Paul, etc., R. Co., 30 Minn. 438, 15 N. W. 872.

Mississippi.—Mobile, etc., R. Co. *v.* Tupelo, etc., Mfg. Co., 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262.

Missouri.—Flynn *v.* St. Louis, etc., R. Co., 43 Mo. App. 424.

New York.—Hunt *v.* Michigan, etc., R. Co., 37 N. Y. 162, 35 How. Prac. 287; Myerson *v.* Woolverton, 9 Misc. Rep. 186, 29 N. Y. S. 737, 61 N. Y. St. Rep. 78; Smith *v.* New York Cent. R. Co., 41 N. Y. 620.

North Carolina.—Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675; Knott

or live stock against the last connecting carrier, if it is shown that the goods or live stock were received by the initial carrier in good condition and when delivered by the defendant they were damaged or part of them lost, it will be presumed, in the absence of evidence to the contrary, that the damage or loss occurred while the goods or live stock were in hands of the defendant, and the burden rests upon it to overcome such presumption, and to show that the damage or loss did not result from any cause for which it was responsible.[35] This rule seems to have been

v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321; Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547; Morganton Mfg. Co. *v.* Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

Oregon.—Lacey *v.* Oregon R., etc., Co., 63 Ore. 596, 128 Pac. 999.

Tennessee.—Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392; Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188.

Texas.—Gulf, etc., R. Co. *v.* Cushney, 95 Tex. 309, 67 S. W. 77; Gulf, etc., R. Co. *v.* Pitts & Son, 37 Tex. Civ. App. 212, 83 S. W. 727; Houston, etc., R. Co. *v.* Ney (Tex. Civ. App.), 58 S. W. 43; Missouri, etc., R. Co. *v.* Clayton (Tex. Civ. App.), 84 S. W. 1069; Missouri, etc., R Co. *v.* Mazzie & Co., 29 Tex. Civ. App. 295, 68 S. W. 56; St. Louis, etc., R. Co. *v.* Cohen (Tex. Civ. App.), 55 S. W. 1123; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Texas, etc., R. Co. *v.* Capper, 38 Tex. Civ. App. 61, 84 S. W. 694.

Washington.—Sheble *v.* Oregon R., etc., Co., 98 Pac. 745, 51 Wash. 359.

Wisconsin.—Laughlin *v.* Chicago, etc., R. Co., 28 Wis. 204, 9 Am. Rep. 493.

In an action against the last but one of a chain of connecting carriers for loss and damage to goods shipped over its line, where it is shown that the goods were delivered to the first carrier in good order, but were damaged in part, and some lost when delivered by defendant to the last carrier, the burden is upon defendant to show that the loss or damage had occurred when it received the goods, since such facts are peculiarly within its own knowledge, and the presumption is that the goods remain in the condition in which they were originally shipped; and, if it fails to show this, plaintiff is entitled to recover. Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. Rep. 551, 12 Am. & Eng. R. Cas. 457.

Delivery of freight to a city expressman in good condition raises the presumption of delivery to the initial railroad in such condition. Willett *v.* Southern R. Co., 45 S. E. 93, 66 S. C. 477.

In an action against a carrier for damages to butter, caused by heat, an instruction that the jury might infer that the butter was in good condition when received by defendant from the fact that it was shipped in good condition in a refrigerator car to St. Louis (whence it was delivered to defendant by a connecting carrier) is proper. Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

Where it is shown that horses were in a good condition at a certain point in transit, it will be presumed that they were still in such condition at a subsequent point, where they were delivered to a connecting carrier. Powers *v.* Chicago, etc., R. Co., 105 N. W. 345, 130 Iowa 615.

The presumption being established that a shipment of melons was delivered to defendant, as a connecting carrier, in good order, the burden was on it to show, either that, when the original company received the melons, they were in a damaged condition, or that they had become so after shipment, without fault on the part of any of the carriers, though the melons would, by mere lapse of time, become worthless, from natural, inherent causes. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

But in Michigan it has been held that where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to instruct that, if the goods were delivered in good order to the first carrier, it is inferable, in the absence of evidence, that they continued so until received by the defendant, as one who sues a carrier for injury to goods must show affirmatively that the defendant received them in good order. Marquette, etc., R. Co. *v.* Kirkwood, 7 N. W. 209, 45 Mich. 51, 40 Am. Rep. 453.

35. Presumption and burden of proof in action against last connecting carrier.—*Alabama.*—Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 So. 392; Central, etc., R. Co. *v.* Dothan Mule Co., 159 Ala. 225, 49 So. 243; Walter *v.* Alabama, etc., R. Co., 142 Ala. 474, 39 So. 87; Southern Exp. Co. *v.* Hess, 53 Ala. 19.

Arkansas.—St. Louis, etc., R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125; St. Louis, etc., R. Co. *v.* Birdwell, 82 S. W. 835, 72 Ark. 502; Gibson *v.* Little Rock, etc., R. Co., 93 Ark. 439, 124 S. W. 1033; Midland Valley R. Co. *v.* Hale, 111 S. W. 646, 86 Ark. 483.

Delaware.—Klair *v.* Philadelphia, etc., R. Co. (Del.), 2 Boyce 274, 78 Atl. 1085.

Georgia.—Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498; Central R. Co. *v.* Rogers &

universally accepted in this country, except in Michigan, where the contrary rule

Sons, 66 Ga. 251; Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Indiana.—Cleveland, etc., R. Co. *v.* Schaefer, 47 Ind. App. 371, 90 N. E. 502.

Maine.—Colbath *v.* Bangor, etc., R. Co., 105 Me. 379, 74 Atl. 918.

Maryland.—Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, 458; New York, etc., Transp. Line *v.* Baer & Co., 84 Atl. 251, 118 Md. 73.

Massachusetts.—Cote *v.* New York, etc., R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. Rep. 656.

Minnesota.—Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Beede *v.* Wisconsin Cent. R. Co., 95 N. W. 454, 90 Minn. 36, 101 Am. St. Rep. 390.

New Jersey.—Gude *v.* Pennsylvania R. Co., 77 N. J. L. 391, 71 Atl. 1128.

North Carolina.—Boss *v.* Atlantic Coast Line R. Co., 156 N. C. 70, 72 S. E. 93.

Oklahoma.—St. Louis, etc., R. Co. *v.* Carlile, 35 Okla. 118, 128 Pac. 690.

Oregon.—Lacey *v.* Oregon R., etc., Co., 63 Ore. 596, 128 Pac. 999.

South Carolina.—Cooper *v.* Seaboard Air Line Railway, 78 S. C. 81, 58 S. E. 930; Lowry *v.* Atlantic Coast Line R. Co., 88 S. C. 310, 70 S. E. 806; Parnell *v.* Atlantic Coast Line R. Co., 91 S. C. 270, 74 S. E. 491. Compare Milam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571.

Tennessee.—Memphis, etc., R. Co. *v.* Holloway, 68 Tenn. (9 Baxt.) 188; Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392.

Texas.—International, etc., R. Co. *v.* Folts, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.; Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410; Gulf, etc., R. Co. *v.* Cushney, 95 Tex. 309, 67 S. W. 77, affirming 64 S. W. 795; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Houston, etc., R. Co. *v.* Ney (Tex. Civ. App.), 58 S. W. 43; Missouri, etc., R. Co. *v.* Mazzie & Co., 68 S. W. 56, 29 Tex. Civ. App. 295; Ft. Worth, etc., R. Co. *v.* Shanley, 81 S. W. 1014, 36 Tex. Civ. App. 291.

Wisconsin.—Stolze *v.* Ann Arbor R. Co. (Wis.), 134 N. W. 376.

In the case of connecting carriers, in the absence of evidence, it is presumed that any injury to the shipment was owing to the negligence of the delivering carrier. St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 317.

In an action against a railroad company, for damaging goods delivered to it by another railroad company, whose road connected with it, to be transported to a place on the line of the defendant's road, the plaintiff makes out a prima facie case by showing a delivery of the goods in good condition to the railroad company which first received them, and a delivery by the latter to the defendant, without proof of their good condition at that time. The burden of proof is then upon the defendant to show that the goods were not injured while in its possession or that they were damaged when received. Smith *v.* New York Cent. R. Co. (N. Y.), 43 Barb. 225, affirmed in 41 N. Y. 620.

Where the terminal carrier received and delivered a part of a shipment, the presumption is that it received the entire shipment, and, to escape liability, it must rebut the presumption. Smith *v.* Southern Railway, 71 S. E. 989, 89 S. C. 415.

Where the initial carrier receives goods for transportation to another state by a connecting carrier, in absence of contrary evidence it is presumed that the goods were lost en route through the negligence of the last carrier, and the burden is on it to show that the loss did not occur on its own line. Kansas, etc., R. Co. *v.* Carl, 91 Ark. 97, 121 S. W. 932.

Where, in an action for injuries to mules, there was evidence that the injured mules when delivered to defendant, the terminal carrier, were apparently in good condition, it would be presumed that the injury occurred while the mules were in defendant's possession. Winslow Bros. & Co. *v.* Atlantic Coast Line R. Co., 60 S. E. 709, 79 S. C. 344.

Proof that, when a shipment of shoes was delivered, three pairs were missing, was prima facie evidence that the loss occurred while the shipment was in the possession of the terminal carrier. Jenkins *v.* Atlantic Coast Line R. Co., 66 S. E. 415, 84 S. C. 361: S. C., 66 S. E. 416, 84 S. C. 360.

Where several articles of household furniture, including in a single shipment and covered by one bill of lading, which mentioned them in detail, were delivered in good order to the initial carrier, and where a part of such goods were not delivered by the connecting carrier to the consignee, proof of such facts and of the value of the goods lost makes out a prima facie case against the connecting carrier and shifts the burden to it to show nonliability. Way *v.* Southern R. Co., 64 S. E. 1066, 132 Ga. 677.

A prima facie showing of loss while in the hands of the terminal carrier is made out by testimony of the consignee that he ordered 30 bags of rice of W., and that such carrier presented to him, and he paid, a freight bill for carrying 30 packages of rice consigned by one having the same initials as W., and that it was indorsed, "4 sacks short." Charles *v.* Atlantic Coast Line R. Co., 58 S. E. 927, 78 S. C. 36; Mazursky *v.* Atlantic

prevails.[36] In some jurisdictions, however, the rule has been to some extent changed or modified by statute.[37] The presumption against the terminal carrier

Coast Line R. Co. (S. C.), 58 S. E. 931; Von Lehe *v.* Atlantic Coast Line R. Co., 59 S. E. 1135, 78 S. C. 167.

A case containing goods was delivered in good order to an initial carrier. When the connecting carrier delivered it to the owner, it was found that some of the goods had been removed and were lost. Held, that the loss presumptively occurred on the line of the connecting carrier. Bullock *v.* Boston, etc., Dispatch Co., 187 Mass. 91, 72 N. E. 256.

Where goods in a box were shipped by three successive carriers, and when delivered to the consignee (although there were no external indications of the fact) the box was found to have been opened, and certain goods abstracted therefrom, held, that the jury might presume, in the absence of evidence to the contrary, that the box remained unopened until it came into the possession of the last carrier, and that the loss occurred through its fault. Laughlin *v.* Chicago, etc., R. Co., 28 Wis. 204, 9 Am. Rep. 493.

Where the agent of the connecting carrier had been apprised of the contents of a car at the time of its delivery to the connecting carrier, and he had an opportunity before he sealed the car to verify the waybill by ascertaining the contents of the car by inspection, the connecting carrier, neglecting such opportunity, could not require the shipper suing for a loss of a part of the goods, to furnish it with information that it could have acquired by due diligence, and the burden was on it to prove that the loss occurred before it received the goods. Podrat *v.* Narragansett Pier R. Co. (R. I.), 78 Atl. 1041.

Statute not changing presumption.—Under the South Carolina statute, Civ. Code, § 2176, providing that, under a contract for shipment of freight between two or more common carriers, the responsibility of each shall cease on delivery to the connecting line in good order, on obtaining a receipt to that effect from such connecting carrier, and that the last carrier, on failure on notice to inform shipper where freight delivered was damaged, shall be liable therefor, the rule that the presumption is that the terminal carrier damaged goods delivered in bad order is not changed. Willett *v.* Southern R. Co., 45 S. E. 93, 66 S. C. 477.

36. Rule in Michigan.—In Michigan it has been held that where property shipped in good condition through several connecting carriers is damaged when it reaches the consignee, there is no presumption that the damage was the fault of the last carrier, but the burden of proof in an action against such last carrier is on plaintiff to show that defendant received the property from the other carriers in good condition. Marquette, etc., R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; Rolfe *v.* Lake Shore, etc., R. Co., 144 Mich. 169, 107 N. W. 899, 115 Am. St. Rep. 388.

37. Statutes changing or modifying rule.—A Georgia statute, Code, § 2084, provides that where there are several connecting railroads under different companies, the last company which has received the goods in "good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability. As to the presumptions arising under this statute and burden of proof that it imposes on a terminal carrier in actions against it for damages to goods, see the following cases: Central R., etc., Co. *v.* Rogers' Sons, 57 Ga. 336; Georgia R., etc., Co. *v.* Forrester, 96 Ga. 428, 23 S. E. 416; Central R., etc., Co. *v.* Bayer, 91 Ga. 115, 16 S. E. 953; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Southern R. Co. *v.* Waters & Co., 125 Ga. 520, 54 S. E. 620; Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498; Central R. Co. *v.* Rogers & Sons, 66 Ga. 251; Georgia R. Co. *v.* Gann, 68 Ga. 350; Rome R. Co. *v.* Sloan, 39 Ga. 636; Susong *v.* Florida Cent., etc., R. Co., 115 Ga. 361, 41 S. E. 566; Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757.

A Mississippi statute, Code 1892, § 4301, provides that if a carrier receive freight for further transportation and delivery within that state from another carrier on any contract, express or implied, for continuous carriage, and it arrive at the place of delivery in a damaged condition, etc., it is the duty of the last carrier to furnish to the consignee, on demand, true copies of all records and memoranda entered on the books of each carrier touching the receipt, transfers, and handling of the freight while in transit, and if it shall not furnish the same within 30 days after demand, it shall be presumed to have caused such damage, etc.; but in case of damage, loss, or destruction of perishable goods by reason of their nature, and of damage not discoverable by outward inspection, proof thereof shall be admissible. Held, that the presumption raised is necessarily conclusive, save in the two excepted cases. Russell *v.* Mobile, etc., R. Co., 40 So. 1015, 87 Miss. 806.

For the consignee of a car of freight to write the last of connecting carriers that there was a shortage, saying "Kindly trace shortage," is not such a demand as

stands as evidence throughout the trial to be weighed by the jury along with any rebutting evidence of the defendant tending to show that the damage was done while the goods were in the hands of another carrier.[38] The presumption that the damage resulted from the negligence or fault of the terminal carrier does not arise if there is no proof that the goods were in any other condition when received by the initial carrier than as found in the hands of the terminal carrier.[39] Where goods are shipped over several lines and there is a total loss, the goods not arriving at their final destination, the initial carrier is liable, unless it proves delivery to the next carrier.[40] In such case, if suit is brought against the last carrier, the burden of proof is on the plaintiff to establish the receipt of the goods by the defendant, unless some relation of agency or partnership or some special contract affects the status.[41] But evidence that the goods were delivered to and received by the defendant for transportation, and that the defendant failed to deliver the goods to the plaintiff, makes a prima facie case in favor of the plaintiff.[42] The rule that the presumption from the receipt by the consignee from the terminal carrier of a shipment of goods in a damaged condition is that the goods were damaged while in the possession of such carrier applies to perishable goods as well as other shipments, and such carrier must show that its negligence did not contribute to bring about the deterioration of the goods.[43] The presumption that goods reached the hands of the last carrier in the same condition as when delivered to the first carrier in the line, is not modified or changed by the fact that the last carrier transported the goods over its line in the same car in which it received them, instead of transferring them.[44] The presumption that goods were damaged while in the hands of the last carrier exists whether the damage is open

to make such carrier liable under Code 1892, § 4301 (Code 1906, § 4853), providing that if a carrier receive freight from another carrier for further transportation and delivery, and on arrival at place of delivery there is a shortage therein, it is the duty of the last carrier to obtain and furnish the consignee, "on demand," true copies of all notations, exceptions, records, and memoranda entered on the books of each carrier touching the receipt, transfer, and handling of the freight while in transit, and, failing to furnish the same within 30 days after demand, it shall be presumed to have caused such loss. Threefoot *v.* New Orleans, etc., R. Co., 43 So. 303, 89 Miss. 192.

38. Consideration by jury of presumption against terminal carrier and of rebutting evidence.—Parnell *v.* Atlantic Coast Line R. Co., 91 S. C. 270, 74 S. E. 491.

Instruction placing greater burden on terminal carrier than law required.—Where a shipment was over the lines of several carriers, in an action for damages to the shipment it was error to instruct that the terminal carrier was liable for all damages, unless it "should satisfy" the jury that the damage occurred on one of the other connecting lines, as the instruction placed a greater burden than the law required. Judgment 86 S. W. 17, reversed in Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761, citing Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842, reversing 38 S. W. 1141; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

39. Proof essential to presumption of liability of terminal carrier.—Alabama, etc., R. Co. *v.* Cassell Drug Co. (Miss.), 59 So. 932; Conti *v.* American Exp. Co., 110 Me. 145, 85 Atl. 484; Gude *v.* Pennsylvania R. Co., 77 N. J. L. 391, 71 Atl. 1128. See, also, Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

40. Burden of proof where there is a total loss.—International, etc., R. Co. *v.* Folts, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.; Galveston, etc., R. Co. *v.* Schafermeyer, 31 Tex. Civ. App. 586, 72 S. W. 1037.

41. Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 So. 392. See, also, International, etc., R. Co. *v.* Folts, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687.

42. Tradewell *v.* Chicago, etc., R. Co., 150 Wis. 259, 136 N. W. 794.

43. Presumption against terminal carrier applies to perishable goods.—Trakas *v.* Charleston, etc., R. Co., 87 S. C. 206, 69 S. E. 209.

44. Presumption is against last carrier though it transported goods in car in which it received them.—Leo *v.* St. Paul, etc., R. Co., 30 Minn. 438, 15 N. W. 872.

Where the last of several connecting carriers receives cars loaded with hogs so closely crowded that some of them are found to be suffocated on reaching destination, the last carrier is liable, in the absence of proof that the injury occurred on the line of the preceding carrier. Paramore *v.* Western R. Co., 53 Ga. 383.

or concealed.[45] Such presumption arises even though the goods were delivered to the last carrier in a sealed car.[46] That goods could not be inspected, when received by the final carrier, because shipped in bond, will not prevent the presumption from attaching that goods, in good condition when received by the initial carrier, were in good order when they reached the final carrier.[47]

Custom Not Overcoming Presumption That Damage Occurred after Delivery to Second Carrier.—Where goods in transit over connecting lines are discharged by the first company at a station in charge of the joint agent of the first and second companies, the presumption that the damage there occurring was after delivery to the second carrier can not be overcome by proving a prevailing custom that the goods were not considered as delivered to the second carrier till a record showing the delivery was made by the joint agent on the books.[48]

Effect of Bill of Lading Issued by Initial Carrier as Agent for Delivering Carrier.—Under a bill of lading reciting that goods were received in apparent good order, issued by the initial carrier as agent for the delivering carrier, the burden is on the delivering carrier to show that the goods were not in the condition recited.[49]

Presumption Where Terminal Carrier Receipts for Whole Shipment.—The delivery by a terminal carrier of a part of a single shipment for the whole of which it has receipted raises a presumption that the loss of the part not delivered occurred on its line, so as to require it to show the contrary.[50]

Burden upon Connecting Carrier Receipting for Goods as in Good Order.—When it is stated in the receipt given by a connecting carrier that goods were received in good order, in an action against such carrier for the loss of the goods, the onus is put upon the carrier to show they were not in the condition stated in the receipt.[51]

45. Presumption against last carrier exists though damage is concealed.—Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410.

In such a case it is not error to refuse to charge that if such carrier delivered the property in the same apparent good order as that in which it was received by it, it will not be liable. Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410.

Where a box of goods is shipped over several connecting lines, and the terminal line receives the box in apparently good condition, and marks the bill of lading "O. K.," and the goods are found to be damaged at the end of the line, a rebuttable presumption is raised that the damage occurred on that line. Morganton Mfg. Co. *v.* Ohio, etc., R. Co., 28 S. E. 474, 121 N. C. 514, 61 Am. St. Rep. 679.

46. Colbath *v.* Bangor, etc., R. Co., 105 Me. 379, 74 Atl. 918.

In an action against the last of several connecting carriers, to recover for goods shipped over the lines of such carriers by through bill of lading, and lost, the burden is on defendant to show that such loss did not occur on its line, and the presumption is not rebutted by showing that its preceding carrier loaded such goods into one of its sealed cars, which had no end windows or other means of entering except through the doors, where it was not shown that the seal remained as put on. Faison *v.* Alabama, etc., R. Co., 69 Miss. 569, 13 So. 37, 30 Am. St. Rep. 577.

47. Presumption against final carrier applies to goods shipped in bond.—Stolze *v.* Ann Arbor R. Co. (Wis.), 134 N. W. 376.

48. Custom not overcoming presumption that damage occurred after delivery to second carrier.—Kansas City Southern R. Co. *v.* Embry, 90 S. W. 15, 76 Ark. 589.

49. Effect of bill of lading issued by initial carrier as agent for delivering carrier.—St. Louis, etc., R. Co. *v.* Jamieson, 20 Okla. 654, 95 Pac. 417.

50. Presumption where terminal carrier receipts for whole shipment.—Harter *v.* Charleston, etc., R. Co., 85 S. C. 192, 67 S. E. 290.

51. Burden upon connecting carrier receipting for goods as in good order.—Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

The burden is upon the last of several connecting carriers who received a parcel under a receipt for it as in good order, and delivered it in damaged condition, to prove that the injury was due to the fault of previous carriers, if that defense is relied on. Dixon *v.* Richmond, etc., R. Co., 74 N. C. 538.

Evidence overcoming presumption raised by receipt.—Where, in an action predicated on Civ. Code 1895, § 2298, for the value of a bale of cotton against defendant as the last connecting carrier receiving the same in good order, it ap-

Presumption Where Portion of Goods Is Lost and Remainder Found in Possession of a Carrier.—Where a portion of the goods shipped over the lines of several connecting carriers is lost, it will be presumed that the carrier in whose possession the remainder is found has caused the damage; and the burden is on such carrier to show that it was not responsible for the loss.[52]

Effect of Receipt from Connecting Carrier Differing from Original Bill of Lading as to Destination Designated.—In an action against an initial carrier for loss of goods, in which it produces a receipt from a connecting carrier differing from the original bill of lading as to the destination designated, the burden is on the initial carrier to show that its failure to extend to the connecting carrier proper instructions did not cause the loss.[53]

Presumptions and Burden of Proof Where Live Stock Are Mixed and Unclassified.—The liability of a connecting carrier of live stock for damages for mixing and unclassifying the stock can not be predicated on the fact that it received the stock in the mixed condition and carried the same to the point of destination without grading and classifying them, since it may not be presumed to know that the stock had been mixed or that they were not loaded on its cars as they were loaded by the shipper.[54] Where, in an action against a connecting carrier for mixing cattle in reloading, the petition specifically alleges that the mixing was done at stockyards at which the initial carrier delivered the stock, the burden of showing that the mixing of the cattle was done before delivery to the connecting carrier does not rest on it to avoid liability, for it can not be presumed that it owned or controlled the yards.[55]

§§ 3802-3804. Admissibility of Evidence—§ 3802. In Action against Initial Carrier.—Shipping Order and Bill of Lading.—In an action against the initial carrier it is error to refuse to admit in evidence, when offered by the carrier, the shipping order, containing directions as to the shipment and the bill of lading, when the circumstances in evidence warrant their admission.[56]

Admissibility of Parol Evidence Where Contract for Carriage Is in Writing.—In an action against the initial carrier, where the contract for car-

peared that defendant, as a connecting carrier, received two cars containing cotton from the initial carrier, and gave its receipt therefor as in apparent good order, and that at the time the cars were turned over to defendant they were in good condition, the seals unbroken, and there was no indication that they had been tampered with, and there was no way to enter the car without injuring the seals, and when defendant broke the seals for the purpose of delivering the cotton it was ascertained that one bale was missing, such facts overcome the presumption raised by the receipt for the goods as in apparent good order, and could lead to no other conclusion but that there had been an error in counting the bales of cotton when loading the cars, and that, in fact, the bale of cotton was not in the cars at the time it was delivered to defendant by the initial carrier. Atlantic, etc., R. Co. *v.* Henderson, 61 S. E. 1111, 131 Ga. 75.

52. **Presumption where portion of goods is lost and remainder found in possession of a carrier.**—Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 38 S. E. 894, 128 N. C. 280, 83 Am. St. Rep. 675.

53. **Effect of receipt from connecting carrier differing from original bill of lading as to destination designated.**—Chartrand *v.* Southern Railway, 67 S. E. 741, 85 S. C. 479.

54. **Presumptions and burden of proof where live stock are mixed and unclassified.**—Baltimore, etc., R. Co. *v.* Clift, 142 Ky. 573, 134 S. W. 917.

55. Baltimore, etc., R. Co. *v.* Clift, 142 Ky. 573, 134 S. W. 917.

56. **Shipping order and bill of lading erroneously excluded.**—Where goods were delivered to a railroad company in Indiana, marked and directed to a consignee in Kansas, for transportation, its line of road terminating at Chicago, Ill., and it appeared that on the next day the company made out and delivered to the shipper a bill of lading, containing an agreement to carry the goods to the company's freight station in Chicago, and limiting its liability to its own line of road, and that the goods reached Chicago in safety, and were transferred to another company, in whose custody they were burned, held, in a suit against the company so giving such bill of lading, to recover for the loss, that it was error to refuse to admit in evidence on the part of the company the shipping order, containing directions as to the shipment and the bill of lading. Pennsylvania Co. *v.* Fairchild, 69 Ill. 260.

riage is in writing, parol evidence is inadmissible to vary its terms or to import into it a stipulation which it does not contain.[57]

Evidence of Usual Course and Custom of Doing Business Adopted by Connecting Carriers.—In an action to recover from an initial carrier for the loss of goods after they had been delivered to a connecting carrier, evidence of the usual course and custom of doing business adopted by connecting lines of railroad is admissible on the question of the receipt or delivery of the property by one to the other.[58]

Evidence of General Usage of Carrier to Transfer Goods to Next Carrier.—In an action against a carrier for the loss of goods consigned to a point beyond its terminus, the shipper, where the bill of lading is silent on the subject, may show the general usage of the carrier to transfer goods to the next carrier so as to render the defendant liable, as a carrier, for a loss occurring before the transfer was completed.[59]

Evidence of Custom between Carriers Not to Receipt for Cars until the Day after Receiving Them.—In an action against a carrier to recover damages by delay to a car load of perishable goods shipped, where there was evidence that the car was delivered by defendant to a connecting carrier on the

57. **Parol evidence inadmissible to vary terms of written contract.**—Where the contract for carriage of a passenger is in writing, the writing alone should be looked to, and it is not competent to import into the agreement by parol testimony a stipulation that the plaintiff was to be carried to his destination, over connecting lines, in the same car. Missouri, etc., R. Co. *v.* Harrison, 97 Tex. 611, 80 S. W. 1139, reversing 77 S. W. 1036. See Missouri, etc., R. Co. *v.* Foster, 97 Tex. 618, 80 S. W. 1097, reversing 78 S. W. 1134.

When, under the terms of a contract of carriage, the carrier obligates itself to carry freight to one of the termini of its railroad and there deliver the same to a connecting line of railroad or steamer to be transported to the destination, evidence of a parol representation that the freight would be delivered to a connecting railroad and not to a steamer, is inadmissible to vary the terms of the written agreement. McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

No ambiguity in contract warranting admission of oral evidence.—A railroad company in Wisconsin gave a shipper a receipt, "as agents and forwarders," for 100 barrels of flour. "Contract from Neenah to New York, at $2.25 per barrel." Held, that the contract was for the transportation of the flour to New York, and that there was no such ambiguity in it as to make oral evidence admissible to show that it was not intended to bind the company as common carriers for the whole distance to New York. Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

Evidence held not objectionable as tending to vary terms of contract.—In an action against an initial carrier for injuries to plaintiff's wife as a passenger on defendant's through car by failure to properly heat the same, where the contract for transportation provided that the initial carrier should be liable only for injuries occurring on its own line, testimony of plaintiff as to conversations with agents of defendant prior and subsequent to the purchase of the ticket, but before the journey commenced, in which he was told by the agents that defendant was to furnish the cars for the through trip, was not objectionable as tending to vary the terms of the contract. Missouri, etc., R. Co. *v.* Foster (Tex. Civ. App.), 87 S. W. 879, affirmed in 101 Tex. 649, no op.

It having been shown on the trial of a suit against a railroad company for damages alleged to have been occasioned by delay in delivering a carload of fruit that the defendant accepted the same for transportation and gave a receipt describing the car, stating it was consigned to a named party at a designated point, and containing the figures "62.20," the point named being in another state and beyond the defendant's line, there was no error in admitting evidence to prove that the "62.20" was the amount of the freight for the entire distance and was prorated among all the railroad companies over whose lines the car was routed in order to reach its destination; nor in leaving the jury to determine whether or not the receipt, in the light of such evidence, constituted a through contract of shipment. Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

58. **Evidence of usual course and custom of doing business adopted by connecting carriers.**—Root *v.* Great Western R. Co. (N. Y.), 65 Barb. 619, 1 Thomp. & C. 10, affirmed in 55 N. Y. 636.

59. **Evidence of general usage of carrier to transfer goods to next carrier.**—Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

afternoon of the 13th, but the receipt therefor was given defendant on the 14th, it was error to exclude evidence that it was a custom between the carriers not to receipt until the following day for cars received by one from the other in the afternoon.[60]

Evidence to Show Condition of Goods When Delivered to Connecting Carrier.—In an action against the initial carrier to recover damages for injury to goods evidence is admissible to show delivery of the goods in good condition to the next connecting carrier.[61] In an action against the initial carrier for injury to poultry occasioned by delay in shipment, evidence of the condition of the poultry after transportation by a connecting carrier is admissible, as tending to show its condition when delivered by defendant to the connecting carrier.[62]

Evidence that Injury Occurred after Delivery of Property to Connecting Carrier.—In an action to recover for the deterioration in value of live stock caused by delays, under a complaint alleging a special contract by the defendant to carry to a specified place, and a breach of the contract, and an answer containing a general denial, the defendant may prove that the injury complained of accrued after the property had passed beyond the defendant's terminus onto another line.[63] But where injury to live stock is due to the defective condition of the car, testimony that it occurred after the car was delivered to a connecting carrier is properly excluded.[64]

§ 3803. In Action against Intermediate or Last Carrier.—Evidence That Goods Were Delivered to Initial Carrier for Shipment.—Evidence that goods were delivered to a carrier for shipment is admissible on behalf of the plaintiff in an action against a connecting carrier to recover for the loss of the goods.[65]

Evidence to Prove Terms of Contract Made by Initial Carrier.—In an action against an express company, as a connecting carrier, for refusal to deliver a soldier's corpse to his father, evidence that the telegraph agent at the destination was also the express agent, and that he had received a telegram before the arrival of the corpse, notifying the consignee that all the expenses of shipment

60. **Evidence of custom between carriers not to receipt for cars until the day after receiving them.**—Hewitt *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790.

61. **Evidence held competent to show delivery of goods in good condition.**—In an action to recover damages for injury to goods shipped over defendant road, an agent of defendant testified that the goods were delivered in good condition to the next line of road, and that his knowledge was derived from the custom of the road receiving goods from another, of examining them, and, if in good condition, receiving them, and checking them "all right." Held, that the evidence was competent to show a delivery of the goods in good condition. Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

But in Georgia, in an action against a carrier, under Civ. Code 1910, §§ 2771, 2772, requiring carriers, on application by shipper, to trace freight which may have been lost, and to inform applicant in writing within 30 days of the time, place, and manner of the loss, and the names of those by whom such facts may be established, for failure to trace freight on application, evidence that defendant, the initial carrier, delivered the property in good order to the next carrier for transportation to its destination was held inadmissible, though the bill of lading stated that it was subject to the conditions thereon, and was signed by the shipper and the carrier's agent, and one of the conditions was that no carrier should be liable for loss or damage not occurring on its portion of the route. Davis *v.* Seaboard Air Line Railway, 71 S. E. 428, 136 Ga. 278. See, also, Savannah, etc., R. Co. *v.* Elder, 116 Ga. 942, 43 S. E. 379.

62. **Evidence of condition of poultry after transportation by connecting carrier.**—Holden *v.* New York Cent. R. Co., 54 N. Y. 662.

63. **Evidence that injury occurred after delivery of property to connecting carrier.**—Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

64. Burnside, etc., R. Co. *v.* Tupman, 72 S. W. 786, 24 Ky. L. Rep. 2052.

65. **Evidence that goods were delivered to initial carrier for shipment.**—Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 38 S. E. 894, 128 N. C. 280, 83 Am. St. Rep. 675.

had been paid by the government, was admissible to prove the terms of the shipment contract made by the initial carrier, and binding upon the defendant.[66]

Receipt or Bill of Lading Given by Initial Carrier.—The receipt or bill of lading given by the initial carrier will be competent evidence in an action against any of the succeeding carriers into whose possession the goods may have come to show the delivery for transportation, the condition of the goods at the time of such delivery, and the terms of the shipment.[67]

Original Waybill.—In an action against a connecting carrier for failure to deliver goods transported by it upon the tender by plaintiff of the charges for carriage specified in the bill of lading issued by the initial carrier, the original waybill, showing that, at the time defendant company received the freight, it paid accrued charges amounting to as much as the amount fixed in the bill of lading for the entire transportation, is admissible in defendant's behalf, as it shows that the latter did not intend to ratify the original contract.[68]

Evidence That Shipment Was Accepted and Forwarded on a Through Rate.—In an action against the terminal carrier, evidence that the shipment was accepted and forwarded on a through rate does not prove the existence of a traffic arrangement between the initial and connecting carriers such as to make them partners in the transportation of the goods or agents of each other, but it may be considered in connection with other evidence on the issue.[69]

Evidence That Injury Was Done before Carrier Received Goods.—A statute, providing that, where there are several connecting railroads under different companies, the last company which has received goods as in "good order" shall be responsible to the consignee for any damage, having no application to an action against a railroad company where the declaration fails to allege that defendant received the goods as in good order, evidence that the injury to the goods was done before defendant received them is admissible in defense.[70]

Memorandum by Carrier's Agent as to Poor Condition of Horses Received.—Where, in an action against the last of two connecting carriers for damages to horses shipped over both roads, the complaint alleges that the horses were in good condition on their arrival at the place where the two roads connect, evidence is competent of a memorandum made by defendant's agent at such place, in the presence of plaintiff, as to their poor and weak condition on such arrival.[71]

66. **Evidence to prove terms of contract made by initial carrier.**—Alcorn *v.* Adams Exp. Co., 148 Ky. 352, 146 S. W. 747.

67. **Receipt or bill of lading given by initial carrier.**—Southern Exp. Co. *v.* Hess, 53 Ala. 19; Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392.

But in Georgia it has been held that a bill of lading executed in St. Louis, Mo., for corn, "received in apparent good order on board good steamboat Emma C. Elliott, to be conveyed from St. Louis to Memphis, and from thence by the Memphis and Charleston Railroad, to be delivered in like good order at the company's depot at La Grange, Ga.," and signed by their agent, is not evidence to show the reception of the corn in good order by the defendant, unless it is proved that the defendant was one of the connecting roads under contract with the other and with the steamer, and thus bound by the act of the steamer's agent at St. Louis. Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

To bind "the last company which has received the goods as in good order," under the Georgia statute, Code § 2084, there must be some proof that it so received them; and the written indorsement of the agent on the bill of lading, made some time after the reception, is not evidence, unless accompanied with proof that it was his business so to act on reference of the matter to him. Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

68. **Original waybill.**—Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 16 Am. St. Rep. 926, 7 L. R. A. 478.

69. **Evidence that shipment was accepted and forwarded on a through rate.**—Smith *v.* Southern Railway, 89 S. C. 415, 71 S. E. 989.

70. **Evidence that injury was done before carrier received goods.**—Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, so holding in an action under Code, § 2084.

71. **Memorandum by carrier's agent as to poor condition of horses received.**—Vicksburg, etc., R. Co. *v.* Stocking (Miss.), 13 So. 469.

Evidence of Loss Resulting from Carrier Requiring Transshipment of Freight.—Where one who shipped freight over a road for delivery to a connecting road to be transported to its destination sues the connecting road to recover for its refusal to receive the freight loaded on board the cars of the receiving carrier, and for requiring transshipment thereof, evidence of the loss sustained by the plaintiff by being compelled to sell freight of the same kind which they had on hand, at greatly reduced prices, by reason of the conduct of the defendant, is admissible.[72]

Evidence to Show that Carrier Furnishing Car Knew Purpose for Which It Was Required.—Evidence that in making requisitions on a connecting line for cars a railroad company is obliged to give the connecting line information of the use to be made of the cars, and of the place to which they are to be sent, is admissible, in an action for negligence in transporting the plaintiff's cattle in a car infected with Texas fever, to show that the company that furnished the car knew the purpose for which it was required.[73]

Freight Bill Presented by Terminal Carrier.—For the purpose of showing that four bags out of a shipment of rice were lost while in the possession of the terminal carrier, a freight bill for transporting 30 packages of rice presented by such carrier to, and paid by the consignee, and indorsed, "4 sacks short," is relevant.[74]

§ 3804. In Action against Initial and Connecting Carriers.—Evidence That Agent Acted in Joint Interest of Carriers.—In an action against connecting carriers, evidence that an agent, with the knowledge of the companies, acted in their joint interest and for their common benefit, was admissible, as tending to show the joint prosecution of a common undertaking.[75]

Evidence Offered by One Carrier That Other Neglected to Furnish Cars.—Where two railroads are sued on a joint contract for transportation, evidence offered by one of them to prove that the other neglected to furnish cars is immaterial.[76]

Evidence to Explain Circumstances under Which Connecting Carrier Receipted for Freight.—In an action against the initial and connecting carriers for loss of freight, evidence that the waybill, made at the place where the goods were delivered to the connecting carrier, was made out from the waybill which accompanied the car, and not from an inspection of the contents of the car, which was sealed, is admissible to explain how it happened that the connecting carrier receipted for the freight.[77]

§ 3805. Weight and Sufficiency of Evidence.—In actions against connecting carriers the courts have frequently been required to pass upon the weight of the evidence and its sufficiency to prove particular facts. Thus the courts have been required to determine whether there was sufficient evidence to show that a particular carrier was a connecting carrier;[78] whether the evidence justified an

72. **Evidence of loss resulting from carrier requiring transshipment of freight.**—Central R. Co. *v.* Logan & Co., 77 Ga. 804, 2 S. E. 465.

73. **Evidence to show that carrier furnishing car knew purpose for which it was required.**—St. Louis, etc., R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

74. **Freight bill presented by terminal carrier.**—Charles *v.* Atlantic Coast Line R. Co., 58 S. E. 927, 78 S. C. 36; Mazursky *v.* Atlantic Coast Line R. Co. (S. C.), 58 S. E. 931; Von Lehe *v.* Atlantic Coast Line R. Co., 59 S. E. 1135, 78 S. C. 167.

75. **Evidence that agent acted in joint interest of carriers.**—Chicago, etc., R. Co. *v.* Halsell, 80 S. W. 140, 35 Tex. Civ. App. 126, judgment affirmed in 83 S. W. 15, 98 Tex. 244.

76. **Evidence offered by one carrier that other neglected to furnish cars.**—Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

77. **Evidence to explain circumstances under which connecting carrier receipted for freight.**—Mussellam *v.* Cincinnati, etc., R. Co., 104 S. W. 337, 31 Ky. L. Rep. 908.

78. **Evidence showing defendant was a connecting carrier between points of shipment and destination.**—Where the evidence shows that a particular car bearing a specific number and loaded

instruction as to the identity of two railroads;[79] whether the evidence authorized a finding that connecting carriers were liable as partners;[80] whether the evidence proved an agreement between connecting carriers rendering them practically one;[81] whether the evidence authorized a finding that one railroad was simply a division of the other;[82] whether the evidence was sufficient to show that an initial carrier was authorized to make a contract in behalf of a connecting line for through shipments;[83] whether the evidence was sufficient to show that a bill of lading was modified by parol agreement;[84] whether bills of lading were sufficient to prove delivery of the quantity of goods noted to an initial carrier, in the absence of evidence to disprove their accuracy or correctness;[85] whether there was sufficient evidence to show that the consignor did not regard the original carrier as having assumed a carrier's liability for the entire route;[86]

with melons was shipped from a point on the initial carrier's line to a point beyond its terminus, and that this same car was afterwards in the possession of the defendant carrier at the point of its destination and that the latter sent to the consignee a bill for freight, the fact that the defendant carrier was one of a line of connecting roads between the point of shipment and the point of destination, is sufficiently established. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

Evidence warranting finding that line to which cattle were transferred was a connecting carrier.—In an action for injuries to cattle shipped on defendant's line, evidence held sufficient to warrant a finding that a line to which the cattle were transferred by defendant was a connecting carrier. Chicago, etc., R. Co. *v.* Slaughter, 106 S. W. 208, 84 Ark. 423.

79. Evidence justifying instruction as to identity of two railroads.—In Southern Kansas R. Co. *v.* Crump, 32 Tex. Civ. App. 222, 74 S. W. 335, affirmed in 97 Tex. 647, no op., the evidence was held to justify court in summarily instructing the jury as to identity of two railroads negligently transporting plaintiff's cattle.

80. Evidence sufficient to authorize finding that carriers were liable as partners.—Evidence in an action for delay in delivery of freight, to be transported from G. to J. over the Z. Railroad and from J. to T. over the I. Railroad, that the two companies had the same freight agent at J., the same freight dispatcher and other employees, and that the entire route from G. to T. was under the supervision of a common traveling freight agent, is sufficient to authorize a finding of a partnership arrangement between the two companies, making them liable as partners. Illinois Cent. R. Co. *v.* Jones, 39 So. 493, 87 Miss. 489.

81. Evidence insufficient to show agreement between connecting carriers rendering them practically one.—In an action against an initial carrier for injuries to live stock by the negligence of a connecting carrier, evidence held insufficient to show any contract, express or implied, or a partnership or traffic agreement, between the two carriers, which rendered them practically one, so as to make the initial carrier liable for injuries from the negligence of the connecting carrier. Carter *v.* Chicago, etc., R. Co., 146 Iowa 201, 125 N. W. 94.

82. Evidence authorizing finding that one railroad was simply a division of the other.—In an action against connecting railroads for injuries to live stock, evidence that the railroads were under the same executive control; that the checks to the men employed by one came from the headquarters of the other; that the stationery of the former was furnished by the latter; that the contract of shipment was made in the name of the latter, while the name of the former was stamped at the head thereof; and other evidence generally tending to show that the two roads were under the same management although using a distinct name and having a separate charter—was sufficient to authorize a finding that the railroads were not separate organizations, but that one was simply a division of the other. Southern R. Co. *v.* Thomas, 90 S. W. 1043, 28 Ky. L. Rep. 951.

83. Evidence held to show that an initial carrier of freight was authorized to make a contract on the part of a connecting line for through shipments. Gulf, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 139 S. W. 81.

84. Evidence showing that bill of lading was modified by parol agreement.—Evidence held to show that a bill of lading for goods to be transported over several connecting lines was modified by parol agreement between the parties as to the lines over which the shipment was to be made. Steidl *v.* Minneapolis, etc., R. Co., 102 N. W. 701, 94 Minn. 233.

85. Bills of lading held sufficient to prove the delivery of the quantity of goods noted to an initial carrier, in the absence of evidence to disprove their accuracy or correctness. New York, etc., Transp. Line *v.* Baer & Co., 118 Md. 73, 84 Atl. 251.

86. Evidence that consignor did not regard original carrier liable for entire distance.—Where the consignor of property which a railroad company agreed to

whether the evidence warranted a finding that a carrier made delivery by employing another carrier as its agent;[87] whether the evidence was sufficient to show that a particular carrier was responsible for a delay in transportation;[88] whether the evidence was sufficient to show that goods were delivered to the initial carrier in good condition;[89] whether there was sufficient evidence to place the responsibility for loss of or injury to goods upon the initial carrier;[90] whether the evidence warranted submission to the jury of the question

transport from one point to another, partially over connecting lines, signed and received from the connecting lines bills of lading in which they assumed all liability, there was sufficient evidence that such consignor did not regard the original carrier as having assumed a carrier's liability for the entire distance. Hartley *v.* St. Louis, etc., R. Co., 89 N. W. 88, 115 Iowa 612.

87. **Evidence warranting finding that carrier made delivery by employing another carrier as its agent.**—In an action against a railroad company for loss of grain in transit over connecting lines, evidence held to warrant a finding that defendant, after transporting the shipment to the point of destination, made delivery to the consignee, using another railroad company's freight yard as its yard, and employing that company to haul the shipment as defendant's agent. Shapiro *v.* Boston, etc., Railroad, 99 N. E. 459, 213 Mass. 70, Ann. Cas. 1913E, 1028.

88. **Evidence held to warrant a finding that defendant's connecting carrier was responsible for a delay** in the transportation of an emigrant's effects, between points of shipment and junction points. McManus *v.* Chicago, etc., R. Co. (Iowa), 136 N. W. 769.

Evidence showing unreasonable delay by connecting carrier.—Evidence held to show unreasonable delay in the transportation of live stock by the connecting carrier. McMillan *v.* Chicago, etc., R. Co., 147 Ill. 596, 124 N. W. 1069.

Evidence justifying finding that delay was caused solely by last carrier's mistake.—Cotton was shipped by plaintiff to "Byron Sherman," and received by defendant from a connecting line with a freight bill in which was stated the numbers and marks on the bales, but the consignee's name was given as "Ryan Sherman." Defendant in its entries changed the name of the consignee to "Ryan & Sherman," and so carried it to its destination. Not finding such a firm, defendant warehoused the cotton. Byron Sherman called at defendant's office at the destination about the time of the arrival of the cotton, and several times thereafter, and exhibiting the bills of lading containing the number of bales and marks thereon, and inquired for the cotton, but could get no information concerning it. In an action to recover for delay in the delivery, held, that the evidence was sufficient to justify a finding that the delay was caused solely by defendant's mistake. Sherman *v.* Hudson River R. Co., 64 N. Y. 254, affirming 5 Daly 521.

No evidence warranting finding that delay was chargeable to last carrier.—Where goods shipped over connecting lines are delayed in arriving at their destination, and there is no evidence of the terms of the contract of shipment, or that the company completing the transportation had any connection with the contract, or evidence, showing when, where, or by which of the companies the delay was caused, a finding that the delay was chargeable to the company last receiving the goods was not warranted. Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674.

89. **Evidence showing goods were delivered to initial carrier in good condition.**—In an action against a terminal carrier for injuries to peaches, evidence held sufficient to show that the fruit was delivered to the initial carrier in sound condition. Philadelphia, etc., R. Co. *v.* Diffendal, 72 Atl. 193, 109 Md. 494, rehearing denied in 72 Atl. 458.

In an action to recover damages by freezing of a car load of holly while in transit, evidence held to sustain a finding that it was in good condition when delivered to the initial carrier. Pressley Co. *v.* Illinois Cent. R. Co. (Minn.), 136 N. W. 11.

90. **Evidence justifying inference that initial carrier was solely to blame for damage.**—Defendant railroad company received certain batteries in crates for transportation, and after the arrival of the batteries delivered the same to a transfer company for delivery. The batteries were in the railroad company's possession for about two weeks, and in the possession of the transfer company not more than one or two days. On arrival it was found that the batteries were damaged by the spilling of their contents, and there was evidence that the same must have been spilled for more than a week before the goods were received, because of the condition and appearance of the packing. Held, that such facts were sufficient to justify an inference that the railroad company was solely to blame for the damage. Hoye *v.* Pennsylvania R. Co., 100 N. Y. S. 190, 114 App. Div. 821, affirmed in 83 N. E. 586.

Evidence establishing, prima facie, liability of initial carrier for loss of goods.—In an action against a carrier for the

whether the shipper relied on statements of the carrier's agent;[91] whether, in an action against the terminal carrier, the evidence was sufficient to take the case to the jury;[92] whether the evidence was sufficient to charge a connecting carrier with the receipt of goods;[93] whether there was sufficient evidence to show that the terminal carrier did not receive freight;[94] whether there was evidence sufficient to show that goods or live stock were in good condition when delivered to

loss of goods, it appeared that plaintiff delivered them to defendant, to be transported to a point beyond the terminus of the latter's line, and that defendant gave a receipt therefor, reciting that the goods were to be forwarded to its terminus for plaintiff at the specified point of destination. Held, that it was sufficient to establish, prima facie, a right of recovery in an action on the case against defendant, for negligence as a common carrier, for loss of the goods, to show the delivery of the goods to defendant, and that they had not arrived at the point of destination, but were lost. Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665.

Evidence warranting verdict against initial carrer for injury to books.—Defendant received a package of plaintiff's books for shipment, and then delivered them to a connecting carrier after an unexplained delay of three days. The other carrier receipted for the package as being in good condition, without opening it. When plantiff opened the package, the books were wet, and mildew indicated that they became so at an early stage of transportation. Held, that a verdict for plaintiff was sustained. Hunt *v.* Michigan, etc., R. Co., 37 N. Y. 162, 35 How. Prac. 287.

Evidence warranting finding that hogs were not properly cared for by initial carrier.—In an action against the initial carrier for injuries to a shipment of hogs, evidence held to warrant a finding that the hogs were not properly cared for while in the possession of the initial carrier. Illinois Cent. R. Co. *v.* Stevens, 96 S. W. 888, 29 Ky. L. Rep. 1079.

Circumstances warranting inference that initial carrier was responsible for injury to hogs.—In an action by a shipper against a railroad company for damages arising out of defendant's alleged failure to transport and deliver with reasonable dispatch a car load of hogs, and to water them externally while in transit, by reason of which neglect a number of them died, it did not appear whether the damage occurred while the car was being transported by defendant, or later, while in charge of the connecting road. Held that, it appearing that the delay was during the most trying time of the day and while the car was in defendant's charge, the jury might have drawn from such circumstance the inference that defendant was responsible for the injury. Wallace *v.* Lake Shore, etc., R. Co., 95 N. W. 750, 133 Mich. 633.

91. Evidence warranting submission to jury of question whether plaintiff relied on statements of defendant's agent.—In an action for damages to live stock shipped over defendant's railroad, evidence examined, and held sufficient to warrant submitting to the jury the question as to whether plaintiff signed the contract of shipment in reliance on untruthful statements of the agent that it rendered defendant liable as a through carrier. Louisville, etc., R. Co. *v.* Bennett, 76 S. W. 408, 25 Ky. L. Rep. 834.

92. Evidence sufficient to take case to jury in action against terminal carrier.—In an action against a terminal carrier for injury to live stock during transportation, evidence examined, and held sufficient to take the case to the jury. Huggins *v.* Atlantic Coast Line R. Co., 60 S. E. 694, 79 S. C. 341.

93. Evidence sufficient to charge connecting carrier with receipt of goods.—Evidence that 14 boxes of goods were delivered to a railroad company for shipment; that they were sealed in a car; and that the car, still sealed, was delivered to a connecting line, is sufficient to charge such connecting carrier with the receipt of the 14 boxes. Newport News, etc., R. Co. *v.* Mendell, 17 Ky. L. Rep. 1400, 34 S. W. 1081.

Evidence, in an action against a carrier for nondelivery of freight, that there was shipped to plaintiff at the same time, and as parts of the same shipment, a barrel and a box, that defendant received from a connecting carrier the barrel and transported it to destination, that on its waybill and expense bill appeared both the barrel and box with notations indicating that both were received by it and carried to destination and checked as in its possession there, is sufficient evidence that it received the box, though 30 days after delivery of the barrel to plaintiff, at which time defendant could not find the box, it was found in the possession of another carrier at its destination. Chicago, etc., R. Co. *v.* Pfeifer & Bro., 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107.

94. Evidence not showing that terminal carrier did not receive freight.—In an action against a terminal carrier for loss of freight, evidence held not to show that the terminal carrier did not receive the freight from the initial carrier contracting for a through shipment. Lacey *v.* Oregon R., etc., Co., 63 Ore. 596, 128 Pac. 999.

an intermediate or last carrier;[95] whether there was sufficient evidence to show that loss of or injury to goods or live stock occurred on the line of an intermediate or last carrier, or that such carrier was responsible therefor;[96] and

95. Evidence supporting finding that horses were in good condition when delivered by a prior carrier.—In an action against a railroad for injury to horses in transit, evidence held sufficient to support a finding that the horses were in good condition when they were delivered to defendant by a prior carrier. Powers *v.* Chicago, etc., R. Co., 105 N. W. 345, 130 Iowa 615.

Evidence insufficient to show goods were in good order when received from initial carrier.—In an action against a terminal carrier for injuries to goods, evidence held insufficient to show that they were in good order when received from the initial carrier. Rolfe *v.* Lake Shore, etc., R. Co., 107 N. W. 899, 144 Mich. 169, 115 Am. St. Rep. 388.

Sufficiency of evidence to show reception of freight in good order by last carrier.—A bill of lading given by the agent of a steamboat line acknowledging the receipt on board of the freight in apparent good order, for transportation by the boat and connecting railroads, is not sufficient to show the reception of the freight in good order by the last carrier, unless it is shown also that the last carrier was one of the connecting roads under contract with the other carriers and steamer and thus bound by the act of the steamer's agent. Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

96. Evidence held not to show that injury occurred on line of intermediate carrier.—On the arrival of freight at the consignee's store, a box was discovered to have been opened and the contents damaged. Its exterior showed chisel marks. The freight had been routed, by way of connecting rail and river lines, to a river point, and from there by rail to the place of destination, and the last rail transportation took only about two hours. In answer to the agent's suggestion that the injury must have occurred before the last carrier received the goods, the consignee stated that he believed the injury was done before then. A bill of lading issued by the last carrier receipted for the goods in apparent good order. Held not to show that the injury occurred on the preceding carrier's line. Great Western R. Co. *v.* McDonald, 18 Ill. 172.

Evidence not warranting recovery against intermediate carrier for injury to cattle.—Part of the train on which plaintiff's cattle were transported was derailed by the breaking of the axle on a foreign car, to the rear of the cars in which the cattle were loaded, and the cattle were only slightly jarred by the derailment. After the cattle reached the next transfer point, they were found to be standing, and there were no indications that any of them had been hurt by the accident; but, on reaching their destination, it was found that several had sustained injuries. Held that, in the absence of further proof as to what the injuries were and as to how and where they were inflicted, plaintiff was not entitled to recover therefor against the connecting carrier, on whose line the derailment occurred. Western Maryland R. Co. *v.* Landis, 53 Atl. 976, 95 Md. 749.

Evidence showing goods were not damaged by delivering carrier.—Evidence, in an action for damage to goods en route, held to show that they were not damaged while in the possession of the delivering carrier. Stolze *v.* Ann Arbor R. Co. (Wis.), 134 N. W. 376.

In an action against an intermediate and the delivering carrier for damages to household goods in transit, evidence held to sustain a finding that the goods were not injured while in the possession of the delivering carrier. Boss *v.* Atlantic Coast Line R. Co., 156 N. C. 70, 72 S. E. 93.

Evidence not showing that mixing of live stock was done by connecting carrier's agents.—Where, in an action against a connecting carrier of live stock for mixing and unclassifying the stock, the evidence merely showed that the mixing was done in reloading at stockyards at which the stock was delivered by the initial carrier, but did not show that the carrier owned or controlled the yards or that the persons who reloaded the stock were its agents, there was a failure to show that the mixing was done by the connecting carrier's agents and it was not liable therefor. Baltimore, etc., R. Co. *v.* Clift, 134 S. W. 917, 142 Ky. 573.

Evidence not showing a wanton or willful breach of duty by terminal carrier.—A terminal carrier transported horses 711 miles after a previous transportation of over 1,400 miles. The carriage was made by the terminal carrier within 4 or 5 days, and food and water were procured at four different places along the route. There was no evidence of any unreasonable delay or wanton neglect of the horses. A witness testified that the horses when delivered to the terminal carrier were in good shape. The horses when delivered by the terminal carrier appeared gaunt, weak, and hungry. Held, not to show a wanton or willful breach of duty by the terminal carrier. Mayfield *v.* Southern R. Co., 84 S. C. 393, 66 S. E. 405.

Evidence justifying finding that loss occurred on connecting carrier's line.—On the issue whether a connecting carrier exonerated itself from liability for loss

whether there was sufficient evidence to prove that the defendant carrier was exempted from liability for loss by fire.[97]

§§ 3806-3807. Measure of Damages—§ 3806. In Action against Initial Carrier.—For Injuries to Live Stock in Transit.—Where live stock are shipped over connecting carriers, the measure of damages in an action against

of goods delivered to it by an initial carrier, evidence held to justify a finding that the loss occurred on the connecting carrier's line. Bullock *v.* Boston, etc., Dispatch Co., 72 N. E. 256, 187 Mass. 91.

Evidence sufficient to charge carrier, making insufficient delivery to connecting carrier, with injury to property.—Proof that a railroad company, an intermediate carrier, in November, left a car of apples on the track of another railroad company, without making such delivery, to the latter, of the car, freight bill, and expense voucher, as a reasonable usage and regulation between the two corporations required, and for that reason the latter corporation did not assume the actual custody of the car, but returned it to the track of the former, is sufficient evidence of negligence to charge the former corporation with subsequent injury to the property, resulting from the weather. Reynolds *v.* Boston, etc., R. Co., 121 Mass. 291.

Evidence held to justify a finding that shrinkage of live stock was due to the failure of the connecting carrier to unload the stock on the shipper's request at the point it received the shipment from the initial carrier. Westphalen *v.* Atlantic, etc., R. Co., 152 Iowa 232, 132 N. W. 57.

Evidence held to establish prima facie case for all damages against terminal carrier.—In the case of Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410, a shipment of furniture was made from Chicago, Ill., to Dallas, Tex. The evidence showed that the furniture was in good condition and carefully packed when it left Chicago, and in a damaged condition when it reached Dallas. It was hauled from Chicago to Purcell, Ind. T., by the Santa Fe Railway Company, and from Purcell to Dallas by the Gulf, Colorado & Santa Fe Railroad Company. The latter company was the final carrier, and showed by its conductor that at the time he received the car at Purcell the door of the car was open, and the furniture considerably damaged, but did not show the extent of the damage. Upon this evidence the supreme court held that a prima facie case for the full amount of the damage had been made against the Gulf, Colorado & Santa Fe Railroad Company, and that it had failed to relieve itself of any part of the liability; that simply showing that the goods were damaged to some extent, without attempting to show how much, when delivered to it, did not defeat, or in any wise meet, plaintiff's prima facie case.

Evidence held to show apples were injured through negligence of last carrier.—Evidence in an action against the last of a line of connecting carriers for injuries to apples shipped held to show that they were injured by frost, while in the custody of defendant carrier, by its negligence. Beede *v.* Wisconsin Cent. R. Co., 95 N. W. 454, 90 Minn. 36, 101 Am. St. Rep. 390.

Nonsuit on ground that there was no evidence connecting last carrier with shipment properly refused.—In an action against the last of several connecting carriers for damage to goods, where the proof showed that the goods were received from the shipper by the initial company at Charleston, S. C., and loaded in one of its cars, to be conveyed to Macon, Ga., and the car containing them was delivered to the consignee "at the Old Courthouse square on the defendant's railroad" at Macon, it was not error to refuse a nonsuit on the ground that there was no evidence connecting defendant with the shipment; since the jury might reasonably infer from the evidence that defendant received the goods from the connecting carrier, and transported them over its own line, and was in possession of them when the consignee received them. Central R., etc., Co. *v.* Bayer, 91 Ga. 115, 16 S. E. 953.

97. Evidence not proving exemption from loss by fire.—Where a through bill of lading provided that, in the event of the articles being shipped by water, they should be subject to all customary conditions, and it was claimed by defendant, a connecting water carrier, in whose possession the goods were destroyed by fire, that it was customary to stipulate for nonliability for such loss, but the proof established that a large part of defendant's business was transacted without any right to such exemptions, and that through bills of lading issued by railroads in connection with defendant were not uniform in stipulating for such exemptions, and that one of the defendant's witnesses had been engaged in an attempt to agree on a uniform bill, containing exemptions, but had been unsuccessful, the custom was not proved, and defendant was liable for the loss. Judgment 74 N. Y. S. 384, 36 Misc. Rep. 705, and 78 N. Y. S. 359, 75 App. Div. 431, affirmed in Robinson *v.* New York, etc., Steamship Co., 69 N. E. 1130, 177 N. Y. 565.

the initial carrier for injuries to the stock in transit is the value of the animals killed and the depreciation in value of those injured at the point of destination, and not at the initial carrier's terminus.[98]

For Failure to Conform to Shipper's Instructions.—Where a shipper delivers to a forwarder goods to be forwarded to an express company, and by it to be forwarded to the consignee on receipt from him of a certain price, and delivers to the forwarder with the goods written instructions, with which the forwarder in forwarding the goods complies in all respects except that he fails to accompany the goods with a statement of the shipper's charges, the measure of damages for failure to conform to the instructions is the precise loss the parties had in contemplation when such instructions were sent, and to prevent which the agreement was made.[99]

For Misrouting Shipment.—Where an initial carrier fails to deliver a shipment to the connecting carrier agreed on, but delivers the same to another connecting carrier, the measure of damages for which the initial carrier is liable is the difference in the value of the shipment in the condition in which it was delivered at the point of destination, and its value in the condition it would have been in if it had been transported to that point with due diligence, and handled with proper care.[1] An initial carrier, which willfully misroutes a special shipment, so that the shipper is compelled to pay a higher rate than that specially agreed upon, is liable for the full amount of the difference, and not merely for such a lesser sum as might reasonably have been within the contemplation of the parties.[2]

For Failure to Deliver under a Contract for Through Transportation.—When a railroad company agrees to transport goods beyond the line of its own road, and fails to deliver them as agreed, the measure of damages will be the value of the goods at the place of delivery, less the cost of transportation, if unpaid.[3]

For Delay in Transportation or Delivery.—Where a carrier contracts to ship goods over a connecting carrier, but the delivery is delayed, the elements of damages against the contracting carrier includes the necessary expense incurred by the shipper in finding and taking possession of the goods.[4] The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier as to make such first carrier liable therefore by reason of such delay.[5] In an action against a railroad

98. **Measure of damages for injuries to live stock in transit.**—St. Louis, etc., R. Co. *v.* Deshong, 63 Ark. 443, 39 S. W. 260; Texas, etc., R. Co. *v.* White, 35 Tex. Civ. App. 521, 80 S. W. 641, affirmed 98 Tex. 635, no op.; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

Where a shipper agreed to pay a through charge for the delivery of horses at a point beyond the initial carrier's line, the measure of damages for injuries to the horses on the initial carrier's line was to be based on the value of the horses at the point of destination. Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

But in Kansas it has been held that where animals shipped to the end of a railroad line and there turned over to a connecting carrier are negligently injured on the road of the original carrier and unloaded at its terminus, the shipper can make the measure of his recovery the difference between their market value as delivered at such terminus and what they would have been worth if no injury had occurred. St. Louis, etc., R. Co. *v.* Licurance, 102 Pac. 842, 80 Kan. 424.

99. **Measure of damages for failure to conform to shipper's instructions.**—Hutchings *v.* Ladd, 16 Mich. 493.

1. **Measure of damages for misrouting shipment.**—Cincinnati, etc., R. Co. *v.* Pendleton, 96 S. W. 434, 29 Ky. L. Rep. 721.

2. Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. 846, 30 C. C. A. 430, reversing Central Trust Co. *v.* Georgia Pac. R. Co., 81 Fed. 277.

3. **Measure of damages for failure to deliver under a contract for through transportation.**—Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

4. **Measure of damages for delay in transportation or delivery.**—Savannah, etc., R. Co. *v.* Pritchard, etc., Co., 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

5. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6. Compare Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702.

company to recover for unreasonable delay in the transportation of cattle, it is not error to take as the basis for computation of damages the difference in the market price of the cattle in the market to which they were being shipped, where the destination was known to the defendant, although its contract covered their transportation only over its own line, and their delivery to a connecting carrier for the remainder of the shipment.[6]

§ 3807. In Action against Intermediate or Last Carrier.—For Storing Goods in a Warehouse Instead of Delivering Them to the Next Carrier.—Where a connecting carrier, instead of delivering a shipment of cotton to the next carrier in line under the bill of lading, as it should have done, stored it in a warehouse, subject to the owner's order, the measure of its liability is the damage resulting to the owner from its failure to forward the cotton when it should have done so; and it can not be held liable for the value of the cotton, as for a conversion.[7]

For Failure to Re-Ice a Car Containing Peaches.—In an action against a connecting terminal carrier for injuries to peaches, resulting from the carrier's failure to re-ice the car containing them, the market value of the peaches at the place of destination on the day of their arrival there is the proper measure of damages, though the defendant had no notice that the peaches were intended for market on that day.[8]

For Delay in Transportation or Delivery.—For breach of a connecting carrier's duty to deliver freight at its destination within a reasonable time, such carrier is responsible for the loss sustained, whether by a falling in the market price of the goods, or by damages thereto, or both.[9] Notice to an initial carrier that goods are to be used for a certain purpose at the place of delivery is not notice to the connecting carrier of such use, so as to be a basis of a recovery of loss of profits caused by delay in shipment.[10] The acceptance by a connecting carrier of a carload of buggies for delivery was not notice to the carrier that the only time buggies could be sold at the place of delivery was between the time the buggies should have been delivered, and the date when they were delivered, so as to be a basis of the recovery of loss of profits caused by the delay in shipment.[11]

For a Wrongful Refusal to Deliver a Corpse.—Five hundred dollars is not an excessive recovery for the wrongful refusal of a connecting carrier to deliver a corpse to the consignee.[12]

§ 3808. Instructions.—In an action against a connecting carrier an instruction by the court to the jury must not be abstract, but must be clearly applicable to the case.[13] In such an action the defendant is entitled to have the evidence in

6. Judgment 104 Fed. 728, 44 C. C. A. 179, affirmed in Missouri, etc., R. Co. *v.* Truskett, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259.

7. **Measure of damages for storing goods in warehouse instead of delivering them to next carrier.**—Buston *v.* Pennsylvania R. Co., 116 Fed. 235, affirmed in 119 Fed. 808, 56 C. C. A. 320.

8. **Measure of damages for failure to re-ice a car containing peaches.**—Philadelphia, etc., R. Co. *v.* Diffendal, 72 Atl. 193, 109 Md. 494, rehearing denied in 72 Atl. 458.

9. **Measure of damages for delay in transportation or delivery.**—Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, 458.

10. Brand *v.* Illinois Cent. R. Co., 108 S. W. 356, 32 Ky. L. Rep. 1335.

11. Brand *v.* Illinois Cent. R. Co., 108 S. W. 356, 32 Ky. L. Rep. 1335.

12. **Measure of damages for wrongful refusal to deliver corpse.**—Alcorn *v.* Adams Exp. Co., 146 S. W. 747, 148 Ky. 352.

13. **Instruction held not abstract, but clearly applicable to case.**—In an action by a shipper of live stock to recover damages from the delivering carrier for injury to the live stock delivered by the carrier to the shipper, an instruction declared that "where the carriage of freight is to be over several connecting carriers, as was the case here, it seems that if the consignee, the consignee bringing the suit in this case, shows to the jury that the animals were in good condition when delivered to the initial carrier, and that they were not in good condition when delivered by the discharging carrier, and

its favor submitted to the jury under correct instructions as to the law.[14] Where a connecting carrier is only liable for injuries to goods occurring on its own line, an instruction that plaintiff is entitled to recover, unless defendant delivered the goods to another connecting carrier and ceased from that time to exercise all jurisdiction and control over the goods before delivery of the same to plaintiff, is erroneous, as pretermitting any inquiry as to whether the injury to the goods occurred on defendant's line, or while in defendant's possession as a carrier.[15] Where the court expressly charges that connecting carriers sued for injuries to live stock are each liable only for its own negligence, an instruction referring to the fact that the train broke in two and ran together, to the injury of the cattle, while on the line of one of the defendants, is not erroneous as tending to minimize the injuries on the line of the other.[16] Where horses transported by successive carriers are injured in shipment, and the court charges that, before plaintiff can recover of the defendant line, the jury must be satisfied by the preponderance of the evi-

the suit is against the discharging carrier, then these facts alone, without any more, put the burden on the defendant, the discharging carrier, to show to the reasonable satisfaction of the jury that the harm and injury did not come to the animals while they were in the keep of the discharging carrier, and that is the law in this case." Held, that this was a clear and explicit statement of the law in relation thereto, and that the instruction was by no means abstract, and was clearly applicable to the case. Central, etc., R. Co. *v.* Dothan Mule Co., 159 Ala. 225, 49 So. 243. See ante, "As to Line on Which Injury or Loss Occurred and the Responsibility Therefor," § 3801.

14. Evidence for defendant must be submitted to jury under correct instructions.—Illinois Match Co. *v.* Chicago, etc., R. Co., 250 Ill. 396, 95 N. E. 492, reversing 153 Ill. App. 568.

Where, in an action against the initial carrier for loss of freight on a connecting carrier's line, the evidence showed that plaintiff was constantly shipping freight in carload lots beyond the line of the initial carrier, and received bills of lading from the initial carrer limiting its liability for loss to that occurring on its own line, that plaintiff used shipping orders directing shipments as per conditions of the carrier's bill of lading, and the officers of plaintiff testified that they had never read a bill of lading and did not know its contents, the facts raised a natural inference that plaintiff, through its officers, knew the conditions of bills of lading and assented to the limitations therein, and the carrier was entitled to a charge that, if plaintiff assented to the conditions of the bill of lading, it could not recover. Illinois Match Co. *v.* Chicago, etc., R. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment 153 Ill. App. 568.

Where there was evidence that at a station on the connecting line between the starting point and the point where the goods were received by defendant the barrels were leaking, the boxes were stained, and the glass therein rattling, an instruction that the goods should not be presumed to be in worse condition at the point where they were received by defendant than at the starting point was inapplicable and incorrect. Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894.

Where, in an action against several connecting carriers for damages to cattle owing to delay in transportation, it appeared that there was no delay on the line of the final carrier, and that when such carrier received the cattle they were not in the same condition as when delivered to the initial carrier, there was no ground for an instruction that, if the cattle were in a damaged condition when delivered to the final carrier, it devolved on it to show that the damage did not occur on its line, and that it could not acquit itself of liability by simply showing that a part of the damage occurred on the line of a preceding carrier, but that it must show how much damage, if any, so occurred. Judgment 86 S. W. 18, reversed in Houston, etc., R. Co. *v.* Scott, 99 Tex. 326, 89 S. W. 763.

Where the petition alleged that the goods were delivered to defendant at O. to be transported to C., and there delivto plaintiff, and that while in the custody of defendant they became unsound, and the evidence showed that defendant received the goods from another company, and that it was impossible that the goods should have become unsound while in defendant's custody, but must have been damaged before delivery to defendant, it was error to charge the jury, under the Georgia statute, Code, § 2084, that where goods pass over several connecting lines the last to receive the goods is responsible for their condition. Columbus, etc., R. Co. *v.* Tillman, 79 Ga. 607, 5 S. E. 135.

15. Instruction pretermitting injury as to whether injury to goods occurred on defendant's line.—Walter *v.* Alabama, etc., R. Co., 39 So. 87, 142 Ala. 474.

16. Instruction not erroneous as tending to minimize injuries on connecting road.—Texas, etc., R. Co. *v.* Hall, 72 S. W. 1052, 31 Tex. Civ. App. 464.

dence that they were injured while in defendant's possession, the objection that the court makes the defendant an insurer beyond its own line is not well taken.[17] It is not error to embody in a charge, a statute making connecting carriers liable for all damages to freight carried under a through billing contract with the initial carrier, where the bill of lading, though it does not name defendant carrier, bills the shipment via a junction station from which no other line reaches the point of destination.[18] An instruction, in an action against the initial carrier for delay in transporting cattle, which directs the jury to measure the damages by the difference between the market value of the cattle at the point of destination at the time and in the condition of their arrival and at the time and in the condition they would have arrived had they not been delayed by the initial carrier, is not erroneous, as authorizing the jury to find any damages sustained to the cattle on the line of the connecting carrier, especially where the court excludes in its charge the idea that the initial carrier is liable for any damages done after the cattle left its line.[19] In an action against connecting carriers for damages sustained by delay in shipping cattle, an instruction which in effect directs the jury to first find the whole amount of the damage done by all the defendants, and then "apportion" it among them "according to and in proportion to their respective liability, as indicated by instructions already given," is not open to the objection that it authorizes the jury to fix the liability of each according to an arbitrary rule, and not according to the evidence, when read with other instructions that the jury shall apportion against each defendant only the damage that it has caused, and shall not apportion against one the damage caused by another.[20]

§ 3809. Province of Court and Jury.—The general rule that it is the exclusive province of the jury to decide all questions of fact, and erroneous for the court to eliminate any material facts in issue from the consideration of the jury, applies to actions against connecting carriers.[21] But where there is no legally

17. **Instructions not imposing on defendant liability as insurer beyond its own line.**—Milam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571.

18. **Embodying statute in charge.**—Texas, etc., R. Co. *v.* Bigham (Tex. Civ. App.), 47 S. W. 814, affirmed in 93 Tex. 673, no op., so holding where Rev. Stat. 1995, art. 331a, 331b, were embodied in charge.

19. **Instruction as to measure of damages held not erroneous.**—Texas, etc., R. Co. *v.* McNairy, 42 Tex. Civ. App. 222, 94 S. W. 111, affirmed in 101 Tex. 663, no op.

20. **Instruction as to apportionment of damages held not erroneous.**—Gulf, etc., R. Co. *v.* Cushney, 67 S. W. 77, 95 Tex. 309.

21. **Question by whom contract of shipment was made.**—Where the question whether a contract for shipment of freight was made by the initial carrier alone, or was the joint contract of all the connecting lines over which the shipment was made, depends not only on written instruments, but on oral testimony it should be left to the jury. Bradford *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 201, 62 Am. Dec. 411.

Question of existence of contract for through transportation.—The weight, force, or degree of evidence as to a contract for through transportation is for the jury and is not open for consideration by the supreme court. Ogdensburg, etc., R. Co. *v.* Pratt (U. S.), 22 Wall. 123, 2 L. Ed. 827, 49 How. Prac. 84.

When a common carrier receives express goods, the question whether the carrier contracts to carry said goods to their destination, or only to deliver them safely to the next carrier at the point nearest or most convenient to their destination, is one of fact for the jury, dependent upon the circumstances. Philadelphia, etc., R. Co. *v.* Ramsey, 89 Pa. 474.

If competent evidence of a contract for through transportation over connecting lines is adduced upon trial of an action against the initial carrier for loss of goods upon a connecting route, the weight of it is a question for the jury. Ogdensburg, etc., R. Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

Where the main issue is whether or not a contract of shipment to a point beyond the carrier's terminus was made by the shipper and the carrier, it is error to take from the jury the consideration of that question and to instruct them that whether or no such a contract was made, the carrier was liable under the common law if it failed to ship the goods to the terminus within a reasonable time. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Whether a contract for through transportation was made with defendant terminal company, or a contract for line

sufficient evidence to entitle the plaintiff, upon whom rests the burden of proof,

terminal transportation with the initial carrier, held for the jury, in an action for loss or perishable freight. Catanzaro *v.* Pennsylvania R. Co., 83 Atl. 64, 234 Pa. 218.

On an issue whether a railroad company adopted a contract made with plaintiff by its station agent to transport freight beyond its line over a connecting line in a through car without transshipment or rehandling of the goods, an agreement to that effect with the agent, and a payment to him of an entire freight charge to the destination, and the sending by the carrier of a car ordered by the agent over the connecting line, were circumstances sufficient to take the question to the jury. Page *v.* Chicago, etc., R. Co., 7 S. Dak. 297, 64 N. W. 137.

Whether a receipt for cattle consigned to a point beyond the end of its line, upon which was indorsed a "rule of transportation" that the company would not be liable as carrier beyond its terminus, constituted a special contract for through carriage, was a question that should have been submitted to the jury, with the evidence of all the attendant circumstances. Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

In an action against a railroad company in Vermont, a receipt given by its station agent for pay for "transporting the merchandise from Ludlow to Charlestown, Mass.," together with evidence that it was the usual course of business to receive freight at all points on the defendant's road and bill it through to Charlestown, either collecting freight in advance for the whole line, or collecting at Boston for the whole line, and giving receipts accordingly, were held to be proper and sufficient evidence to warrant the court in submitting to the jury the question whether or not the defendant undertook to transport the goods over the connecting roads to the point of their ultimate destination. Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

Question whether carrier had knowledge or direction that goods should be transported.—Whether carrier receiving and transporting goods had knowledge of the direction that they should be transported by a different line, was a question of fact for the jury. Bird *v.* Georgia Railroad, 72 Ga. 655.

Question of condition of shipment when received by initial carrier.—Evidence in an action against terminal carrier held to present question for jury whether shipment was received by initial carrier in bad condition. Parnell *v.* Atlantic Coast Line R. Co., 74 S. E. 491, 91 S. C. 270.

Question of delivery of goods to connecting line.—Where there is a conflict of evidence as to the fact of the delivery of goods to the connecting line, the question of delivery is one of fact for the jury. Rome R. Co. *v.* Sloan, 39 Ga. 636.

In an action against a carrier for injuries to goods, whether there was a delivery to a connecting carrier held under the evidence a question for the jury. Reason *v.* Detroit, etc., R. Co., 113 N. W. 596, 150 Mich. 50.

Question whether delivery of cotton to compress company constituted a delivery to carrier.—Defendant railroad company made a contract with a cotton compress company located on a belt line at Birmingham, Ala., reciting that defendant would receive uncompressed cotton for shipment, but for convenience desired a portion of the same compressed, and providing that the compress company would receive and receipt for such cotton from defendant or shippers, compress the same, and load it in cars of defendant, as directed, for which it was to receive payment as herein fixed. It also agreed to be responsible to defendant for any loss of damage to such cotton while in its possession. A through shipment of cotton was made from a point in Mississippi to plaintiff at New York by way of Birmingham, and thence over defendant's road. The initial carrier delivered the cotton to the belt line road, which delivered it to the compress company. The first carrier then paid to defendant its share of the freight, and delivered to it the compress company's receipts. The cotton was not delivered by the compress company to defendant, and was never received by plaintiff which brought an action against defendant for its value. Aside from such contract, there was evidence of a custom of the initial carrier to make deliveries of cotton to defendant at Birmingham in the manner pursued in this instance. Held, that such evidence warranted the submission to the jury of the question whether the delivery of the cotton to the compress company constituted a delivery to defendant, either because of an agency to receive it, created by the contract, or by the custom which the evidence tended to prove. Southern R. Co. *v.* Hubbard Bros. Co., 146 Fed. 31, judgment affirmed on rehearing 150 Fed. 312.

Question of delivery in good condition to connecting carrier.—Whether a carrier of live stock delivered it in good condition to a connecting carrier is a question of fact for the jury. Louisville, etc., R. Co. *v.* Crozier, 13 Ky. L. Rep. 175.

Question as to conductor's duty to put car on track from which connecting line took cars.—Where, in an action against a railroad company for damages caused by delay in carrying plaintiff's merchan-

to recover, the court should instruct the jury to that effect;[22] and if there is no

dise, the evidence was contradictory as to whether it was the duty of defendant's conductor to put the car containing the merchandise on a track from which the connecting line took cars for defendant, the question was for the jury. Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

Question on which line of railway injury occurred.—Where horses were injured in shipment over several connecting lines of railway, an instruction that the question on which line of railway the injury occurred was for the jury, was proper. Milam *v.* Southern R. Co., 36 S. E. 571, 58 S. C. 247.

Where, in an action against a carrier for injuries to fruit shipped under a contract requiring that the cars should be properly iced when delivered, there was some evidence that the cars furnished were inadequately iced, and that plaintiffs were not aware of the fact until they were loaded, when it was too late to remedy the difficulty, and there was other evidence that the cars were delayed in transit on defendant's line, whether the injury occurred while the cars were on defendant's line was for the jury. Johnson *v.* Toledo, etc., R. Co., 95 N. W. 724, 133 Mich. 596, 103 Am. St. Rep. 464.

In an action against the initial carrier for negligence in the transportation of a shipment of stock it appeared that the carrier limited its liability to its own line. The train which carried the stock was delayed by a wreck on the initial carrier's line. The stock was placed on the receiving track of the connecting carrier. There was nothing to show when the stock left that point or how it was transported from there to the point of destination. Held, that the question of the liability of the initial carrier was for the jury. Illinois Cent. R. Co. *v.* Stevens, 96 S. W. 888, 29 Ky. L. Rep. 1079.

Question of connecting carrier's liability.—Under a contract exempting the carriers from liability for loss through heat or decay, berries in good condition were shipped at double rates, with notice to a connecting carrier, in summer, in a car properly iced so as to require no further attention until the following afternoon. They were delivered to the connecting carrier the next day, at 1 o'clock, at a place seven miles from its ice house, and were permitted to remain on the track until evening, when, on inspection, the ice boxes of the car were found two-thirds empty, and refilled. The condition of the berries when delivered to the connecting carrier did not appear. Held, that the issue of the connecting carrier's liability was properly submitted to the jury. Lamb *v.* Chicago, etc., R. Co., 76 N. W. 1123, 101 Wis. 138.

In an action against a railroad for injuries to horses, it appeared that it was the last of three connecting lines, and plaintiffs averred that such injury was caused by defendant's negligence. Defendant receipted for the stock as in "good order and condition," and there was other evidence that the horses were unhurt when received by defendant, and were injured when they reached their destination. Held, that whether or not the horses were injured by defendant's negligence was for the jury. Louisville, etc., R. Co. *v.* Grant, 99 Ala. 325, 13 So. 599.

Whether a connecting carrier of horses in a car furnished by the initial carrier was negligent in transporting the horses in a defective car held for the jury. Blair *v.* Wells Fargo & Co. (Iowa), 135 N. W. 615.

In an action for the loss of a horse out of a car load, the verdict should not be directed for defendant where it is not clearly shown that he was dead in the car when delivered to defendant by connecting carrier. Walker *v.* Southern R. Co., 56 S. E. 952, 76 S. C. 308.

Questions for jury in actions against carriers for loss of freight.—In an action against the initial and connecting carriers for loss of freight, held, that the questions whether the freight was delivered to the initial carrier, and, if it was, whether it was lost by it, or whether it was lost by the connecting carrier, were for the jury. Mussellam *v.* Cincinnati, etc., R. Co., 104 S. W. 337, 31 Ky. L. Rep. 908.

In an action for a loss of wool in shipment, whether the loss occurred upon the lines of the terminal carrier or while in its possession held, on the evidence, a jury question. New York, etc., Transp. Line *v.* Baer & Co., 84 Atl. 251, 118 Md. 73.

22. Evidence warranting instruction that there was no legally sufficient evidence to entitle plaintiff to recover.—Evidence in an action against a connecting carrier for damages from delay in transportation considered, and held to warrant the court in instructing the jury that upon the pleading and evidence there was no legally sufficient evidence to entitle the plaintiff to recover. Shockley *v.* Pennsylvania R. Co., 109 Md. 123, 71 Atl. 437.

In an action against a carrier to recover for apples injured by freezing within two days while they were in the course of transportation through a cold snowstorm, where there was evidence that the apples were frozen when they arrived, but no evidence of their condition when they were received by the defendant from a connecting road, over which they were transmitted in the same

evidence to sustain an item in plaintiff's claim it is error to submit such item to the jury.[23] If there is no evidence that would warrant the jury in finding that defendant made a contract for through transportation, it is error to submit to the jury the question of the existence of such a contract.[24] In an action against two railroads for negligence in transporting plaintiff's cattle, where the evidence conclusively shows that the two roads are one and the same, save in name only, the court may summarily instruct the jury to that effect, instead of submitting the question to them.[25] A nonsuit will be ordered in an action against a terminal carrier for damages to a shipment if the evidence conclusively overcomes the presumption that defendant is liable.[26]

§ 3810. Verdict.—In an action against several carriers for injuries to live stock, in the absence of a special contract extending the liability beyond the end of their respective lines, the jury should be instructed to find a separate verdict against each carrier for the damages that occurred on its line.[27] Where an action is brought against connecting carriers for injuries to live stock shipped without any person accompanying them, and both carriers deny all negligence and offer evidence in support of the denial, in the face of conclusive evidence of serious delay in transportation, and that the animals when delivered were injured, so that it is impossible for the jury to determine which of the carriers is to blame for their condition, a verdict charging the entire damages against each is proper.[28]

§ 3811. Judgment.—When Joint Judgment May Be Rendered.—The court, in an action against the initial and connecting carriers for damages for joint negligence in transporting a shipment of live stock, may render a joint judgment against them, they being joint tort-feasors arising from their joint concur-

car during the previous day, except that the weather was very cold, defendant is entitled to a ruling that there is no evidence that the apples were delivered before they were frozen. Swetland *v.* Boston, etc., R. Co., 102 Mass. 276.

23. Error to submit to jury item in plaintiff's claim if there is no evidence to sustain it.—McManus *v.* Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919.

In an action for damages to a shipment of stock, where there was evidence that one animal was down before the stock reached a connecting carrier, and that there was a delay caused by an obstruction on defendant's track, but there was no evidence showing the cause of the animal's condition, nor that it was thrown down by improper management of the train, or that its condition was in any way caused by defendant, submission to the jury of the issue of damages therefor was error. McManus *v.* Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919.

24. Evidence not warranting submission to jury of question of existence of contract for through transportation.—A shipping receipt recited that the goods were marked, "F. M. P., Delavan, Wis., care W. W. A., Buffalo," and provided that they were "to be delivered in good order * * * as addressed." A receipt given the owner by H., a forwarder at the place of shipment, stated that the goods were received in store, and in all other respects appeared to be a contract by him as forwarder, but had written thereon the price of freight from Buffalo, which H. testified was merely a memorandum made from a circular in his possession. There was no statement of the freight to Buffalo, and nothing stating that H. professed to act as agent for the carrier, which was engaged in transporting goods by canal to Buffalo, and by whose boat the goods were shipped, and no proof that he was such agent, except the fact that he shipped goods by it and received goods from it. Held, that it was error to submit to the jury the question whether there was a contract by the carrier to transport the goods through to Delavan. Parmelee *v.* Western Transp. Co., 26 Wis. 439.

25. Evidence warranting instruction that two roads are one save in name.—Southern Kansas R. Co. *v.* Crump, 74 S. W. 335, 32 Tex. Civ. App. 222; Buie *v.* Chicago, etc., R. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542, affirmed in 93 Tex. 694, no op.; Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129, affirmed in 93 Tex. 721, no op.

26. When a nonsuit will be ordered.—Parnell *v.* Atlantic Coast Line R. Co., 91 S. C. 270, 74 S. E. 491.

27. Verdict.—Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513.

28. Cincinnati, etc., R. Co. *v.* Greening, 100 S. W. 825, 30 Ky. L. Rep. 1180.

rent negligence, in failing to properly transport the stock.[29] Where plaintiff alleges a partnership between carriers jointly sued and such fact is not denied in the answer, a joint judgment is properly rendered.[30]

When Judgment Decreeing a Joint and Several Liability Is Proper.—Where the verdict, in an action against two railroad companies, finds a joint liability, a judgment decreeing a join and several liability is proper.[31]

Judgment against Connecting Carriers Made Parties Defendant in Suit against Initial Carrier.—In an action against an initial carrier for injuries to live stock, all the connecting carriers against whom it is sought to recover damages may be made parties defendant; and, if brought before the court by process as provided by statute, a judgment may be given against any one or all of them that the evidence shows to have committed the injuries.[32]

29. **When joint judgment may be rendered.**—Norfolk, etc., R. Co. *v.* Crull, 112 Va. 151, 70 S. E. 521.

30. Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144, affirming 34 S. W. 410, citing International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Baylor County *v.* Craig, 69 Tex. 330, 6 S. W. 305.

31. **When judgment decreeing a joint and several liability is proper.**—Southern Kansas R. Co. *v.* Crump, 32 Tex. Civ. App. 222, 74 S. W. 335, affirmed in 97 Tex. 647, no op., following Kuykendall *v.* Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748.

32. **Judgment against connecting carriers made parties defendant in suit against initial carrier.**—Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513.

PART VI

INTERSTATE AND FOREIGN COMMERCE

CHAPTER XXXIV.

Interstate Commerce in General.

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§ 3812. In General.—Commerce with foreign nations and among the several states, the regulation of which is committed to congress by the constitution, comprehends not merely traffic, but intercourse for the purposes of trade in any and all its forms,[1] between the citizens of the United States and the citizens or

1. **Interstate and foreign commerce.**—2 Story on the Constitution, §§ 1057, 1061, 1062. Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 190, 6 L. Ed. 23; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Railroad Co. *v.* Fuller, 17 Wall. 560, 21 L. Ed. 710; Veazie *v.* Moor (U. S.), 14 How. 568, 14 L. Ed. 545; Steamship Co. *v.* Joliffe (U. S.), 2 Wall. 450, 17 L. Ed. 805; State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678; United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249; Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543; United States *v.* Holliday (U. S.), 3 Wall. 407, 18 L. Ed. 182; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128; Anderson *v.* United States, 171 U. S. 604, 43 L. Ed. 300, 19 S. Ct. 50; Northern Securities Co. *v.* United States, 193 U. S. 197, 330, 48 L. Ed. 679, 24 S. Ct. 436; Leisy *v.* Hardin 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

subjects of foreign countries, and between the citizens of different states,[2] including within these terms transportation and transit.[3] Such transportation and transit embraces the transportation and transit of persons[4] and property[5] by land[6] or by water.[7]

Commerce among the several states, or interstate commerce, is commerce which concerns more states than one. The word among means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states can not stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more states than one. The completely internal commerce of a state, then, may be considered as reserved for the state itself.[8]

Commerce with foreign nations signifies commerce which, in some sense, is

2. Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

3. County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

4. Transportation of persons.—County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

5. Transportation of property.—Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

The transportation of freight, or of the subjects of commerce for the purpose of exchange or sale, is a constituent part of commerce itself. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

6. Transportation by land.—2 Story on the Constitution, §§ 1061, 1062; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

7. Transportation by water.—2 Story on the Constitution, §§ 1061, 1062; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

8. Leovy *v.* United States, 177 U. S. 621, 44 L. Ed. 914, 20 S. Ct. 797; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 193, 6 L. Ed. 23.

necessarily connected with these nations, transactions which either immediately or at some state of their progress must be extraterritorial.[9]

Commerce between Individuals.—Commerce with foreign nations and among the states means commerce between the citizens of the United States and citizens or subjects of foreign governments, and between the citizens of different states, as individuals.[10]

Carriage by Corporation.—The protection of the interstate commerce clause of the federal constitution extends to commerce conducted by corporations as well as to that conducted by individuals.[11]

Means and Instruments of Commerce.—The term "commerce," in its broadest acceptation, embraces not merely traffic, but the means, vehicles and appliances necessarily employed in carrying it on.[12]

Gratuitous Carriage.—The power of congress over interstate transportation embraces all manner of carriage whether gratuitous or otherwise.[13]

Navigation.—Navigation is included in the word commerce as used in the constitution of the United States.[14]

"**Transportation** of property from one state to another is a branch of interstate commerce. Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation." [15]

Intercourse and Traffic.—Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities.[16] Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of the nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[17]

9. Commerce with foreign nations.—Veazie *v.* Moor (U. S.), 14 How. 568, 14 L. Ed. 545; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224.

10. United States *v.* Holliday (U. S.), 3 Wall. 407, 18 L. Ed. 182; Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550; Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543.

11. Carriage by corporation.—Greek-American Sponge Co. *v.* Richardson Drug Co., 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961.

12. Means and instruments of commerce.—2 Story on the Constitution, §§ 1061, 1062; Veazie *v.* Moor (U. S.), 14 How. 568, 14 L. Ed 545; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710.

13. Gratuitous carriage.—American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315; United States *v.* New York, etc., R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 S. Ct. 313.

14. Navigation.—2 Story on the Constitution, §§ 1057, 1061, 1062; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 190, 6 L. Ed. 23; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Steamship Co. *v.* Joliffe (U. S.), 2 Wall. 450, 17 L. Ed. 805; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Scranton *v.* Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 S. Ct. 48; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

Commerce with foreign nations includes navigation, as the principal means by which foreign intercourse is effected. Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543.

15. Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527.

16. Intercourse and traffic.—County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

17. Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 189, 6 L. Ed. 23; United States *v.* Holliday (U. S.), 3 Wall. 407, 18 L. Ed. 182; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865; United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249.

Purchase and Sale of Property.—Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce.[18]

Interstate and Intrastate Commerce Distinguished.—Interstate commerce must be such as takes place between states, as differentiated from commerce wholly within a state. It must have reference to interstate trade or dealing; and if the regulation is not such, and comprehends only commerce which is internal, the state may legislate concerning it. In each case the recurring question is, on which side of the line does the commerce under investigation fall?[19] The phrase "among the several states" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon congress and the regulation of the latter remaining with the states severally.[20]

Commerce and Transportation Distinguished.—"Commerce" is the interchange or mutual change of goods, productions, or property of any kind between nations or individuals, while "transportation" is the means by which commerce is carried on.[21]

Commerce and Trade Distinguished.—"Commerce" relates to dealings with foreign nations. "Trade" means mutual traffic among the citizens of a state or nation, or the buying, selling, or exchange of articles between members of the same community.[22]

Transportation for Another.—Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.[23]

Where State Line Crossed.—As interstate commerce means simply commerce between the states, it must apply to all transportation which crosses a state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line.[24]

Part of Continuous Voyage.—The transportation within the limits of a

18. Purchase and sale of property.—Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40; Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436; Montague & Co. *v.* Lowry, 193 U. S. 38, 48 L. Ed. 608, 24 S. Ct. 307; United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249.

19. Interstate and intrastate commerce distinguished.—Ware, etc., Co. *v.* Mobile County, 209 U. S. 405, 52 L. Ed. 855, 28 S. Ct. 526, 14 Am. & Eng. Ann. Cas. 1031.

20. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

21. Commerce and transportation distinguished.—Council Bluffs *v.* Kansas, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

22. Commerce and trade distinguished.—People *v.* Fisher (N. Y.), 14 Wend. 9, 28 Am. Dec. 501.

23. Transportation for another.—Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214.

24. Where state line crossed.—Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

state, which is a part of a continuous voyage to or from points outside of the state, is interstate commerce.[25]

Contract of Shipment.—The character of a shipment, whether local or interstate, depends on the contract of shipment, and is not changed by a transfer of title during the transportation. A contract for an interstate shipment is completed upon delivery at the terminal point specified in such contract, and a further shipment to another point in the same state, on the order of the consignee and under a separate contract, is not a continuation of the interstate shipment, but is local in its character and is controlled by the state law and not by the interstate commerce act. A contract of shipment for local transportation does not become interstate in its character from the fact that the shipper intends, after such local contract of shipment has been completed, to forward the goods to some place outside the state. Where a contract of shipment was from a point in one state to a point in another state, the fact that during that transportation a contract was made at an intermediate point in a third state for the sale of the property, did not affect the character of the shipment between the two first mentioned points. It was an interstate shipment after the contract of sale as well as before. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier.[26]

Shipment Through Another State to Point in Same State.—Transportation, under a contract for a continuous carriage, from one point to another within the same state, but by a route lying partly in another state, is interstate commerce.[27] A shipment of grain over a single railroad between two points, both

25. Part of continuous voyage.—Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

26. Contract of shipment.—Gulf, etc., R. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 S. Ct. 360.

27. Shipment through another state to point in same state.—In Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806, it was held that a state might impose upon a railroad corporation of its own creation a tax in respect of receipts from transportation by continuous carriage from one point in the state to another, but by a route lying partly in another state, and that the imposition of such tax was not a regulation of interstate commerce. This case was distinguished in Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214, and held not to decide that transportation under the conditions above stated was not interstate commerce, but that the imposition of the tax under the circumstances related was not a regulation of such transportation, whereas the fixing of rates for a like transportation would constitute a regulation of such transportation and be void.

A contract for the sale of vessels plying between two points in the same state over a boundary river was held not to contemplate interstate commerce from the fact that the vessels in passing between such points might sail over soil belonging to another state. Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208, holding that it would be an extravagant consequence to draw from Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214, a case of a state attempting to fix rates over a railroad route passing outside its limits, that such a contract contemplated interstate commerce because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points.

Where a railroad runs for a portion of the distance between two stations in the state of Kansas, and for a great portion of the distance beyond the boundaries of the state, and again returns into Kansas, in conveying freight over such route between such stations the railroad company is engaged in interstate commerce. Patterson *v.* Missouri Pac. R. Co., 77 Kan. 236, 94 Pac. 138, 15 L. R. A., N. S., 733.

A shipment of freight from one point in the state to another point therein by way of a town outside the state, is interstate shipment and is not governed by Revisal 1905, § 2632, imposing a penalty on a carrier for its failure to transport freight within a reasonable time. Shelby Ice, etc., Co. *v.* Southern R. Co., 147 N. C. 61, 60 S. E. 723.

Where any part of the transportation of freight from one point in the state to another point therein is outside of the state, the shipment is interstate traffic, and is not within Revisal 1905, § 2632, imposing a penalty on a carrier for its failure to transport freight within a rea-

within the same state, is not an interstate shipment, so as to bring it within the terms of the interstate commerce act, and authorize a federal court to compel such shipment, by mandamus, at the same rates charged other shippers of a like commodity, because the line of road between the two terminal points passes through other states; nor is it rendered an interstate shipment by the fact that the grain was received at the initial point from a carrier by which it was transported from a point in another state, and was there stored in an elevator for further shipment, where it was not taken by the first carrier under a through bill of lading.[28] The railroad commission of Arkansas can not, without violating the commerce clause of the federal constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian Territory or Texas.[29] A state has no power to regulate the charges of a railroad company for the carriage of goods between two points in the state, where the course of transportation must be for a considerable part of the distance through another state or territory. Such transportation, although continuous and made on through bills of lading, constitutes commerce "among" the states, within the meaning of the commerce clause of the federal constitution, and is subject to regulation by congress alone.[30]

Receiving and Landing Passengers and Freight.—The receiving and landing of passengers and freight is incident to their transportation, and where the transportation is interstate, the business of receiving and landing constitutes interstate commerce.[31]

When Transportation Completed.—Moving goods from the station platform to the freight warehouse is a part of the interstate commerce transportation.[32] Where cars of coal were transported from one state to another state and were not delivered to the consignee, but remained on the tracks of the railway company in the condition in which they had been originally brought into the state from points outside of that state, it was held that the interstate transportation of the property had not been completed, and it still retained its interstate character.[33]

Fares and Charges.—Fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.[34]

Production and Manufacture.—Production and manufacture is not commerce, and the fact that an article is produced or manufactured for exportation to another state or foreign country, does not of itself make it an article of interstate or foreign commerce within the meaning of the constitution, nor does the intent of the manufacturer or owner determine the time when the article or product passes from the control of the state and belongs to commerce. Articles produced or manufactured within a state and intended for exportation to a foreign country or to another state, do not become articles of interstate or foreign

sonable time. Davis *v.* Southern R. Co., 147 N. C. 68, 60 S. E. 722.

A continuous transportation of freight between points within a state is "interstate commerce," free from the interference of the state, where a part of the route is outside of the state because of the unsafe condition of a bridge forming a part of the line of road in the state between such points. St. Louis, etc., R. Co. *v.* State, 87 Ark. 562, 113 S. W. 203.

28. United States *v.* Lehigh Valley R. Co., 115 Fed. 373.

29. Decree, Kansas, etc., R. Co. *v.* Board, 106 Fed. 353, affirmed in Hanley *v.* Kansas, etc., R. Co., 23 S. Ct. 214, 187 U. S. 617, 47 L. Ed. 333.

30. Kansas, etc., R. Co. *v.* Board, 106 Fed. 353, affirmed in Hanley *v.* Kansas, etc., R. Co., 23 S. Ct. 214, 187 U. S. 617, 47 L. Ed. 333.

31. **Receiving and landing passengers and freight.**—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

32. **When transportation completed.**—Rhodes *v.* Iowa, 170 U. S. 412, 42 L. Ed. 1088, 18 S. Ct. 664.

33. McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722, citing Rhodes *v.* Iowa, 170 U. S. 412, 42 L. Ed. 1088, 18 S. Ct. 664.

34. **Fares and freights.**—Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

commerce, until they commence their final movement for transportation from the state of their origin to the state or country of their destination, and this final movement begins only when they have been actually started in the course of transportation to another state or country, or delivered to a common carrier for such transportation. The carrying of products to and depositing them at a depot or place of shipment where the journey to another state or foreign country is to commence, is a part of that journey, and such products are not yet exports, nor are they in the process of exportation. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation.[35] Every private enterprise which may be carried on chiefly or in part by means of interstate shipments is not necessarily to be regarded as so related to interstate commerce as to come within the regulating power of congress.[36] The business of superintending and managing the operation of a factory in a state, and controlling, handling and selling its output, does not constitute interstate commerce from the fact that the products of the factory may be sold and transported outside of the state.[37] Where a contract is for the sale of an article and for its delivery in another state, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale.[38]

Shipment under Local Bill of Lading.—Where a railroad operating wholly within a state refuses to accept goods from another railroad from without the state except under the local bill of lading, such railroad is not engaged in interstate commerce.[39] A railroad lying wholly within a state, which transports freight whether coming from within or without the state, solely on local bills of lading, under a special contract limited to its own line, and without dividing charges with any other carriers or assuming any other obligations to or for them, does not come within the provisions of the interstate commerce act, and is not bound to make any report of its business to the interstate commerce commission.[40] A railroad company whose line is wholly within a single state, and which, although it carries freight destined to points beyond such state, never issues bills of lading to points beyond its own line, receives no freight on through bills of lading, and has no arrangement with other roads for a conventional division of charges, or for a common control or management, is not within the pur-

35. Production and manufacture.—Kidd *v.* Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6; United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249. See, also, Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

36. Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96.

37. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 47 L. Ed. 328, 23 S. Ct. 206.

38. Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96.

39. Shipment under local bill of lading.—Defendant, as receiver, operated a narrow guage railroad wholly in Ohio, which connected at one of its termini with the B. & O. Railroad. Defendant refused to ship interstate traffic over his road, either received from or delivered to the B. & O. road, under a through bill of lading, or any other arrangement, except that, on the delivery of such freight shipped over defendant's road under a local bill of lading at its terminus, it should be received for transportation without the state by the B. & O. road under another bill of lading, the latter road assuming defendant's local freight charge, and defendant, on receiving such shipments from the B. & O. for transportation to points on his line, charged a local freight tariff from the receiving point to destination, also assuming payment of the B. & O.'s advance charges, settlement of freight between the parties being made weekly. Held, that defendant's railroad was not engaged in interstate commerce within the meaning of, and was, therefore, not liable for penalties for noncompliance with, the safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 532, as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]), requiring common carriers engaged in interstate commerce by railroad to equip their cars with automatic couplers, etc. United States *v.* Geddes, 131 Fed. 452, 65 C. C. A. 320.

40. United States *v.* Chicago, etc., R. Co., 81 Fed. 783.

view of the interstate commerce act or of the supplemental act of August 7, 1888.[41]

Shipment to Territory.—The interstate commerce act governing shipments from one state or territory to any other state or territory from any place in the United States to an adjacent foreign country, or through a foreign country, to any other place in the United States, applies to a shipment to or from an unorganized territory.[42]

Goods Billed from without State.—The fact that coal was billed from a point in Tennessee to a point in Kentucky does not make the shipment an interstate one, it appearing that the coal was mined in Kentucky, and loaded on the cars at a switch at the mines, and there taken charge of by the carrier.[43]

Reshipment.—The intention or purpose of the owners of an interstate shipment of a car load of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission.[44]

Carriage under through Bill.—Every carrier who transports goods through any part of a continuous passage in the state to a point in another state is engaged in interstate commerce, whether the goods are carried upon through bills of lading or rebilled by the several carriers.[45]

Concurrent Power of United States.—A state statute regulating the operation of railroads, and providing that certain freight trains shall be equipped with a crew of not less than an engineer, a fireman, a conductor, and three brakemen, belongs to that field of legislation in which it is competent for both the state and nation to enter, and is therefore not in violation of the constitution of the United States, vesting in congress the power to regulate interstate commerce.[46]

Intrastate Shipment by Interstate Carrier.—The interstate commerce clause of the federal constitution does not apply to shipments wholly within the state, though the carrier over whose lines the shipment is made is engaged in interstate commerce.[47]

Necessity for Delivery.—Delivery to the purchaser of goods in another state is an inherent and essential part of the intercourse defined by the word "commerce," without consideration as to the manner or continuity of the transportation or the maintenance at the time of delivery of the same inclosure or package which characterized the commencement of the transportation.[48]

Where Goods Reshipped.—Where goods received for transportation from a point outside the state to an intrastate point were missent, and the carrier rebilled the goods from a point in the state to the point of destination over the line of another carrier, which received and transported the goods, the transportation

41. Interstate Commerce Comm. *v.* Bellaire, etc., R. Co., 77 Fed. 942.

42. **Shipment to territory.**—Missouri, etc., R. Co. *v.* Bowles, 1 Indian T. 250, 40 S. W. 899.

43. **Goods billed from without state.**—Louisville, etc., R. Co. *v.* Vancleave, 110 Ky. 968, 63 S. W. 22, 23 Ky. L. Rep. 479.

44. **Reshipment.**—Judgment 97 Tex. 274, 78 S. W. 495, affirmed in Gulf, etc., R. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 S. Ct. 360.

45. **Carriage under through bill.**—United States *v.* Colorado, etc., R. Co., 157 Fed. 321.

46. **Concurrent power of United States.**—Chicago, etc., R. Co. *v.* State, 86 Ark. 412, 111 S. W. 456.

The acts of congress legislating on safety appliances and other means to promote the safety of freight trains engaged in commerce did not exclude the state from enacting Laws 1907, p. 295, regulating the operation of freight trains, and providing that crews operating certain freight trains should consist of not less than an engineer, fireman, conductor, and three brakemen. Chicago, etc., R. Co. *v.* State, 86 Ark. 412, 111 S. W. 456.

47. **Intrastate shipment by interstate carrier.**—McCutchen *v.* Atlantic, etc., R. Co., 81 S. C. 71, 61 S. E. 1108.

48. **Necessity for delivery.**—Loverin, etc., Co. *v.* Travis, 135 Wis. 322, 115 N. W. 829.

by the latter carrier was not an interstate shipment.[49]

Where Goods Remain in Cars.—When goods are shipped from one state into another and upon arrival at their destination remain in the cars placed upon public sidings, they continue a part of the interstate commerce transaction until unloaded.[50]

Determined by Contract of Shipment.—Whether a shipment by the owner from one point in a state for delivery to his own order at another point in such state, under a shipping contract, completely performed by delivery at destination, is intrastate or interstate commerce, must be determined by the shipping contract, and not by the intent of the consignee as to the future disposition of the goods.[51]

Power of State and United States.—Commerce for the purpose of defining federal and state jurisdiction in legislation is divided into three fields: That in which the power of the state is exclusive, that in which the state may act in the absence of legislation by congress which is controlling and exclusive, and that which the authority of congress is exclusive, and the states can not interfere at all.[52]

Means and Instruments of Commerce.—"Interstate commerce" within the exclusive jurisdiction of congress, involves, as an essential and indispensable element, the transportation of property or intelligence from one state to another, embracing not only the property or intelligence so sent, but the physical agencies, as the railroad, express and telegraph companies engaged in the commerce, and their employees, as well as all persons who are directly connected as principals or agents in carrying on the business, except that as applied to intelligence it does not include all persons who write letters, but is confined to those persons, such as the postal authorities and employees of telegraph companies, through whose agency or instrumentality the intelligence desired to be sent is conveyed, and those who send or exchange intelligence as an essential part of their business and that directly results in the transportation of property.[53]

§ 3813. Statutory Provisions.—Interstate Commerce Act.—See elsewhere.[54]

Anti-Trust Law.—The anti-trust law, construed as applying only to contracts whose direct and immediate effect is a restraint upon interstate commerce, and not to such as are made to promote legitimate business, though they may indirectly or incidentally affect such commerce, is a legitimate exercise by congress of its power to regulate interstate commerce.[55]

49. **Where goods reshipped.**—Hockfield *v.* Southern R. Co., 150 N. C. 419, 64 S. E. 181.

50. **Where goods remain in cars.**—Pennsylvania R. Co *v.* Coggins Co., 38 Pa. Super. Ct. 129.

51. **Determined by contract of shipment.**—Texas, etc., R. Co. *v.* Sabine Tram Co. (Tex. Civ. App.), 121 S. W. 256.

A manufacturer of lumber in Texas sold lumber there for delivery at a port in Texas to a buyer for exportation through the port. The manufacturer delivered the lumber to a carrier under a contract calling for delivery to his own order at such port. The lumber remained at the port until loaded by the buyer on chartered vessels for transportation. There was no local market at the port, and the carrier had never done any local business there. Held, that the carriage was intrastate commerce, governed by the rates and fixed by the Texas Railroad Commission. Texas, etc., R. Co. *v.* Sabine Tram Co. (Tex. Civ. App.), 121 S. W. 256.

52. **Power of state and United States.**—People *v.* Erie R. Co., 198 N. Y. 369, 91 N. E. 849, 29 L. R. A., N. S., 240, 18 Am. & Eng. Ann. Cas. 811, reversing order 119 N. Y. S. 873, 135 App. Div. 767.

53. **Means and instruments of commerce.**—United States Fidelity, etc., Co. *v.* Commonwealth, 139 Ky. 27, 129 S. W. 314.

54. **Statutory provisions.**—See post, "Interstate Commerce Act," chapter 37.

55. **Anti-trust law.**—United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259, 19 S. Ct. 25, reversing judgment 76 Fed. 895, which was affirmed in 32 C. C. A. 491, 89 Fed. 1020.

§ 3814. Articles of Commerce.—Goods or merchandise only[56] and not persons are the subjects of interstate and foreign commerce.[57]

Lawful Subjects of Ownership.—The commodities or articles which may be regarded as the legitimate subjects of interstate and foreign commerce, and within the protection of the commerce clause, are only such as may be the lawful subjects of ownership and property, and hence, lawful subjects of exchange barter, and traffic.[58]

Merchantable Articles.—An article, in order to be a proper subject of trade and commerce, must be merchantable.[59]

Oleomargarine is a legitimate subject of interstate and foreign commerce, and has been so recognized by congress.[60]

Intoxicating liquors are recognized as legitimate articles or subjects of foreign and interstate commerce.[61] Ardent spirits, distilled liquors, ale and beer are universally admitted to be subjects of ownership and property and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property and traffic exists.[62]

Tobacco, being a product which has from time immemorial been recognized by custom or law as a fit subject for barter or sale, and particularly as its manufacture has been made the subject of federal regulation and taxation, must be recognized as a legitimate article of commerce, although it may to a certain extent be within the police power of the states.[63]

56. Articles of commerce.—New York *v.* Miln (U. S.), 11 Pet. 102, 9 L. Ed. 648; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

57. Persons.—New York *v.* Miln (U. S.), 11 Pet. 102, 9 L. Ed. 648.

58. Lawful subjects of ownership.—Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767; Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

59. Merchantable articles.—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

60. Oleomargarine.—Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767.

Under Oleomargarine Act (Act Cong. May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 370]), § 1, declaring that renovated butter transported into any state, and remaining there for use or sale, shall on arrival be subject to state laws for the exercise of police powers, as though produced within the state, the arrival of renovated butter, duly stamped and labeled as provided by such act, within a state other than that from which it was shipped, did not divest the butter of its interstate commerce character, so as to immediately entitle the consignee to remove such marks and labels, without liability for violating such act. United States *v.* Green, 137 Fed. 179.

61. Intoxicating liquors.—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Adams Exp. Co. *v.* Commonwealth, 214 U. S. 218, 53 L. Ed. 972, 29 S. Ct. 633; Thurlow *v.* Massachusetts (U. S.), 5 How. 504, 12 L. Ed. 256; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Louisville, etc., R. Co. *v.* Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 S. Ct. 189.

Whisky manufactured in Kentucky and sent by the distiller into Ohio in order to be reshipped in retail quantities to consumers in local option territory in Kentucky, whose order have been taken by the distillers' agents, is not the subject of interstate commerce. Crigler *v.* Commonwealth, 120 Ky. 512, 87 S. W. 276, 27 Ky. L. Rep. 918; S. C., 87 S. W. 280, 27 Ky. L. Rep. 925, 927; S. C., (Ky.), 87 S. W. 281.

62. Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256.

63. Tobacco.—Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

"Whatever might be our individual views as to its deleterious tendencies, we can not hold that any article which congress recognizes in so many ways is not a legitimate article of commerce." Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

Cigarettes.—In view of the Rev. St. U. S., § 3243, providing that the payment of internal revenue for carrying on any business shall not authorize it to be carried on in states by whose laws it is prohibited, § 3392, taxing cigarettes, and prescribing the form of putting them up,

Lottery tickets are subjects of traffic and their transportation in packages from one state to another constitutes interstate commerce.[64]

The public or quasi public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money markets of this country, as such enter into and form a part of the foreign commerce of the country.[65]

Nitroglycerin and Dynamite.—A freight train may be regarded as a passenger train, within the meaning of the act of congress, prohibiting the transportation of nitroglycerin on vehicles engaged in interstate passenger traffic, when passengers are conveyed thereby for compensation, in any kind of cars, by authority of the railway company. The prohibition extends also to dynamite, which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient.[66]

Game and Fish.—There is no unqualified right of property in game or fish, which, although reduced to possession, remain subject to the control of the state, in the exercise of its police powers; and a law making it a penal offense for a person to have trout in his possession for sale is a valid police regulation, and not an unlawful interference with interstate commerce, although such trout were brought for sale from another state, where they were lawfully caught.[67]

Natural Gas.—A state law prescribing that it shall be unlawful to conduct natural gas to any point outside of the state, is unconstitutional, as affecting interstate commerce—natural gas, when reduced to possession, being an article of commerce—and hence the court will not enjoin such transmission, no undue appropriation nor the use of artificial means to produce an unnatural flow from the wells being alleged.[68]

Rafting Logs.—Rafting logs is not engaging in commerce between the states, though incidentally connected with it.[69]

Articles within Police Power of State.—Whatever article or product has from time immemorial been recognized by custom or law as a fit subject for barter and sale,[70] particularly if it has been recognized by congress, and its manufacture and sale has been made the subject of federal regulation and taxation, must be recognized as a legitimate article of commerce,[71] although it may to a certain extent be within the police power of the states.[72]

Articles Which Spread Diseases.—Articles, which, on account of their ex-

and of stamping them, is not a recognition of them as a legitimate article of commerce. Austin *v.* State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 702, affirmed in 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

64. **Lottery tickets.**—Lottery Case, 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 321.

65. **Securities of foreign governments or banks.**—United States *v.* Arjona, 120 U. S. 479, 30 L. Ed. 728, 7 S. Ct. 628.

66. **Nitroglycerin and dynamite.**—Rev. St., § 5353; United States *v.* Saul, 58 Fed. 763.

67. **Game and fish.**—In re Deininger, 108 Fed. 623.

Under the act of congress, known as the "Lecey Act," providing that the game laws of a state may be made equally applicable to game imported into the state as to game killed within the state, Kirby's Dig., § 3620, prohibiting any express company from transporting or receiving any game for transportation beyond the state, was not unconstitutional because it applied equally to game killed without the state and to game killed therein. Wells Fargo Exp. Co. *v.* State, 79 Ark. 340, 96 S. W. 189.

A statute restricting the taking of fish is not violative of the commerce clause of the federal constitution, as to one whose purpose in taking them was to ship them into another state. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700.

68. **Natural gas.**—Manufacturers' Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 545, 58 N. E. 706.

69. **Rafting logs.**—Tittabawassee Boom Co. *v.* Cunning (Mich.), Howell N. P. 82.

70. **Articles within police power of state.**—Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

71. Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767.

72. Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

isting condition, would cause and spread disease, pestilence, and death, such as substances infected with the germs of contagious diseases, or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption, are not merchantable, and are therefore not legitimate subjects of trade and commerce within the protection of the commerce clause of the constitution, but are within the jurisdiction of the police power of the state.[73] The self-protecting power of each state may be rightfully exerted against the introduction of such articles within its limits, and such exercises of power can not be considered regulations of commerce prohibited by the constitution. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life.[74]

Determining Subjects of Interstate Commerce.—The power to regulate interstate and foreign commerce includes the power to determine what commodities or articles of property shall be the lawful subjects of that commerce and therefore the determination of this question is for congress and not for the states.[75]

Failure of Congress to Determine.—Congress, by omitting any express declaration on the subject, has not intended to submit to the several states the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country.[76]

§§ 3815-3828. Means and Instruments of Commerce—§ 3815. In General.—The power to regulate interstate commerce extends to all the instrumentalities of interstate commerce.[77]

The means of transportation of persons and freight between the states does not affect the character of the business as one of interstate commerce.[78]

Where Several Agencies Employed in Transportation.—The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress.[79]

73. **Diseased or unsound articles.**—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865.

74. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed 128, 10 S. Ct. 681.

75. **Power to determine what shall be subjects of commerce.**—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct 865; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256.

76. **Failure of congress to determine.**—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681.

77. **Means and instruments of commerce.**—Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

78. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

79. **Where several agencies employed in transportation.**—"On this point The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999, is an authority. In that case the steamer Daniel Ball was engaged in transporting goods on Grand River, wholly within the state of Michigan, destined for other states, and goods brought from other states destined for places in the state of Michigan, but did not run in connection with, or in continuation of, any line of vessels or railway leading to other states; and the contention was that she was not engaged in interstate commerce. But this court held otherwise and said: 'So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce, for when-

§ 3816. Railroads.—Under Arrangement for Continuous Carriage of Goods.—A state railroad corporation, when it voluntarily engages in interstate commerce, by making an arrangement for a continuous carriage of goods, becomes subject, so far as such traffic is concerned, to the provisions of the interstate commerce law.[80]

Terminal or Belt Railroads.—A terminal or belt railroad company, whose line is in and around a city, and entirely within one state, which receives interstate freight for shipment from or delivery to points on its line on through bills of lading issued by other companies on whose lines the shipment begins or ends, submits its road to a common control for continuous shipment, within section 1 of the interstate commerce act, and is subject to the provisions of such act.[81]

Hauling Car of Another Company.—A railroad company, which hauls over its line within a state a car of another company employed in moving interstate traffic consigned to a point in another state, which car is not equipped with the appliances required by the Safety Appliance Act, is liable for the penalty imposed by said act.[82]

Empty Cars.—The act of March 2, 1893, requiring cars used in moving interstate commerce to be equipped with couplers coupling automatically, applies to a car designed for interstate traffic, though at the time being hauled empty.[83] Within the meaning of the act of congress approved March 2, 1893, providing that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds, where a train made up in one state, and loaded with stock and merchandise, is destined for a point in another state, a car in such train, whether loaded or empty, is used in interstate commerce.[84]

Cars Not in Actual Use.—The act of March 2, 1893, requiring common carriers engaged in interstate commerce to equip their cars with automatic couplers, applies to all cars regularly used on any railroad engaged in interstate commerce not only while actually in use in such commerce but at all times when in use on such road.[85]

Car Necessarily Moved in Moving Interstate Commerce.—In an action

ever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.'" Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958.

80. Under arrangement for continuous carriage of goods.—Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986; Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

81. Terminal of belt railroads.—Interstate Stock Yards Co. *v.* Indianapolis, etc., R. Co., 99 Fed. 472.

82. Hauling car of another company.—United States *v.* Chicago, etc., R. Co., 143 Fed. 353.

A car employed in moving interstate traffic and not equipped with an appliance required by Safety Appliance Act March 2, 1893, c. 186, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], was received from another company by defendant railroad company and hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state. Held, that in such movement the car was being used in interstate commerce within the meaning of the act, and that defendant was liable for the penalty imposed thereby for its violation. United States *v.* Pittsburgh, etc., R. Co., 143 Fed. 360.

83. Empty cars.—Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867, reversed in 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

84. Judgment 99 Ill. App. 360, affirmed in Malott *v.* Hood, 201 Ill. 202, 66 N. E. 247.

85. Cars not in actual use.—United States *v.* Great Northern R. Co., 145 Fed. 438.

Act Cong. March. 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], requiring railroads to equip their cars used in interstate commerce with automatic couplers, and making railroads liable for a personal injury action by a failure to comply with the statute, applies not only in cases where the cars are, at the very moment of the injury, being actually used in moving interstate traffic, but to cases where the injury occurs in the making up of the train for the purpose of moving interstate traffic. Mobile, etc., R. Co. *v.* Bromberg, 37 So. 395, 141 Ala. 258.

for injuries received while coupling a tender to a car, it was claimed that the tender was not properly equipped under such act. It was held that, though the car to which the tender was being coupled was not used in interstate traffic, the case was within the statute, if the removal of such car was a necessary step in moving an interstate car.[86]

Railroad Operating Its Own Construction Train.—A carrier operating its own construction train, which hauls its own rails and products from a point in one state to a point in another state, is engaged in interstate commerce.[87]

Lessor Railroad.—A railroad corporation whose tracks lie wholly within a certain state does not, by leasing its tracks to a railroad corporation engaged in interstate commerce, itself engaged in interstate commerce.[88]

Train Engaged in Both Interstate and Intrastate Commerce.—Where a railroad engineer was injured while hauling a train containing cars engaged in both interstate and intrastate commerce, he was himself engaged in interstate commerce, and entitled to sue under the employer's liability act.[89]

§ 3817. Express Companies.—The interstate commerce act does not apply to independent express companies not operating railway lines.[90]

§ 3818. Dining Cars.—A dining car being engaged in interstate commerce while actually making its interstate journey, it is equally so when waiting for a train to be made up for the next trip, it being regularly used in the movement of interstate traffic.[91]

§ 3819. Terminal Companies and Stockyards.—A terminal company which received cars of coal coming from another state, and delivered them within its yards to the engines of a railroad company, was engaged in moving interstate traffic, within Safety Appliance Act, March 2, 1893, c. 496, 27 Stat. 531 [U. S.

86. **Car necessarily moved in moving interstate commerce.**—Winkler *v.* Philadelphia, etc., R. Co. (Del.), 4 Pen. 80, 53 Atl. 90.

87. **Railroad operating its own construction train.**—United States *v.* Chicago, etc., R. Co., 149 Fed. 486.

88. **Lessor railroad.**—Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858.

A fireman, whose run was wholly within the state, having oiled and prepared his engine, which was not then attached to any train, was killed while crossing the tracks to his boarding house for a personal purpose. His engine was to have hauled some freight, which was interstate commerce, but the road upon which it operated was not an interstate carrier, though the lessee of the road was engaged in such commerce. Held, that the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), which applies only to a carrier by railroad while engaged in interstate commerce, and only to an employee suffering injury while employed in such commerce, did not apply, for the fireman was not then engaged in interstate commerce. Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858.

89. **Train engaged in both interstate and intrastate commerce.**—Horton *v.* Seaboard, etc., R. Co., 157 N. C. 146, 72 S. E. 958.

90. **Express companies.**—Decree 88 Fed. 659, affirmed in Southern Indiana Exp. Co. *v.* United States Exp. Co., 35 C. C. A. 172, 92 Fed. 1022.

91. **Dining cars.**—"Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and Coe *v.* Errol 116 U. S. 517, 29 L. Ed. 715, 6 S. Ct. 475, is cited as supporting that contention. In Coe *v.* Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun. The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly a dining car is under the control of congress while in the act of making its interstate journey, and it was equally so when waiting for a train to be made up for the next trip, it being regularly used in the movement of interstate traffic." Johnson *v.* Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158.

Comp. St. 1901, p. 3174].[92] The fact that the state line runs through stockyards, resulting in some of the pens in which stock may be confined being partly in one state and partly in another, and that sales may be made of a lot of stock which may be at the time partly in one state and partly in the other, does not make the business of buying and selling live stock on commission at such stock yards interstate commerce, when the business would not otherwise partake of that character.[93] The fact that a particular stockyard extends over the boundary line between two states does not make the business there carried on interstate commerce.[94] A live-stock commission merchant, whose place of business is at certain stockyards in a city, and who there buys and sells stock for others, is not engaged in interstate commerce, within the meaning of the anti-trust statute, although the stock may have been shipped from another state or territory, consigned to him for sale, and may be sold for shipment to another state or a foreign country. Nor is the nature of his business affected in that regard by the fact that he pays drafts drawn against consignments of stock to him for sale, nor because he may have previously loaned money to aid in the preparation of the stock for market, and taken a mortgage thereon, the amount of which he deducts from the proceeds of the sale.[95]

Where Compensation Paid by Railroad.—A stockyards company maintaining tracks connecting with the tracks of railroad companies, and which by its own locomotives and servants transports cars containing interstate shipments to and from the tracks of the railroad companies, is a common carrier engaged in interstate commerce, though it collects compensation only from the railroad companies and is paid under a contract between it and them.[96]

§ 3820. Warehouses and Elevators.—While grain warehouses and elevators situated and whose business is carried on exclusively within a state, may be used as instruments by those engaged in interstate commerce, yet they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so.[97]

92. Terminal companies and stockyards.—United States *v.* Northern Pac. Terminal Co., 144 Fed. 861.

93. "The erection of the building and the putting up of the stockpens upon the ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts." Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

Live stock shipped from various states to the yards of a stockyards association in another state, by the solicitation and procurement of the members thereof, to be there sold, or to be reshipped to other states, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the state. United States *v.* Hopkins, 82 Fed. 529, reversed in 19 S. Ct. 40, 171 U. S. 578, 43 L. Ed. 290; Cotting *v.* Kansas City Stockyards Co., 82 Fed. 839.

94. Cotting *v.* Kansas City Stockyards Co., 82 Fed. 850; reversed in Cotting *v.* Godard, 22 S. Ct. 30, 183 U. S. 79, 46 L. Ed. 92.

95. Hopkins *v.* United States, 171 U. S. 578, 19 S. Ct. 40, 43 L. Ed. 290, reversing order 82 Fed. 529.

96. Where compensation paid by railroad.—Judgment, United States *v.* Union Stockyards Co., 161 Fed. 919, affirmed in 94 C. C. A. 626, 169 Fed. 404.

97. Warehouses and elevators.—Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247, 12 S. Ct. 468; Brass *v.* Stoeser, 153 U. S. 391, 38 L. Ed. 757, 14 S. Ct. 857; Cargill Co. *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423.

The long-mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the interstate commerce commission was answered by the Act of June 29, 1906 (34 Stat. at L. 584, 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), in which congress declared that the term "'transportation' shall include * * * all * * * facilities of shipment, * * * irrespective of ownership, * * * and all services in connection with the * * * elevation and transfer in transit * * *

Where Delivery to Consignee Contemplated.—Where an interstate shipment of goods is made, wherein it is the contemplation that delivery will be made to the consignee, instead of being delivered at a warehouse, the goods continue a subject of interstate commerce until they are so delivered.[98]

Property Held in Warehouse after Refused by Consignee.—Property held by a carrier in its warehouse after a refusal of the consignee to accept, without any notice to the consignor, must be considered as still in interstate commerce for the purpose of determining liability for its destruction.[99]

§ 3821. Pipe Lines.—Natural gas, when reduced to possession, is a commodity which belongs to the owner of the land, and may be the subject of both intrastate and interstate commerce; and a state law which prohibits the construction of pipe lines for natural gas, or the transportation of the gas by such lines except by domestic corporations and only between points within the state, with a strict prohibition against transporting, selling or in anywise furnishing gas for use beyond the limits of the state, unconstitutionally interferes with interstate commerce and the right to engage therein, and can not be justified as an exercise of the police power of the state to conserve its natural resources.[1]

§ 3822. Bridges.—The transportation of persons and property over a bridge connecting two states is interstate commerce, and the bridge is an instrument of such commerce.[2]

§ 3823. Ferries.—The transportation of passengers and freight by a ferry over a river between two states is interstate commerce.[3]

§ 3824. Ports, Harbors and Wharves.—In the absence of action by congress on the subject, a state may pass harbor regulations, describing wharfage charges, regulating the position of vessels and the usual police duties in harbors.[4]

§ 3825. Connecting Carriers.—When a carrier unites with one or more others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the interstate commerce act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage, constitutes assent to such common arrangement, and makes the carrier a party to the contract, within the meaning of the act.[5] The business of a through line of railroad, consisting in

and handling of property transported." Carriers were required "to provide and furnish such transportation upon reasonable request therefor." The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. at L. 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1159) provides that "if the owner * * * renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable," the commission being authorized to determine what is reasonable. Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

98. **Where delivery to consignee contemplated.**—State *v.* Railroad Comm., 171 Ind. 138, 85 N. E. 337, 19 L. R. A., N. S., 93, rehearing deined in 85 N. E. 966.

99. **Property held in warehouse after refused by consignee.**—Nashville, etc., R. Co. *v.* Dreyfuss-Weil Co., 150 Ky. 333, 150 S. W. 321.

1. **Pipe lines.**—West *v.* Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716, 31 S. Ct. 564, 35 L. R. A., N. S., 1193.

2. **Bridges.**—Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

3. **Ferries.**—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826. See, also, Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

4. **Ports, harbors, and wharves.**—Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691, 2 S. Ct. 732; Harbor Master *v.* Sutherland, 74 Ala. 511.

5. **Connecting carriers.**—United States *v.* Wood, 145 Fed. 405.

A car loaded with coal, to be delivered to a consignee in another state, is "used in moving interstate traffic," within

carrying passengers and freight into a state from other states, and out of that state into other states, being interstate commerce, it follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce.[6]

Line Wholly within State.—A connecting railroad carrier over whose line an interstate shipment passes is engaged in interstate commerce with respect to such shipment and subject to the law regulating the same, although its line may lie wholly within one state.[7]

Carriage under Common Arrangement or Control.—All carriers participating in the transportation of merchandise from one state to another are engaged in interstate commerce, without reference to the bill of lading, and though no traffic arrangement existed between them, no matter how the transportation was carried out or the freight paid.[8] A common carrier operating a railroad entirely within a single state, and transporting thereon articles of commerce shipped in continuous passage from places within the state to stations on its road or from stations on its road to points without the state, is subject to the provisions of the act of March 2, 1893, though it carries the property free from a common control or arrangement with any carrier for continuous carriage or shipment of the articles.[9] That a defendant made contracts for the through carriage of interstate shipments, and settlements therefor, solely with one railroad company, although such shipments passed over the lines of other companies also, sufficiently proves a common arrangement between the carriers for a continuous carriage.[10]

Shipment of Joint Rates.—Where a railroad company published and filed a schedule of rates between points on its line within a state, and also procured and filed as its own the schedules of rates of a terminal company for the carriage of property from one of such points into another state and made contracts for through carriage and collected the freight therefor, it was an interstate carrier as to such shipments, and the lawful rate was the sum of the rates shown by the two schedules.[11]

Continuous Shipment.—Freight received in a state for transportation over the receiving and connecting line on a through bill of lading and by a continuous trip to a point beyond the state is interstate commerce.[12]

Where Final Carrier within State.—The final link in an interstate shipment may be through a carrier wholly within the terminal state, and such carrier may be another railroad or a horse and wagon.[13]

§ 3826. Soliciting Agents.—An agency of a line of railroad established for the purpose of inducing passengers going from one state into and through other states, to travel by that line, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in inter-

the meaning of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], by the railroad company which takes it from the place of loading, although such company only undertakes to deliver it to a connecting carrier within the same state. United States *v.* Southern R. Co., 135 Fed. 122.

6. Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958, citing The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999.

7. **Line wholly within state.**—United States *v.* Standard Oil Co., 155 Fed. 305.

8. **Carriage under common arrangement or control.**—American Exp. Co. *v.* Miller (Miss.), 61 So. 306.

Shipments of liquor from Louisiana to Vicksburg, and thence to destination in this state, held interstate commerce; and hence defendant express company could not refuse to receive the liquor in Vicksburg and transport the same to destination, because of Code 1906, § 1771, making persons assisting in the state of liquors in a prohibited district guilty of a misdemeanor. American Exp. Co. *v.* Miller (Miss.), 61 So. 306.

9. United States *v.* Colorado, etc., R. Co., 157 Fed. 342.

10. United States *v.* Standard Oil Co., 155 Fed. 305.

11. **Shipment of joint rates.**—United States *v.* Standard Oil Co., 155 Fed. 305.

12. **Continuous shipment.**—Missouri, etc., R. Co. *v.* New Era Milling Co., 80 Kan. 141, 101 Pac. 1011.

13. **Where final carrier within state.**—Commonwealth *v.* People's Exp. Co., 201 Mass. 564, 88 N. E. 420.

state commerce. Such business is directly connected with interstate commerce, and consists wholly in carrying it on.[14] Solicitators employed by a live stock exchange to solicit the various owners of stock to consign the cattle to the exchange for sale, are not engaged in interstate commerce. The effect of an agreement as to the number of solicitors to be employed by a live stock exchange can only be remote and indirect upon interstate commerce.[15]

§ 3827. Steamboats.—The carrying of a pleasure party on a steamboat is not interstate commerce, although the boat may touch the shores of different states.[16]

§ 3828. Determining Whether Commerce Is Intrastate or Interstate.—The character of the traffic, as intrastate or interstate, in which a car is being used at the time of an injury, is to be determined from the proof as to the points between which the car was being moved at the time, irrespective of whether the road was an interstate road or whether the car was sometimes used in interstate traffic.[17] In determining whether a service in the transportation of freight from a point in one state to an unloading point in another is interstate commerce, the circumstances of a through tariff rate, a through bill of lading, and continuity of ownership and consignee are evidentiary, but not controlling.[18] Between the point of delivery of freight for transportation and the point for discharge, there may be changes of ownership and of consignees, successive bills of lading, or no bill for some section of the transit, and the freight yet be of interstate commerce throughout.[19] In case a car of freight is started for a point without to a point within the state and the transit is characterized by a bill of lading which does not expressly call for delivery at an unloading point, but the general custom is to place such cars at a terminus within the scope of the expressed delivery point—to be removed therefrom to an unloading point, determined after arrival thereat, or at the start or in the meantime—either by the initial or some connecting carrier, there being no expectation from the start, of the freight being discharged at the point of temporary break in the transit, nor facilities therefor, the presumption is that the shipper purposed, in the beginning, that the freight should go beyond such terminus to a place for unloading, and the whole is a unit as regards whether the service is interstate or intrastate, regardless of the fact that such terminus answers the literal call in the bill for the end of the shipment and in fact as to the particular tariff rate specified therein.[20] In the case suggested in the forego-

14. Soliciting agents.—McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881, distinguished in Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

15. "The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. It was said in Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694, 7 S. Ct. 592, that the negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce. But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to market for sale they will consign it to the solicitor's principal." Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

16. Steamboats.—State *v.* Seagraves, 111 Mo. App. 353, 85 S. W. 925.

17. Determining whether commerce is intrastate or interstate.—Luken *v.* Lake Shore, etc., R. Co., 248 Ill. 377, 94 N. E. 175, 21 Am. & Eng. Ann. Cas. 82.

Shipments f. o. b. Louisville, originating at another point in Kentucky, of ties, held governed by intrastate, and not interstate rates, though the shipments were made in care of nonresident officials of the purchasing companies, and the ties were forwarded to other states without unloading. Louisville, etc., R. Co. *v.* Ohio Valley Tie Co., 148 Ky. 718, 147 S. W. 421.

18. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

19. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

20. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

ing, the temporary place of stoppage, though satisfying the literal call of the bill of lading, is to be regarded only as marking the end of part of the entire transit covered by the tariff rate mentioned in such bill, where continuance to the unloading point is required to be over another line, the additional movement does not militate against the subject of the shipment being interstate to such unloading point.[21] When property is delivered to a carrier in one state for the purpose of having the same transported to an unloading point in another state, it is matter of interstate commerce until it is unloaded at the terminus of the service sought or tendered for unloading, regardless of the number of elements making up the entirety of the transit and that the last is a mere switching movement not covered by a bill of lading.[22] In general, it is the character of the service required, intended and rendered, not the manner in which it is accomplished, which determines interstate character. Such service impresses the subject of the transit at the start, and delivery at the unloading point where the person entitled to receive the freight has reasonable opportunity to accept discharge of it, removes such impress.[23]

21. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

22. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

23. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

CHAPTER XXXV.

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f. Reshipment of Goods, § 3923.
T. Regulation of Relation of Consignor and Consignee, § 3924.
U. As to Remedies, §§ 3925-3937.
a. Prerequisites to Bringing Suit, § 3925.
b. Jurisdiction and Venue of Suits, § 3926.
c. Parties to Suits, § 3927.
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e. Evidence, § 3929.
f. Proceeding by Attachment and Garnishment, § 3930.
g. Removal of Cause to Federal Court, § 3931.
h. Equitable Remedies, § 3932.
i. Requiring Claim for Damages to Be Made in Prescribed Time, § 3933.
j. Requiring Payment of Damages in Prescribed Time, § 3934.
k. Lien on Vessel for Services and Material, § 3935.
l. Seizure for Taxes, § 3936.
m. Entry of Satisfaction of Mortgage.

§§ 3829-3859. Power of Congress—§ 3829. In General.—Congress has been expressly given power by the constitution to regulate commerce with foreign nations and among the several states, and to make all laws necessary and proper for carrying that power into execution.[1] The clause, giving congress the power to regulate interstate and foreign commerce, was among the most important of the subjects which prompted the formation of the constitution.[2] But a carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of congress.[3]

The object of vesting in congress the power to regulate commerce with foreign nations and among the several states was to insure equality and freedom in commercial intercourse and uniformity of regulation against conflicting and discriminating state legislation.[4] The conflict between the commercial regulations of the several states was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the congress of the power to regulate commerce with foreign nations and among the states.[5]

Exclusive Power of Congress.—Railroads engaged in interstate commerce are subjects of such commerce, national in their character, and the power of congress over the same is exclusive, and may be exercised to the utmost extent, and the sovereignty of congress, though limited to specific objects, is plenary as to such objects, and the power over commerce among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[6] Though the act of congress of June 29, 1906,

1. **Regulation and control.**—United States Const., art. 1, § 8; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Fairbank *v.* United States, 181 U. S. 283, 45 L. Ed. 862, 21 S. Ct. 648; United States *v.* Arjona, 120 U. S. 479, 30 L. Ed. 728, 7 S. Ct. 628; Gilman *v.* Philadelphia (U. S.), 3 Wall. 713, 18 L. Ed. 96.

2. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 189, 6. L. Ed. 23.

3. Judgments Brooks *v.* Southern Pac. Co., 148 Fed. 986, and Howard *v.* Illinois Cent. R. Co., 148 Fed. 997, affirmed in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

4. County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238.

5. Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806.

6. **Exclusive power of congress.**—United States *v.* Southern R. Co., 164 Fed. 347.

fixing the liability of the initial carrier to the shipper, expressly preserves in his favor all remedies and rights of action otherwise existing, yet, where the terms of a statute are directly applicable, they become the paramount law, and all state laws to the contrary are superseded.[7] Congress has exclusive power to fix the time when an interstate shipment of intoxicating liquor loses its interstate character and becomes subject to state control.[8]

Shipments between Foreign Countries.—The Elkins Act of Feb. 19, 1903, concerning interstate commerce, does not apply to a cargo shipped from Hamburg, Germany, destined, as stated in the bill of lading, to Philadelphia, for transportation in bond to Alberta, Canada, and taken to its destination by continuous and uninterrupted transportation at the hands of successive carriers; there being no delivery or change of title, but the different carriers merely assisting in a continuous transportation from one foreign country to another.[9] Transportation of passengers between Europe and the United States constitutes a part of the commerce of the United States with foreign nations, and congress has power to prohibit all contracts, combinations, and conspiracies in restraint of such commerce.[10]

Power over Interstate and Foreign Commerce Compared.—The power of congress to regulate interstate commerce is as absolute as is its power to regulate commerce with foreign nations. The power conferred upon congress to regulate commerce among the states is contained in the same clause of the constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive.[11]

Territorial Extent of Power.—The power of congress over commerce with foreign nations and among the several states is broad and comprehensive. It does not stop at the external boundary or jurisdictional lines of the several states, but reaches the interior of every state of the Union, so far as it may be necessary to regulate and protect such commerce.[12]

Limitations on Powers of Congress.—The power conferred upon congress to regulate foreign and interstate commerce, like all other powers vested in congress, is absolute and complete in itself, may be exercised to its utmost extent and is subject to no limitations other than are prescribed in the constitution.[13] This

7. Southern Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865.

A petition against a carrier for damage to an interstate shipment sets out a cause of action, though the bill of lading attached contains provisions which but for Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907 p. 892), the Hepburn Act, would exempt the carrier from liability, for the regulations of congress on the subject are paramount and supersede all state laws. Southern Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865.

8. McCord *v.* State, 2 Okla. Cr. App. 214, 101 Pac. 280

9. **Shipments between foreign countries.**—United States *v.* Philadelphia, etc., R. Co., 188 Fed. 484.

10. United States *v.* Hamburg-Amerikanische, etc., Gesellschaft, 200 Fed. 806.

11. **Power over interstate and foreign commerce compared.**—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577, 39 L. Ed. 538, 15 S. Ct. 415.

12. **Territorial extent of power.**—Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 196, 6 L. Ed. 23; Gilman *v.* Philadelphia (U. S.), 3 Wall. 713, 18 L. Ed. 96; The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999; Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Brennan *v.* Titusville, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767; Kidd *v.* Pearson, 128 U. S. 1, 16, 32 L. Ed. 346, 9 S. Ct. 6; Scranton *v.* Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 S. Ct. 48; In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

13. **Limitations on powers of congress.**—Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 196, 6 L. Ed. 23; Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678; Kidd *v.* Pearson, 128 U. S. 1, 32 L. Ed. 346, 9 S. Ct. 6; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Brennan *v.* Titusville, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed.

power over commerce among the states, so conferred upon congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.[14]

The principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.[15] But in the absence of legislation by congress, there is no common law of the United States which prohibits obstructions and nuisances in navigable waters.[16]

White Slave Act.—Transportation of persons as well as of property is "commerce," and congress may regulate their interstate transportation.[17] The act of June 25, 1910, commonly known as the White Slave Act, which forbids the inducing of a person to come into a state with unlawful purpose by the inducer and in aid of such unlawful purpose, is not unconstitutional as an invasion of the police power of the state.[18]

Compelling Carriers to Make Reports.—Congress did not exceed its powers under the commerce clause by compelling carriers by water in the Great Lakes engaged in transportation of passengers and property, partly by water under a joint arrangement for continuous carriage, to make annual reports embracing joint rail and water business and other business of the carriers as well.[19]

§ 3830. As to Charges.—The constitutional power of congress to regulate commerce among the several states includes the power to regulate freight rates by requiring that they shall be uniform to all shippers, and in construing statutes enacted to that end freight rates should be construed to mean the net cost to the shipper of the transportation of his property, and such regulations may lawfully apply, not only to common carriers, but to all persons and corporation occupying

259, 19 S. Ct. 25; Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622; Lottery Case, 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 321; Buttfield *v.* Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349; Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; Louisiana *v.* Texas, 176 U. S. 1, 44 L. Ed. 347, 20 S. Ct. 251; Scranton *v.* Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 S. Ct. 48; Compagnie Francaise, etc., Vapeur *v.* Louisiana State Board, 186 U. S. 380, 46 L. Ed. 1209, 22 S. Ct. 811; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

14. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

A carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of congress. Judgments Brooks *v.* Southern Pac. Co., 148 Fed. 986, and Howard *v.* Illinois Cent. R. Co., 148 Fed. 997, affirmed in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

15. **Application of common-law principles.**—Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

16. Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 31 L. Ed. 629, 8 S. Ct. 811.

17. **White Slave Act.**—Bennett *v.* United States, 194 Fed. 630, 114 C. C. A. 402.

18. Bennett *v.* United States, 194 Fed. 630, 114 C. C. A. 402.

Congress had power to enact White Slave Act June 25, 1910, making criminal the transportation of women in interstate commerce for purposes of prostitution. Hoke *v.* United States, 227 U. S. 308, 33 S. Ct. 281, Ann. Cas. 1913E, 905, affirming judgment 187 Fed. 992; Athanasaw *v.* United States, 227 U. S. 326, 33 S. Ct. 285, Ann. Cas. 1913E, 911; Bennett *v.* United States, 227 U. S. 333, 33 S. Ct. 288, affirming judgment 114 C. C. A. 402, 194 Fed. 630; Harris *v.* United States, 227 U. S. 340, 33 S. Ct. 289, affirming judgment 114 C. C. A. 406, 194 Fed. 634.

Act June 25, 1910, commonly known as the White Slavery Traffic Act, held within the power of congress to regulate interstate commerce. Kalen *v.* United States, 116 C. C. A. 450, 196 Fed. 888; Pauslen *v.* United States, 118 C. C. A. 97, 199 Fed. 423.

19. **Compelling carriers to make reports.**—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436, reversing judgment 190 Fed. 943.

such relation to transportation that the conduct of their business may operate to impair uniformity of rates.[20]

Railroad Wholly Within State.—Where the line of the defendant's railroad is entirely within the state, but the defendant is engaged in the transportation of property moving wholly by railroad from one state to another, it is as much subject to the act of Feb. 4, 1887, regulating railroad rates, as it would be if operated with a railway connecting points within different states.[21]

Collection of Charges.—An action by an initial carrier against the consignor of an interstate shipment to recover part of the freight charges which its agent through mistake failed to collect did not relate to interstate commerce, so as to be governed by the Interstate Commerce Act, so as to give the interstate commerce commission or the federal courts jurisdiction thereof to the exclusion of the state courts, §§ 8 and 9 making a common carrier liable for damages where it permits any prohibited act, or omits to do anything required by the act, not applying to such an action.[22]

Rebates.—Neither the Interstate Commerce Act of Feb. 4, 1887, nor the amendatory act of Feb. 19, 1903, is unconstitutional on the ground that, in making it a criminal act for the shipper to accept rebates, congress exceeded its power under the commerce clause of the constitution.[23]

Rebate by Connecting Carrier.—The fact that a concession from the published and filed through rate on an interstate shipment over the lines of connecting carriers was given entirely by the initial carrier for transportation over its own line wholly within one state does not relieve the shipper receiving such concession from liability to prosecution.[24]

Printing and Posting Rates.—The Interstate Commerce Act of June 29, 1906, declares that the act shall apply to any carrier engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment, and to the transportation in like manner of property shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or in an adjacent foreign country. A shipment made from a foreign country to a place in the United States was subject to the terms of the act relating to the posting and publishing of schedules of rates as declared by § 2.[25]

20. **Charges.** — Interstate Commerce Comm. *v.* Reichmann, 145 Fed. 235.

21. **Railroad wholly within state.**— United States *v.* Illinois Terminal R. Co., 168 Fed. 546.

22. **Collection of charges.**—St. Louis, etc., R. Co. *v.* Gramling, 97 Ark. 353, 133 S. W. 1129.

23. **Rebates.**—United States *v.* Standard Oil Co., 155 Fed. 305.

24. **Rebate by connecting carrier.**— United States *v.* Vacuum Oil Co., 158 Fed 536.

25. **Printing and posting rates.**—Fisher *v.* Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.

Complainant railroad companies filed with the interstate commerce commission a schedule of rates from points in Louisiana to New Orleans for export shipments. The railroad commission of Louisiana had also fixed a schedule of different and lower rates on local shipments between the same points. It also by an order allowed four days free storage on local shipments and twenty days on shipments intended for export, in which order the railroads acquiesced, and also delivered shipments for export at ship's side free of charge for switching. Certain shipments were delivered to complainants from points in Louisiana for carriage to New Orleans on bills of lading of substantially the local form, and on their arrival the consignees demanded and received the free storage accorded export shipments and free delivery to the vessel carrier; the shipments being delivered by complainants directly from their cars to such carrier, as was intended by the owner when it was shipped. Held that, notwithstanding the use of the local bills of lading, the contract between the shippers and complainants was one for an export shipment, over which the Louisiana Railroad Commission had no jurisdiction, and that complainants were entitled, and even required, to charge the rates on such shipments fixed by their schedules filed with the interstate commerce commission. Texas, etc., R. Co. *v.* Railroad Comm., 183 Fed. 1005.

Preference of Ports of One State over Ports of Another.—Preference is not given to the ports of one state over those of another by applying to articles intended for foreign export the provisions of the act of Feb. 19, 1903, making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.[26]

§ 3831. As to Transportation of Live Stock.—Congress has exercised the power granted in respect to interstate commerce by regulating the transportation of live stock over interstate railroads, and has prohibited interstate transportation by railroads of live stock affected with any contagious or infectious disease.[27]

§ 3832. As to Transportation of Goods Manufactured by Carrier.—Congress could properly enact, as a regulation of commerce, so much of the Hepburn Act June 29, 1906, as forbids a carrier from transporting articles or commodities in interstate commerce when they have been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.[28]

§ 3833. As to Limitation of Liability by Carrier.—It seems that under the broad power conferred upon congress over interstate commerce, it would be lawful for that body to prescribe the measure of liability of interstate carriers for loss resulting from their negligence, and to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation.[29] It is within the power of congress to impose upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss, and to invalidate

26. Preference of ports of one state over ports of another.—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428. Affirming judgment 82 C. C. A. 135, 153 Fed. 1; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment 157 Fed. 830.

27. Transportation of live stock.—Act of March 3, 1873, ch. 252, 17 Stat. 584 (Rev. Stat., §§ 4386 to 4389); Act of May 29, 1884, ch. 60, § 6, 23 Stat. 3132. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

28. Transportation of goods manufactured by carrier.—Judgment 164 Fed. 215, reversed in United States *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 836, 29 S. Ct. 527. See post "Interstate Commerce Act" chapter 36.

29. As to limitation of liability by carrier.—But the legislation of congress to regulate interstate commerce, as found in 24 Stat. at L. 379, 382; 25 U. S. Stat. at L. 855, does not make such provision, and there being no sanction by congress of agreements of this character limiting its liabilities to stipulated valuations, until congress shall legislate upon it, there is no valid objection to a state enforcing its regulations upon the subject, prohibiting such limitation, although it may to this extent indirectly affect interstate commerce contracts of carriage. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

A bill of lading was given in the state of New York for transporting stock to a point in Pennsylvania, containing a clause limiting the carrier's liability for negligence. Held, a state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding, and such requirement is held not to be an unlawful attempt to regulate interstate commerce in the absence of congressional action providing a different measure of liability. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

any agreement or stipulation, limiting the liability of the initial carrier to losses occurring on its own line.[30] Such a statute is not unconstitutional, either as taking the property of the initial carrier to pay the debt of an independent connecting carrier in violation of the due process clause of the fifth amendment, or as violating the liberty of contract guaranteed by that amendment.[31]

The Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906, provides that any common carrier, etc., on receiving property for interstate transportation, shall issue a receipt or bill of lading therefor, and be liable to the holder for any loss, damage, or injury to the property caused by the common carrier, etc., and no contract, receipt, etc., shall exempt the carrier from the liability hereby imposed. Congress has constitutional power to regulate the right of public or common carriers of interstate commerce to contract, and § 20 is constitutional.[32]

30. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205; Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, affirming 168 Fed. 990; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171, affirming 133 Ky. 724, 118 S. W. 990.

The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss which is made by Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce. Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, affirming judgment 168 Fed. 990; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171, affirming judgment 118 S. W. 990, 133 Ky. 724; Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205.

31. The property of the initial carrier is not taken in violation of Const. U. S. Amend. 5, to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of a loss, by the Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1163]), to Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), under which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere en route, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss, since the liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents. Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, affirming judgment 168 Fed. 990; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171, affirming judgment 118 S. W. 990, 133 Ky. 724.

The liberty of contract secured by Const. U. S. Amend. 5, was not unconstitutionally denied by the enactment by congress, in the exercise of its power under the commerce clause, of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1163]) to Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3169), by which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere en route, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss. Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, affirming judgment 168 Fed. 990; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171, affirming judgment 118 S. W. 990, 133 Ky. 724.

32. Under Interstate Commerce Act.— Greenwald *v.* Weir, 111 N. Y. S. 235, 59 Misc. Rep. 431.

Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), known as the "Carmack Amendment to the Interstate Commerce Act," providing that any common carrier receiving property for interstate transportation shall be liable to the holder of the bill of lading for any damage caused by it or any common carrier to which such property may be delivered, and that no contract shall exempt such carrier from the liability imposed, is a valid regulation of interstate commerce, and does not operate to take private property for public purposes. Louisville, etc., R. Co. *v.* Scott, 133 Ky. 724, 118 S. W. 990, 19 Am. & Eng. Ann. Cas. 392.

The Act of June 29, 1906, providing that a carrier receiving property from a point

§§ 3834-3859. Subjects of Regulation—§ 3834. In General.—The commercial power of congress is without limitation. It extends to every species of commercial intercourse between the United States and foreign nations and to all commerce among the several states.[33] The power extends to and embraces within its control all the subjects of that commerce[34] and all persons engaged in it.[35]

Power to Create Corporation.—Congress may create corporations as appropriate means of executing its powers over, and for the purpose of promoting interstate commerce, as for instance, a railroad corporation.[36] To the same end congress may employ such a corporation created by one of the states.[37]

Means and Instruments of Commerce.—The power of congress to regulate interstate and foreign commerce extends to and embraces within its control and authorizes appropriate legislation with respect to all the instrumentalities and means by which that commerce may be carried on or conducted,[38] and congress has authority to regulate an instrumentality or agency employed in commerce between the states, not only when that agency or instrumentality extends through two or more states, but also when it is confined in an action entirely within the limits of a single state.[39]

Means and Instruments Invented Since Constitution Adopted.—The power granted to congress to regulate commerce is not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but it keeps pace with the progress of the country, and adapts itself to the new

in one state to a point in another can not limit its liability to its own line, is not unconstitutional as infringing state sovereignty. Galveston, etc., R. Co. *v.* Wallace (Tex. Civ. App.), 117 S. W. 169.

A carrier receiving property for transportation from a point in one state to a point in another is within Carmack Amendment, June 29, 1906, § 7, to Interstate Commerce Act Feb. 4, 1887, § 20, making it liable for the loss en route, notwithstanding stipulation to the contrary, where it accepts such shipment over route selected by shipper, as to which the carrier has no established through rate. Norfolk, etc., R. Co. *v.* Dixie Tobacco Co., 228 U. S. 593, 33 S. Ct. 609, affirming judgment 111 Va. 813, 69 S. E. 1106.

33. Subjects of regulation.—State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767.

34. Steamship Co. *v.* Joliffe (U. S.), 2 Wall. 450, 17 L. Ed. 805; United States *v.* Marigold (U. S.), 9 How. 560, 13 L. Ed. 257; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819.

35. Persons engaged in commerce.—Steamship Co. *v.* Joliffe (U. S.), 2 Wall. 450, 17 L. Ed. 805; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819.

36. Power to create corporation.—Luxton *v.* North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808, 14 S. Ct. 891; Wilson *v.* Shaw, 204 U. S. 24, 51 L. Ed. 351, 27 S. Ct. 233; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965.

37. Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965.

38. Means and instruments of commerce.—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297, 15 S. Ct. 207; Veazie *v.* Moor (U. S.), 14 How. 568, 14 L. Ed. 545; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622; United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325, 15 S. Ct. 249; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

39. "If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999.

developments of time and circumstances. The power of congress extends from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. It was intended for the government of the business to which it relates, at all times and under all circumstances. As it was intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.[40] The language of the grant of power to congress to regulate foreign and interstate commerce makes no reference to the instrumentalities or agencies by which such commerce may be carried on; it is general, and includes alike commerce by whomsoever carried on, whether by individuals,[41] partnerships, associations,[42] or corporations.[43]

40. Means and instruments invented since constitution adopted. — Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708.

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

41. Commerce carried on by individuals.—Paul *v.* Virginia (U. S.), 8 Wall. 168, 19 L. Ed. 357; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; Luxton *v.* North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808, 14 S. Ct. 891; Wilson *v.* Shaw, 204 U. S. 24, 51 L. Ed. 351, 27 S. Ct. 233.

42. Partnerships and associations.— Paul *v.* Virginia (U. S.), 8 Wall. 168, 19 L. Ed. 357.

43. Paul *v.* Virginia (U. S.), 8 Wall. 168, 19 L. Ed. 357; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

"**At the time of the formation of the constitution** a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations." Paul *v.* Virginia (U. S.), 8 Wall. 168, 19 L. Ed. 357. See, also, Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

"**At the present day,** nearly all enterprises of a commercial character, requiring for their successful management large expenditures of money, are conducted by corporations. The usual means of transportation on the public waters, where expedition is desired, are vessels propelled by steam; and the ownership of a line

§ 3835. Corporations in General.—The power conferred upon congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals.[44] Franchises of a corporation chartered by a state, so far as they involve questions of interstate commerce, must always be exercised in subordination to the power of congress to regulate such commerce.[45]

§§ 3836-3851. Railroads—§ 3836. In General.—Railroad companies engaged in the transportation of passengers and freight among the states and between the United States and foreign countries, are instruments of interstate and foreign commerce, and their business is such commerce itself. Therefore such companies and the railroads they operate are subject to regulation by congress.[46] By the act of June 15, 1866, ch. 124, congress, for the declared purpose of facilitating commerce among the several states, and the postal and military communications of the United States, authorized every railroad company in the United States, whose road is operated by steam, to carry upon and over its road boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property, on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states so as to form continuous

of such vessels generally requires an expenditure exceeding the resources of single individuals. Except in rare instances, it is, only by associated capital furnished by persons united in corporations, that the requisite means are provided for such expenditures." Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

44. Corporations.—The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. Paul *v.* Virginia (U. S.), 8 Wall. 168, 19 L. Ed. 357; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 30 L. Ed. 342, 7 S. Ct. 108.

45. "In respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of congress. It is not intended to intimate, however, that it has a general visitorial power over state corporations." Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370.

46. Railroads.—Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259, 19 S. Ct. 25; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067. See, also, Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965; Chicago, etc., R. Co. *v.* Pullman Southern Car Co., 139 U. S. 79, 35 L. Ed. 97, 11 S. Ct. 490; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465.

When such railroad carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the states, they become—even if they be state corporations—subject to such rules as congress may lawfully establish for the conduct of interstate commerce. Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

Among the instruments and agents to which the power extends are the railroads over which the transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in anywise engaged in such transportation, whether as common carriers or as their employees. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44. See, also, Interstate Commerce Comm. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163; Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

lines for the transportation of the same to the place of destination.[47] This act was passed under the power vested in congress to regulate commerce among the several states, and was designed to remove trammels upon transportation between different states, which previously existed, and to prevent the creation of such trammels in the future.[48] Congress has, by the act of February 4, 1887, commonly known as the interstate commerce act, and amendments thereto, assumed the regulation and control of the interstate railway traffic of the United States. The principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.[49] Therefore, prior to legislation by congress on the subject, the interstate railway traffic of the country was regulated by the principles of common law applicable to common carriers.[50]

47. Act of June 15, 1866, ch. 124, 14 Stat. 66; Rev. Stat., § 5258. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900; Railroad Co. *v.* Richmond (U. S.), 19 Wall. 584, 22 L. Ed. 173; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

In Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096, the court stated that the act of 1866 authorized every railroad company embraced within the act "to connect, in any state authorizing it to do so, with roads of other states, so as to form continuous lines of transportation."

By the statute of Illinois of February 2, 1855, all railroad corporations of the state were empowered to make contracts with each other, and with railroad corporations of other states, for leasing, or running, or connecting their railroads; and by the statute of Illinois of February 25, 1867, railroads terminating at a point at which there was a railroad bridge on a line of continuous railroad thoroughfare were required to be connected by rail, as to make "an uninterrupted communication over such railroads and bridge as public thoroughfares." By the acts of congress of December 17, 1872, c. 4, and February 14, 1883, c. 44, bridges were authorized to be built across the Ohio River by any person or corporation, having lawful authority therefor, and with the approval of the secretary of war; and were declared to be lawful structures and post routes for the transmission of the mails and the troops and munitions of war of the United States. 17 Stat. 398; 22 Stat. 414. The bridge across the Ohio river from the Kentucky shore to the Illinois shore, opposite the city of Cairo in Illinois, having been constructed by a lawful authority, and as permitted by congress, the Illinois Central Railroad Company had the right, under the acts of congress and the statute of Illinois, to connect its roads with that bridge, and to run its southward bound trains over that bridge as part of a system of interstate communication. Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096.

48. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Railroad Co. *v.* Richmond (U. S.), 19 Wall. 584, 22 L. Ed. 173; In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

49. **Common-law principles applicable.**—Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

50. **Application to interstate railway traffic.**—Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

"In Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of exemption from liability created by the contract under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court, after describing the business in which the companies were engaged, said: 'Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.' And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled." Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

In the absence of congressional action the power of interstate carriers to charge for their services is restricted by the principles of the common law requiring

Tracks, Switches, etc.—In the case of railroads, the tracks, terminals, switches, stations, cars, engines, appliances, and the methods of operation are all, when employed as component parts of a general system engaged in interstate traffic, instrumentalities of interstate commerce, within the scope of congressional legislation.[51]

Ownership of Cars, etc.—It is not necessary that a railroad should actually own cars in order to be a common carrier engaged in interstate commerce; but it is sufficient if it owns and controls one of the instrumentalities essential in carrying on trade and commerce between different points.[52]

§ 3837. Power of Congress to Construct Railroad.—Congress has authority, in the exercise of its power to regulate commerce among the several states, to construct, or authorize individuals or corporations to construct railroads across the states and territories of the United States. This power is essential to the complete control and regulation of interstate commerce. Without such power, congress would be without authority to regulate one of the most important adjuncts of commerce.[53] Congress, for the purpose of facilitating interstate rail-

such charges to be reasonable. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

Principle applied in a case of a telegraph company engaged in interstate commerce. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561.

51. Tracks, switches, etc.—McNamara *v.* Washington Terminal Co., 37 App. D. C. 384.

52. Ownership of cars, etc.—McNamara *v.* Washington Terminal Co., 37 App. D. C. 384.

53. Construction of railroads.—California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150, 38 S. Ct. 1073; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965; Luxton *v.* North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808, 14 S. Ct. 891. See, also, United States *v.* Union Pac. R. Co., 160 U. S. 1, 40 L. Ed. 319, 16 S. Ct. 190; Wilson *v.* Shaw, 204 U. S. 24, 51 L. Ed. 351, 27 S. Ct. 233.

For the purpose of the construction of railroads traversing the states as well as the territories, congress may employ the agency of state as well as federal corporations. California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150, 38 S. Ct. 1073; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965; Luxton *v.* North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808, 14 S. Ct. 891. See, also, Pacific R. Removal Cases, 115 U. S. 1, 29 L. Ed. 319, 5 S. Ct. 1113.

The original Kansas Pacific R. R. Company was authorized by § 9 of the Pacific Railroad act of July 1, 1862, to extend its road into the state of Missouri—that is, "to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof (which is in the state of Missouri), so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundred meridian of longitude," namely, the point where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi River, at St. Louis (the eastern terminus of the Pacific Railroad of Missouri), to the Pacific Ocean. The power assumed by congress in giving this authority to the Kansas company was, undoubtedly, assumed to be within the power "to regulate commerce among the several states," and, although by an act of the legislature of Missouri, passed in February, 1865, the consent of that state was also given to the extension of the road into its territory, and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the act of congress, as well as by the consent of the legislature of Missouri. So that the right of appropriating the very property in question in this case was claimed under authority of an act of congress. Pacific R. Removal Cases, 115 U. S. 1, 29 L. Ed. 319, 5 S. Ct. 1113.

Congress, in the act of September 20, 1850, c. 61, granted a right of way, and sections of the public lands, to the state of Illinois, to aid in the construction of a railroad in that state from the southern termination of the Illinois and Michigan Canal "to a point at or near the junction of the Ohio and Mississippi Rivers," with branches to Chicago and Dubuque, "to be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and on which the United States mail should "at all times be transported, under the direction of the post office department, at such price as the congress may by law direct;" and, in order "to aid in the construction of said Central Railroad," made like grants to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construc-

way transportation has authorized the construction of bridges over navigable waters.[54]

§§ 3838-3846. Safety of Persons and Property—§ 3838. In General.—The power of congress to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein, and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it; and it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.[55]

§§ 3839-3846. Rolling Stock and Equipment—§ 3839. In General.—Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is affected, and all who are in anywise engaged in such transportation, whether as common carriers or as their employees.[56] Commerce, in the constitutional sense, includes the instrumentalities by which commerce is carried on, and extends to the equipment of a railroad engaged in interstate commerce, including the coal cars owned by a railroad company engaged in interstate commerce, in which it receives from the tipple of the coal mines along its lines coal purchased by it and used solely for its own fuel purposes.[57] Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce.[58]

§§ 3840-3844. Safety Appliance Act—§ 3840. In General—Congress has the power, under the commerce clause of the federal constitution, to require, as it did in the Safety Appliance Act,[59] that all locomotives, cars, and simi-

tion of a railroad from the city of Mobile "to a point near the mouth of the Ohio River." 9 Stat. 466. The manifest purpose of congress was to establish a railroad in the centre of the continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce, as well as of the military and postal departments of the government of the United States. Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096.

54. **Construction of bridges.**—By the act of July 25, 1866, congress authorized the construction of bridges over the navigable waters of the Mississippi River. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

By the acts of congress of December 17, 1872, c. 4, and February 14, 1883, c. 44, bridges were authorized to be built across the Ohio river by any person or corporation, having lawful authority therefor, and with the approval of the secretary of war; and were declared to be lawful structures and post routes for the transmission of the mails and the troops and munitions of war of the United States. 17 Stat. 398; 22 Stat. 414. Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096.

55. **Safety of persons and property.**—Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2; Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

By virtue of its power to regulate interstate and foreign commerce, congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Johnson *v.* Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158; Adair *v.* United States, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Am. & Eng. Ann. Cas. 764; St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616; Chicago, etc., R. Co. *v.* United States, 220 U. S. 559, 55 L. Ed. 582, 31 S. Ct. 612.

56. **Rolling stock and equipment.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

57. Interstate Commerce Comm. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163.

58. Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

59. **Safety Appliance Act.**—Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143).

Act March 2, 1893, c. 196, 27 Stat. 531

lar vehicles used on any railway engaged in interstate commerce shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic.[60] This is so, not because congress possesses any power to regulate intrastate commerce as such, but because its

(U. S. Comp. St. 1901, p. 3174), and amendments thereto (Act April 1, 1896, c. 87, 29 Stat. 85, and Act. March 2, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), known as the Safety Appliance Acts, are within the power conferred on congress under the constitution of the United States, art. 1, § 8, subd. 3, relating to the regulation of interstate commerce. United States *v.* Southern R. Co., 164 Fed. 347.

Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and amendments thereto (Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), known as the Safety Appliance Acts, are not a violation of the constitution of the United States, Amendment 10, providing that the powers not delegated to the United States by the constitution, or prohibited by it to the states, are reserved to the States respectively, or to the people. United States *v.* Southern R. Co., 164 Fed. 347.

Congress has power, not only under the commerce clause of the constitution to regulate interstate commerce and the instrumentalities thereof, but also by virtue of its police power to provide for the protection of railroad employees and the traveling public by prescribing safeguards for vehicles used over an interstatehighway or any portion thereof; and therefore, under Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and amendments thereto (Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), failure to provide vehicles with the safety appliances required by the acts is a violation thereof when the cars are operated over any portion of the highway though that portion be from a point within a state to another point within the same state. United States *v.* Southern R. Co., 164 Fed. 347.

Where a car is set apart for intrastate traffic exclusively, but is not confined to intrastate trains on an intrastate line, the fact that while laden with intrastate traffic it is hauled in connection with interstate cars on an interstate line requires it to be equipped with automatic couplers and grab irons, in compliance with the Federal Safety Appliance Act (Act March 2, 1903, c. 976, 32 Stat. 934 [U. S. Comp. St. Supp. 1907, p. 885]). Wabash R. Co. *v.* United States, 168 Fed. 1.

Amendment to Safety Appliance Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), requiring regulations as to safety appliances to apply to all trains and cars used in interstate commerce, applies to all cars and trains operated for interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, whether they are empty, or whether the traffic carrier is intrastate. Wabash R. Co. *v.* United States, 168 Fed. 1.

The Safety Appliance Act of 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3173]), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), applies to a railroad which takes part in the transportation of articles of commerce on any part of the way to their point of final destination, although operated wholly within a single state, independently of connecting lines, and without any traffic arrangement with them. Pacific Coast R. Co. *v.* United States, 173 Fed. 448.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), which in terms applies to "any common carrier engaged in interstate commerce by railroad," is not limited by the provisions of the Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), which expressly apply only to carriers "under a common control, management, or arrangement for a continuous carriage or shipment," the two acts having distinct purposes and providing remedies for different evils, not being in pari materia in such sense that the provisions of one should control or limit the other. Pacific Coast R. Co. *v.* United States, 173 Fed. 448.

Under the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring all cars used in interstate traffic to be equipped with automatic couplers, as amended by Act March 3, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), extending the act to all cars used in interstate commerce and all cars used in connection therewith, a carrier of interstate commerce over an interstate railway is liable for penalty as to all cars and trains operated on such railway, though the defective car is being hauled from one point to another in the same state, provided that it is part of a train engaged in interstate traffic. United States *v.* International, etc., R. Co., 98 C. C. A. 392, 174 Fed. 638.

60. Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2, affirming 164 Fed. 347.

power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.[61] For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is highway of interstate commerce.[62]

Power to Impose Absolute Liability.—The power of the legislature to declare an offense and to exclude the elements of knowledge and due diligence from any inquiry as to its commission can not be questioned.[63] Hence it was competent for congress, in enacting the Safety Appliance Acts of March 2, 1893,[64] to impose an absolute liability upon carriers engaged in moving interstate commerce, whose cars do not satisfy the requirements of those acts, so that the carriers whose cars do not conform to the requirements of those acts can not escape liability by showing that they exercised reasonable care in equipping their cars with the required safety appliances, and that they used due care and diligence to keep them in repair by the usual inspection. In short, it was competent for congress to impose upon the carriers an absolute duty which is not discharged by the exercise of reasonable care and diligence.[65] An absolute duty to provide every car used in moving interstate traffic with automatic couplers, and to maintain them in proper condition at all times and under all circumstances, is imposed upon interstate carriers, which was not discharged by properly equipping the car with automatic couplers, and using due diligence to keep them in good working order.[66]

Exclusive Power of Congress.—Congress having determined to regulate the use of cars running on interstate railroads, so as to provide for the use of certain

61. Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2.

62. Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2.

Cars used in moving intrastate traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), declaring, inter alia, that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2, affirming judgment 164 Fed. 347.

63. Excluding elements of knowledge, due diligence, etc.—Chicago, etc., R. Co. *v.* United States, 220 U. S. 559, 55 L. Ed. 582, 31 S. Ct. 612.

64. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, April 1, 1896 (29 Stat. at L. 85, c. 87, U. S. Comp. Stat. 1901, p. 3175, and March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. 1909, p. 1143).

65. Chicago, etc., R. Co. *v.* United States, 220 U. S. 559, 55 L. Ed. 582, 31 S. Ct. 612, following St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

On this point the court says: "We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation can not clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty or the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it." St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

66. The statute imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 S. Ct. 617.

safety appliances on such cars, has by said acts taken affirmative action in regard thereto, and to this extent the action of congress is exclusive.[67]

§ 3841. Construction of Act.—The Safety Appliance Act requiring common carriers "engaged in interstate commerce by railroad" to equip their cars with automatic couplers, etc., must be construed with the Interstate Commerce Act which relates to "any common carrier engaged in the transportation of passengers or property wholly by railroad," etc., "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state to another, such laws being part of one scheme, which is limited strictly to interstate commerce, and not intended to affect railroads operated wholly within a state independent of outside connections, and it is only when there is an arrangement with outside carriers for a continuous carriage from one state to another that the act applies; and hence, where the difference in gauge between defendant's line and that of a connecting carrier prevented a continuous carriage in the same car, and there was no through bill of lading and no conventional division of through charges, each company receiving its own charges according to its own rates, defendant was not "engaged in interstate commerce" within the meaning of the act, though the goods carried were intended for shipment beyond the state.[68]

§ 3842. Carriers Subject to Act.—Where Carrier Has Hauled Interstate Freight on Other Occasions.—That a railroad has frequently hauled interstate traffic is not sufficient in a personal injury action to hold the road amenable to the Federal Safety Appliance Act requiring cars employed in interstate traffic to be equipped with automatic couplers.[69]

Car Not Used in Interstate Commerce.—The cars of an interstate railroad, which are generally used interchangeably and indiscriminately in both interstate and intrastate traffic, are subject to the Safety Appliance Act, while employed commercially and in such indiscriminate and interchangeable use, but not while actually devoted to purely intrastate use, even though not set apart solely and specifically for such use.[70] The act of March 2, 1903, declaring that its provisions relating to train brakes, automatic couplers, grab irons, etc., shall apply to all trains, and similar vehicles used on any railroad engaged in interstate commerce, does not apply to a car not shown to have been ever used or to be intended for use in interstate commerce, congress having no power to regulate equipment not used or intended to be used in interstate commerce, merely because it may be used on a railroad engaged in interstate commerce.[71]

67. Exclusive power of congress.—United States *v.* Southern R. Co., 164 Fed. 347.

The reference in Safety Appliance Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), "to any railroad engaged in interstate commerce," applies to the interstate highway as an instrument of commerce; and, congress having taken affirmative action in reference thereto, its control of the interstate highway being thereby conclusive, the statute requiring vehicles running on interstate highways to be provided with certain appliances embraces all uses of the highway, whether for the transportation of interstate traffic or for the transportation of traffic from a point within the state to another point in the same state by carriers engaged in interstate commerce. United States *v.* Southern R. Co., 164 Fed. 347.

68. Construed with reference to Interstate Commerce Act.—United States *v.* Geddes, 180 Fed. 480, Judgment affirmed in 65 C. C. A. 320, 131 Fed. 452.

69. Where carrier has hauled interstate freight on other occasions.—Felt *v.* Denver, etc., R. Co., 48 Colo. 249, 110 Pac. 215, 1136, 21 Am. & Eng. Ann. Cas. 379.

70. Car not used in interstate commerce.—Southern R. Co. *v.* Snyder, 109 C. C. A. 344, 187 Fed. 492.

71. United States *v.* Erie R. Co., 166 Fed. 352.

The provision of Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), amendatory of the Safety Appliance Acts of March 2, 1893 (ch. 196, § 6, 27 Stat. 532), and April 1, 1896 (29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]), extending the provisions of such acts relating to train brakes, automatic couplers, grabirons, and the height of drawbars to "all trains, locomotives, tenders, cars, and similar vehicles used on

Part of Cars Not Engaged in Interstate Commerce.—A train, composed of cars some of which are and some of which are not engaged in interstate traffic, is subject to the regulation of congress, all the cars in the train being required to comply with the safety appliance acts.[72] If a car which is defective as to its coupling appliances or handholds is hauled in a train containing another car loaded with interstate traffic, the statute is violated though the defective car does not contain interstate traffic.[73] Where a train is composed of cars, some of which are and some of which are not engaged in interstate traffic, the whole train is subject to the Safety Appliance Act, and it is immaterial whether the car not properly equipped is coupled to a car containing interstate commerce or not in order to establish a liability on the railroad company.[74]

Engaged in Intrastate Commerce Only.—State affairs are under the exclusive control of the respective states, and the act of Congress requiring railroads engaged in interstate commerce to equip their cars with automatic couplers can not be extended to cars of such companies when employed only in the carriage of commerce between points in the state.[75]

Car Standing on Switch.—A foreign freight car, moved by one railroad company from one state into another, loaded, and there delivered to defendant company, and by defendant to the consignee, and after being unloaded placed by defendant on a switch track, from which it was afterwards redelivered to the original company, again loaded by it, and returned into the state whence it came, was, when on defendant's switch track awaiting redelivery, a car in use in interstate commerce, and subject to the requirement of the Safety Appliance Act, as to equipment with automatic coupling devices in such condition as to be operative, and its movement on such track by defendant, when so defective that it would not couple by impact, was a violation of such act.[76]

any railroad engaged in interstate commerce," is intended as a regulation of such railroads only when engaged in interstate commerce, and does not apply to a road when engaged in the domestic commerce of a state. Louisville, etc., R. Co. *v.* United States, 108 C. C. A. 326, 186 Fed. 280.

Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requiring automatic couplers on railroad cars moving interstate traffic, has not exclusive control and regulation of a car operated by a railroad over a track commonly used in interstate traffic in a train actually at the time so engaged; but such car, being then loaded with intrastate, as distinguished from interstate, traffic, is within the control and regulation of 98 Ohio laws, p. 75, providing for automatic couplers on cars moving state traffic. Detroit, etc., Railway *v.* State, 21-31 O. C. D. 20, 11 O. C. C., N. S., 482.

Federal Safety Appliance Act March 2, 1893, § 4, as amended by Act March 2, 1903, § 1, applies to cars commonly used on railways engaged in interstate commerce, although engaged at the time in intrastate commerce. Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

72. Where part of cars not engaged in interstate commerce.—United States *v.* Erie R. Co., 166 Fed. 352.

The provision of Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), amendatory of the Safety Appliance Acts of March 2, 1893 (ch. 196, § 6, 27 Stat. 532), and April 1, 1896 (ch. 87, 29 St. 85 [U. S. Comp. St. 1901, p. 3175]), that the requirements of such acts relating to train brakes, automatic couplers, etc., shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used in interstate commerce, "and all other locomotives, tenders, cars and similar vehicles used in connection therewith," does not require that the connection between a car not equipped as therein required and one used in interstate commerce shall be immediate to bring it within the statute, but it is sufficient if they are in the same train. Louisville, etc., R. Co. *v.* United States, 108 C. C. A. 326, 186 Fed. 280.

73. United States *v.* Baltimore, etc., R. Co., 170 Fed. 456.

74. Norfolk, etc., R. Co. *v.* United States, 101 C. C. A. 249, 177 Fed. 623.

A defective car, which is being hauled in a train that contains cars that are being used in moving interstate commerce, is within Federal Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), though the defective car is not itself being used in interstate commerce. Bresky *v.* Minneapolis, etc., R. Co., 115 Minn. 386, 132 N. W. 337.

75. Intrastate commerce.—Rio Grande Southern R. Co. *v.* Campbell, 44 Colo. 1, 96 Pac. 986.

76. Car standing on switch.—Johnson

Where Car on Exchange Track.—Where a freight car loaded with lumber brought from another state was delivered to defendant railroad company on an exchange track a few blocks from its final destination, and after being moved from such track by defendant without inspection was found to have a broken coupler, so that it could not be coupled without going between the cars, it was being used by defendant in interstate commerce in violation of Act March 2, 1893.[77]

Carriage of Empty Car.—The Federal Safety Appliance Act does not apply to cars which, though standing on the tracks of railroads engaged in interstate commerce, were not being used in such commerce; and where, after an interstate carriage a car is unloaded, it ordinarily ceases to be used in interstate commerce, as where it is used in intrastate traffic, or remains idle, awaiting repairs or such future use as may afterwards be determined; but where, after an interstate carriage, it is to return empty to the state from which it came, it is within the act throughout the trip, including the time between the unloading and the beginning of the return trip.[78] The hauling by a railroad company from one state to another of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving interstate commerce, is a use of the defective car in violation of the safety appliance act, though it is empty and is being transported to a repair shop in the state of its destination.[79]

During Stoppage in Transit.—Where a car loaded with lumber and shipped from another state had not been delivered to the consignee at the time it was stopped in a railroad yard at destination and placed on a side track for repairs to the automatic coupler, which had become defective, the stoppage in the yard was an incident to the transportation, so that the car was still engaged in interstate commerce at the time plaintiff was injured while endeavoring to move it in conducting switching operations on such track, before the repairs had been made, within Safety Appliance Act of March 2, 1893, requiring carriers engaged in interstate commerce to be equipped with couplers coupling automatically by impact,

v. Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643.

A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations. Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 S. Ct. 617, reversing judgment 86 C. C. A. 95, 158 Fed. 931, 14 Am. & Eng. Ann. Cas. 233.

77. **Where car on exchange track.**—Chicago, etc., R. Co. *v.* United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A., N. S., 473.

78. **Carriage of empty car.**—Bresky *v.* Minneapolis, etc., R. Co., 115 Minn. 386, 132 N. W. 337.

79. Chicago, etc., R. Co. *v.* United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A., N. S., 473.

In injury actions against railroads, where violation of the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring the use of automatic couplers on cars employed in interstate traffic is claimed, it is not necessary to allege or prove that a car was loaded with interstate traffic. Felt *v.* Denver, etc., R. Co., 48 Colo. 249, 110 Pac. 215, 1136, 21 Am. & Eng. Ann. Cas. 379.

A car which had been actually engaged in moving interstate traffic, and was held in the railroad yards to be sent on an interstate trip whenever required, and had not been segregated from the class of cars used in such traffic, was, though unloaded, being so used, within the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring such cars to be equipped with automatic couplers. Felt *v.* Denver, etc., R. Co., 48 Colo. 249, 110 Pac. 215, 1136, 21 Am. & Eng. Ann. Cas. 379.

A car which has just come in from an interstate trip and is being placed in the yards of a manufacturer at the time of plaintiff's injury to be loaded for another interstate trip was not in use in interstate commerce so as to authorize a recovery for the violation of § 4 of the act of congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring that cars used in interstate commerce shall be provided with secure grabirons. Campbell *v.* Chicago, etc., R. Co., 149 Ill. App. 120, judgment affirmed in 243 Ill. 620, 90 N. E. 1106.

and which can be uncoupled without the necessity of going between the ends of the cars.[80]

Shifting Cars in Yard.—The Federal Safety Appliance Act applies to a defective car or engine used in moving a box car from one switch track to another in defendant's yards, when the purpose of moving such car is to load it with merchandise for shipment into another state.[81]

Stockyard Company.—A union stockyards company operating thirty-five miles of railroad, over which are hauled all cars offered for shipment by any industry located on the line of the road and all cars consigned to such industry, and all cars from one railroad to another in course of shipment from one state to another for which an arbitrary switching charge is made in operating such road, is a common carrier engaged in interstate commerce within the Safety Appliance Act.[82]

§ 3843. Appliances Required by Act.—Drawbars of unloaded freight cars are required, by the act to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the three inches prescribed as the maximum permitted variation from the standard.[83] The statutory duty imposed upon carriers in absolute terms by the act of using interstate commerce only such freight cars as comply with the standard fixed as the height for drawbars, is not discharged by furnishing cars constructed with drawbars of the standard height, and by furnishing to competent inspectors and trainmen a sufficient number of metallic wedges, or "shims," to use as occasion demands to raise to the legal standard drawbars lowered by the natural effect of proper use.[84]

§ 3844. Enforcement of Act.—An action by the United States to recover from a carrier the penalty prescribed for violations of the Safety Appliance Act is a civil and not a criminal action.[85] A petition states no cause of action under the original Safety Appliance Act, making it unlawful for any railroad carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact," where there is no allegation that either of the cars was, at the time of the accident, or at any time, used in moving interstate traffic.[86]

80. Stoppage in transit.—St. Louis, etc., R. Co. *v.* Delk, 86 C. C. A. 95, 158 Fed. 931, 14 Am. & Eng. Ann. Cas. 233, rehearing denied in 162 Fed. 145.

81. Shifting cars in yard.—Bresky *v.* Minneapolis, etc., R. Co., 115 Minn. 386, 132 N. W. 337.

82. Stockyard company.—United States *v.* Union Stock Yards Co., 161 Fed. 919.

83. Appliances required by act.—The act requires that the center of the drawbars of freight cars used on standard guage railroads shall be, when the cars are empty, 34½ inches above the level of the tops of the rails; it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed three inches; it does not require that the variation shall be in proportion to the load, nor that a fully loaded car shall exhaust the full three inches of the maximum permissible variation and bring its drawbars down to the height of 31½ inches above the rails. If a car, when unloaded, has its drawbars 34½ inches above the rails, and, in any stage of loading, does not lower its drawbars more than three inches, it complies with the requirements of the law. If, when unloaded, its drawbars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law. St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

84. St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616.

85. Proceedings to enforce statute.—Chicago, etc., R. Co. *v.* United States, 220 U. S. 559, 55 L. Ed. 582, 31 S. Ct. 612.

86. "The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The supreme court of the state held that in the absence of such an allegation the petition did not state a cause of action under the original act. We

§ 3845. Train Crew.—Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control.[88]

§ 3846. Hours of Labor.—The protection of life and property in connection with the operation of interstate trains is necessarily dependent upon the efficiency of the human agencies employed in the movement of such trains; and as the length of hours of service has a direct relation to the efficiency of such agencies, it follows that a restriction upon the hours of labor of employees connected with the movement of trains in interstate transportation is comprehended within the sphere of authorized legislation under the interstate commerce clause of the federal constitution. In its power suitably to provide for the safety of property and of employees and travelers, therefore, congress is not limited to the enactment of laws relating to mechanical appliances, but it is also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons employed in connection with the operation of interstate trains. And in imposing restrictions having reasonable relation to this end there is no interference with the liberty of contract as guaranteed by the constitution.[89]

think that ruling was right. The terms of that act were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2. The act was amended March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143, so as to include all cars 'used on any railroad engaged in interstate commerce,' but the amendment came too late to be of any avail to the plaintiff." Brinkmeier *v.* Missouri Pac. R. Co., 224 U. S. 268, 56 L. Ed. 758, 32 S. Ct. 412.

88. Train crew.—Prescribing a minimum of three brakemen for freight trains of more than 25 cars, operated in the state, as is done by Laws Ark. 1907, No. 116, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce. Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275, affirming judgment 111 S. W. 456, 86 Ark. 312.

89. Hours of labor.—Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Chicago, etc., R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259.

Congress, in the exercise of its power over commerce, could enact the provisions of Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), restricting the hours of labor of railway employees who are connected with the movement of trains in interstate or foreign commerce. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of train dispatchers, etc., is not invalid, because applying to both interstate and intrastate commerce, though an employee the act may engage in the movement of both interstate and intrastate trains. People *v.* Erie R. Co., 119 N. Y. S. 873, 135 App. Div. 767, order reversed in 198 N. Y. 369, 91 N. E. 849.

Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), provides that no railroad telegraph or telephone operator receiving or transmitting orders affecting train operations shall be required or permitted to remain on duty for a "longer" period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated day and night. Held, that such act was only intended to prescribe a general rule applicable to conditions throughout the country in the movement of interstate commerce, and hence did no so cover the subject as to preclude the state from passing Labor Law (Consol. Laws, c. 31, § 8) § 7a, making it unlawful for any corporation or receiver operating a railroad in New York to permit any telegraph or telephone operator spacing trains by telegraph or telephone under the block system to remain

Exclusive Power of Congress.—The power of congress over interstate commerce is plenary, and, as incident thereto, it may regulate the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employee of a carrier so engaged may be required to remain on duty, and, when it does legislate on the subject, its act supersedes any and all state legislation on the subject.[90] It is elementary that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like his, exists only from the silence of congress on the subject, and ceases when congress acts on the subject, or manifests its purpose to call into play its exclusive power.[91] Congress has so acted upon the subject of the hours of labor of interstate railway employees by enacting the Hours of Service Act[92] as to preclude a state during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees a local regulation limiting hours of labor.[93]

Time Statute Took Effect.—The act of congress of March 4, 1907, regulating the hours of labor of train dispatchers, is a law from its passage, though its operation is suspended for a year, and from the date of its passage it is effective as a declaration of the purpose of congress to deal with the matter, and a state law, adopted after such passage, on the same subject, is not in force.[94]

on duty for more than eight hours in a twenty-four hour period. People *v.* Erie R. Co., 198 N. Y. 369, 91 N. E. 849, 29 L. R. A., N. S., 240, 19 Am. & Eng. Ann. Cas. 811, reversing order 119 N. Y. S. 873, 135 App. Div. 767.

Intrastate railroads and employees wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employees are defined in § 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employees" as meaning persons actually engaged in, or connected with, the movement of any train. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

90. Exclusive power of congress.—Atkinson *v.* Northern Pac. R. Co., 53 Wash. 673, 102 Pac. 876, 17 Am. & Eng. Ann. Cas. 1013.

Until March 4, 1908, the date on which it went into effect, Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), regulating the hours for the continuous employment of employees of carriers of interstate commerce, did not suspend or supersede Act June 12, 1907 (Laws 1907, p. 25, c. 20), relating to the same subject. Atkinson *v.* Northern Pac. R. Co., 53 Wash. 673, 102 Pac. 876, 17 Am. & Eng. Ann. Cas. 1013.

91. Exclusive or controlling operation of statute.—Northern Pac. R. Co. *v.* Atkinson, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

92. Act March 4, 1907, c. 2939, 34 Stat. 1415, U. S. Comp. Stat. Supp. 1909, p. 1170.

93. The train, although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state, destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside the state, and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of congress to regulate commerce, the act of congress was exclusively controlling. Northern Pac. R. Co. *v.* Atkinson, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160; Southern R. Co. *v.* United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2.

94. Time statute took effect.—People *v.* Erie R. Co., 119 N. Y. S. 873, 135 App. Div. 767, order reversed in 198 N. Y. 369, 91 N. E. 849.

Congress having passed an act (Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]) prescribing the hours of labor of railroad telegraph operators engaged in interstate commerce, to take effect August 12, 1907, the Acts of the 30th Leg., c. 122, giving shorter hours, is not operative during the

Requirement as to Hours of Labor Construed.—By § 2 of the act it is made unlawful for common carriers subject to the act to permit any employee subject to the act to be on duty "for a longer period than sixteen consecutive hours," or, after that period, to be on duty again until he has had at least ten consecutive hours off duty, or eight hours after sixteen hours' work in the aggregate; provided that no telegraph operator and the like shall be permitted to be "on duty for a longer period than nine hours in any twenty-four period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime," with immaterial exceptions. Construing this proviso forbidding telegraph operators to be on duty for a longer period than nine hours in any twenty-four hour period, it is held that it does not imply that such operators shall have fifteen consecutive hours of rest in each twenty-four, but that the hours off or on duty may be broken up into shorter periods, and that the requirement is satisfied if the total number of hours on duty does not exceed nine in each twenty-four hour period.[95]

Intrastate Roads and Employees.—Congress has not attempted to extend its powers in this behalf to intrastate railroads and employees wholly engaged in local business.[96] But the power of congress to limit the hours of labor of employees engaged in interstate transportation can not be defeated either by prolonging the period of service through other requirements of the carriers, or

time intervening between the passage and the taking effect of the act of Congress. State *v.* Texas, etc., R. Co. (Tex. Civ. App.), 124 S. W. 984.

95. Requirement as to hours of labor construed.—Requiring a railway telegraph operator to work five and one-half hours, and then after an interval, three and one-half more hours in the same twenty-four, is not made unlawful by the provisions of the Act of March 4, 1907 (34 Stat. L. 1415, 1416, chap. 2939, U. S. Comp. Stat. Supp. 1909, pp. 1170, 1171), §§ 2, 3, forbidding common carriers to permit such employees to be on duty for a longer period than nine hours in any twenty-hour period in a place continuously operated night and day. United States *v.* Atchison, etc., R. Co., 220 U. S. 37, 55 L. Ed. 361, 31 S. Ct. 362.

"It is impossible to extract the requirement of fifteen hours' continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine 'consecutive' hours, as was said in the earlier part of the section, and if it had said so, or even 'for a longer period than a period of nine consecutive hours,' still the defendant's conduct would not have contravened the literal meaning of the words. A man employed for six hours and then, after an interval for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours." United States *v.* Atchison, etc., R. Co., 220 U. S. 37, 55 L. Ed. 361, 31 S. Ct. 362.

96. Intrastate roads and employees.—Intrastate railroads and employees wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employees are defined in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employees" as meaning persons actually engaged in, or connected with, the movement of any train. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

The statute, in it's scope, is materially different from the Act of June 11, 1906, chapter 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1909, p. 1148, which was before the federal supreme court in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141. There, while the carriers described were those engaged in the commerce subject to the regulating power of congress, it appeared that if a carrier was so engaged, the act governed its relation to every employee, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

by the commanding of duties relating to interstate and intrastate operations; and the statute without affecting its constitutionality, may be made to apply, as it does apply, to trains and employees which, through practical necessity, are employed in both interstate and intrastate transportation.[97]

Employees Engaged in Both Intrastate and Interstate Commerce.—The restrictions upon the hours of labor of railway employees connected with the movement of trains in interstate transportation are not unconstitutional because many of such employees are, by virtue of practical necessity, also employed in intrastate transportation.[98]

Effect of Exemption in Case of Emergency, etc.—The words "except in case of emergency," in the proviso in the act of March 4, 1907, § 2, making it unlawful for railway carriers engaged in transportation in the District of Columbia or the territories, or in interstate or foreign commerce, to require or permit employees engaged in such transportation to be or remain on duty for a longer period than that prescribed, do not make the application of the act so uncertain as to destroy its validity, even though the proviso in § 3, limiting the effect of the entire act, can be said to include everything which may be embraced within the term "emergency." [99]

Reports as to Excess Service.—Authority to require the secretary or similar officer of the carriers subject to Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of employees, to make monthly reports under oath, showing instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect in lieu of the form to be used in detailing excess service, was conferred upon the interstate commerce commission by the provision of section 4, empowering it to call to its aid in the enforcement of the act "all powers granted to it," when read in connection with Act June 18, 1910, c. 309, § 14, 36 Stat. 555, authorizing the Commission to require the carriers to file periodical or special reports under oath concerning any matter about which it is by law authorized or required to keep itself informed, or which it is required to enforce.[1] Carriers subject to the act of March 4, 1907, regulating hours of labor of employees, can not claim a privilege against self-crimination to justify the refusal to comply with an order of the interstate commerce commission, requiring the secretary or similar officer to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or where there has been no excess service, to make a separate oath to that effect, in lieu of the form to

97. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Northern Pac. R. Co. *v.* Atkinson, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

The restrictions upon the hours of labor of railway employees connected with the movement of trains in interstate transportation, made by Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), are not unconstitutional because many of such employees are, by virtue of practical necessity, also employed in intrastate transportation. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

98. **Employees also engaged in intrastate commerce.**—Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

The Federal Hours of Service Act (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), which makes it unlawful for any interstate carrier by railroad to permit any employee, as the terms "railroad" and "employee," are defined in § 1, to remain on duty for a longer period than those prescribed, is within the constitutional power of congress to regulate interstate commerce. United States *v.* St. Louis, etc., R. Co., 189 Fed. 954.

99. **Effect of exemption in case of emergency, etc.**—Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

1. **Reports as to excess service.**—Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

be used in detailing excess service.[2] The secretary or similar officer of a carrier subject to the act of March 4, 1907, regulating hours of labor of employees, can not claim a personal privilege against self-crimination to justify a refusal to comply with an order of the interstate commerce commission, requiring such official to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.[3] The transactions to which the required reports relate are corporate transactions, subject to the regulating power of congress. And, with regard to the keeping of suitable records or corporate administration, and the making of reports of corporate action, where these are ordered by the commission under the authority of congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation, and can not claim a personal privilege in hostility to the requirement.[4]

Unreasonable Searches and Seizures.—The constitutional protection against unreasonable searches and seizures is not denied by an order of the interstate commerce commission requiring the secretary or other similar officer of the carriers subject to the act of March 4, 1907, regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.[5]

§§ 3847-3848. Protection of Lives and Limbs of Employees—§ 3847. In General.—Under its commercial power congress may enact appropriate legislation looking to the protection of the lives and limbs of employees of railroads engaged in interstate commerce.[6] And with this end in view congress has passed an act, known as the Safety Appliance Act, to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, those brakes to be accompanied with appliances for operating the train-brake system, and to equip all cars used in moving interstate commerce with couplers coupling automatically by impact, thus rendering it unnecessary for employees operating the couplers to go between the ends of the cars.[7]

Fellow Servant Doctrine.—Congress may prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, that the carrier shall be liable for the death or injury of any such employee while so engaged which may result from the negligence of a fellow servant.[8] The Federal Employer's Liability Act of June 11, 1906, relating to the liability of common carriers engaged in commerce between the states, and between the

2. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

3. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

4. Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Wilson *v.* United States, 221 U. S. 361, 55 L. Ed. 771, 31 S. Ct. 538, Ann. Cas. 1912D, 558.

5. **Unreasonable searches and seizures.**—Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621.

6. **Protection of employees.**—Johnson *v.* Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158; Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 51 L. Ed. 681, 27 S. Ct. 407.

7. **Safety Appliance Act.**—Act of March 2, 1893, ch. 196, § 2, 27 Stat. 531. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158; Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 51 L. Ed. 681, 27 S. Ct. 407; In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

8. **Fellow servant doctrine.**—Judgments, Brooks *v.* Southern Pac. Co., 148 Fed. 986, and Howard *v.* Illinois Cent. R. Co., 148 Fed. 997, affirmed in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

states and foreign nations, to their employees, is within the constitutional power of congress to regulate interstate and foreign commerce, and applies to carriers engaged in foreign commerce by sea, making such a carrier liable for an injury to an employee resulting from the negligence of his fellow servants.[9]

§ 3848. Employers' Liability Act.—Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the federal constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the state, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power.[10]

Intrastate Employees.—An employer engaged in interstate transportation does not bring his entire business, including that which is intrastate as well as that which is interstate, within the legislative power of congress; nor does the interstate commerce clause of the constitution authorize congress to extend the provisions of an employers' liability act to those employees engaged in commerce which is wholly intrastate, except in so far as their negligence or misfeasance may affect that commerce which may be denominated interstate. And where the provisions of an act applicable to both interstate and intrastate employees are so interblended as to be inseparable, the statute is repugnant to the constitution and must fail as a whole.[11]

9. Lancer *v.* Anchor Line, 155 Fed. 433.

10. **Employers' Liability Act.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44; Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

It can not be said that because a regulation adopted by congress as to a train when engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relation of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

11. **Intrastate employees.**—Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

A regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of congress to enact, is made by the provision of Employers' Liability Act July 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891], that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several state shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees." Judgments, Brooks *v.* Southern Pac. Co., 148 Fed. 986, and Howard *v.* Illinois Cent. R. Co., 148 Fed. 997, affirmed in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

The invalidity, as applied to intrastate commerce, of the provision of the Employers' Liability Act of June 11, 1906, that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees," invalidates such provision as applied to interstate commerce. Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

The statute, whilst it embraces subjects within the authority of congress to regulate commerce, also includes subjects not within its constitutional power and the two are so interblended in the statute that they are incapable of separation. The statute is repugnant to the constitution therefore and nonenforceable. Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

The act, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of congress to regulate commerce. Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon

Territories and Places under Exclusive Federal Control.—The federal power of regulation within the states is limited to the right of congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character.[12] But the power of congress to deal with trade and commerce in the District of Columbia and the territories does not depend upon the authority of the interstate commerce clause of the constitution, and the invalidity, so far as interstate commerce is concerned, of the provisions of the Federal Employers' Liability Act of June 11, 1906, does not invalidate such of its provisions as attempt to regulate commerce within the District of Columbia and the territories.[13]

Classification of Carriers and Employees.—The imposition of the liability created by Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), upon interstate carriers by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce not within the act are exposed, does not invalidate the statute under the due process of law clause of the fifth amendment to the federal constitution, on the ground that it makes an arbitrary and unreasonable classification, even assuming that that clause is equivalent to the provision of the fourteenth amendment securing the equal protection of the laws.[14]

Forbidding or Invalidating Contract or Device Waiving, Modifying or Evading Provisions of Act.—The power to enact such legislation carries with it the power to prohibit any contract or device the purpose and intent of which is to waive, modify, evade, or in anywise thwart the purpose of the act by relieving the employer of his liability thereunder, and provisions forbidding the

that authority, it results that the act is repugnant to the constitution, and can not be enforced in view of the fact that the objectionable and unobjectionable provisions of the act are so interblended that they can not be separated, and even if they could, it is plain that congress would not have enacted the act, or so much of it as would remain, with the unconstitutional provisions eliminated. Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

Act of 1908.—The Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is not unconstitutional. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44, reversing judgment 73 Atl. 762, 82 Conn. 373.

The power of congress, under the commerce clause, to regulate the liability of an interstate railway carrier for the death or injury of an employee engaged in interstate commerce, which may result from the negligence of a fellow servant, is not exceeded by the enactment of Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), although that act embraces instances where the casual negligence is that of an employee engaged in intrastate commerce. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

The present act, unlike the one condemned in Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

12. **Territories and places under exclusive federal control.**—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

13. Congress had the power to enact so much of the Federal Employers' Liability Act of June 11, 1906, as provides that every common carrier engaged in trade or commerce in any territory of the United States shall be liable for the death or injury of its employees which may result from the negligence of any of its officers, agents, or employees. El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

14. **Classification of carriers and employees.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494.

making of such contracts or the employment of any such device or evasion are not unconstitutional as infringing the liberty of contract guaranteed by the fifth amendment.[15]

Existing Contracts.—The power of congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, is not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place, to that extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements are necessarily subject to this paramount authority. Existing as well as future contracts of the prescribed character, therefore, fall within the condemnation in the Employers' Liability Act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act." [16]

15. **Power to make act effective by forbidding or invalidating contracts or device waiving, modifying or evading provisions of act.**—"Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the fifth amendment to the constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in Chicago, etc., R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259; Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, and Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621, that if congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44; Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

Congress, possessing the power exercised in Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, made no unwarranted interference with the liberty of contract, contrary to Const. U. S. amend. 5, by declaring in the fifth section of that act any contract, rule, regulation, or device the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44, reversing judgment 73 Atl. 762, 82 Conn. 373.

16. **Existing contracts.**—If congress may compel the use of safety appliances, Johnson *v.* Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158, or fix the hours of service of employees, Baltimore, etc., R. Co. *v.* Interstate Commerce Comm., 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621, its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671.

Congress had the power to enforce the regulation validly prescribed by the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), § 5, by preventing the acceptance of benefits under a contract of membership in a railway relief department from operating as a bar to the recovery of damages for the injury or death of an employee, and by avoiding any agreement to that effect. Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589. See, also,

Particular Provisions Considered.—Congress may prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, that the carrier shall be liable for the death or injury of any such employee while so engaged which may result from the negligence of a fellow servant.[17] And congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce by enacting Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), which abrogates the fellow servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right in any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged.[18]

Exclusive Operation of Federal Act.—State and territorial legislation undertaking to regulate the liability of interstate carriers for the death or injury of their employees while engaged in interstate commerce is superseded by the legislation of congress in so far as it covers the same field.[19]

Chicago, etc., R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259, affirming judgment, 138 Iowa 664, 116 N. W. 801.

Stipulations making the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department equivalent to a release of the company's liability must be deemed to fall within the condemnation in the Employers' Liability Act of April 22, 1908, § 5, of any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, especially in view of the proviso of that section permitting a set-off of any sum which the company may have contributed toward any benefit paid to the employee or his legal representative. Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

Construing the condemnation in the Employers' Liability Act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act" as embracing an existing agreement under which the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department was to release the company from liability does not render the section invalid, since such agreement must necessarily be regarded as having been made subject to the possibility that at some future time congress might so exert its power to regulate commerce as to render the agreement unenforceable, or impair its value. Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

17. Particular provisions considered.—Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141, affirming 148 Fed. 986, 148 Fed. 997.

18. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

19. Exclusive operation of federal act.—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

The laws of the several states, in so far as they cover the same field, were superseded by the enactment by congress of Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce. Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44, reversing judgment 73 Atl. 762, 82 Conn. 373.

In view of the plenary power of congress under the constitution over the territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject. El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

The Federal Employers' Liability Act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), by undertaking to regulate commerce in the District of Columbia and the territories of the United States, necessarily superseded any otherwise applicable provisions of the New Mexico Act of March 11, 1903, governing suits for death and personal injuries. El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

Enforcement of Act—Jurisdiction of State Courts.—Rights arising under the congressional Employers' Liability Act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The enforcement of rights under the act of April 22, 1908, can not be regarded as impliedly restricted to the federal courts, in view of the concurrent jurisdiction provision of the Judiciary Act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, and of the amendment made by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), to the original Employers' Liability Act, which, instead of granting jurisdiction to the state courts, presupposes that they already possess it. Nor may jurisdiction of an action to enforce the rights arising under the act of April 22, 1908, be declined by the courts of a state whose ordinary jurisdiction, as prescribed by local laws, is adequate to the occasion, on the theory that such statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.[20]

Distribution of Damages.—The distribution of damages recoverable, under the act of April 22, 1908, from an interstate railway carrier, for the death of an employee while engaged in interstate commerce, is governed by the provisions of that statute, which necessarily supersede any applicable state legislation.[21]

§ 3849. Qualifications, Duties and Liabilities of Employees.—The power of congress to regulate interstate and foreign commerce is plenary, and, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in such commerce; and such legislation will supersede any state action on the subject, but until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits.[22]

Members of Labor Unions.—There is no such connection between interstate commerce and membership in a labor organization as to authorize congress to enact legislation making it a crime for the officers or agents of interstate carriers to discharge employees because of their membership in such organizations.[23] The act of June 1, 1898, which makes it a criminal offense for any interstate carrier as an employer to require any "employee or person seeking employment" to enter into an agreement not to become or remain a member of any labor organization, or to threaten any employee with loss of employment or unjustly discriminate against any employee because of his membership in such labor organization, is void, as not within the constitutional power of congress to regulate interstate commerce.[24]

20. **Enforcement of act—Jurisdiction of state courts.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

21 **Distribution of damages.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

22. **Qualifications, duties and liabilities of employees.**—Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086.

Qualifications of locomotive engineers.—It would be competent for congress to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086.

23. **Members of labor unions.**—There is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by Act June 1, 1898, c. 370, § 10, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part. Judgment, United States *v.* Adair, 152 Fed. 737, reversed in 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Am. & Eng. Ann. Cas. 764.

24. Act June 1, 1898, ch. 370, § 10; Or-

§ 3850. Arbitration between Railroad and Employees.—Congress has exercised the power granted in respect to interstate commerce by providing for arbitration between interstate railroad companies and their employees.[25]

§ 3851. Conspiracy to Obstruct Transportation.—The relations of the general government to interstate commerce and the transportation of the mails are such as to authorize a direct interference to prevent a forcible obstruction thereof. Therefore, as authority in governmental affairs implies both a power and a duty, when the railroad interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, a United States court, sitting as a court of equity, has jurisdiction to issue, at the instance of the government, an injunction to restrain such obstruction and prevent carrying into effect such conspiracy.[26] And the mere fact that the national government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge its constitutional duties.[27]

der *v.* Louisville, etc., R. Co., 148 Fed. 437.

There is no such connection between interstate commerce and membership in a labor organization as to authorize congress, by Act June 1, 1898, to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part. Judgment United States *v.* Adair, 152 Fed. 737, reversed in 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Am. & Eng. Ann. Cas. 764.

25. **Arbitration between railroad companies and employees.**—Act of October 1, 1888, ch. 1063, 25 Stat. 501. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

26. **Conspiracy to obstruct transportation.**—In the case of In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900, the court in summing up its conclusions, said: "The complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; * * * under such complaint the circuit court had power to issue its process of injunction; * * * it having been issued and served on these defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under § 725, Revised Statutes, which grants power 'to punish, by fine or imprisonment, * * * disobedience, * * * by any party * * * or other person, to any lawful writ, process, order, rule decree or command,' and enter the order of punishment complained of; and, finally, * * * the circuit court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court. Ex parte Watkins (U. S.), 3 Pet. 193, 7 L. Ed. 650; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 4 S. Ct. 152; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77; In re Swan, 150 U. S. 637, 37 L. Ed. 1207, 14 S. Ct. 225; United States *v.* Pridgeon, 153 U. S. 48, 38 L. Ed. 631, 14 S. Ct. 746."

In In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900, it was said by Mr. Justice Brewer, speaking for the court: "If a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?" Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96.

Other modes of preventing unlawful and forcible interference.—"The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws." In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900.

27. **Interest of government in controversy.**—"Whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those

§ 3852. Express Companies.—Where an express company takes packages of merchandise coming from other states at a railroad or steamer terminal, and transports them by wagon through the streets and avenues of a city to the addressees, such local transportation of interstate packages constitutes interstate commerce, and is therefore within the exclusive jurisdiction of the federal government.[28] The provision of Act Feb. 8, 1897, making it unlawful for any person to deposit with an express company or other common carrier, for carriage from one state or territory to another, any article or thing designed or intended for the prevention of conception, is not unconstitutional, on the ground that it is a police regulation, and as such a matter over which the states have exclusive jurisdiction, but is within the constitutional powers of congress to regulate interstate commerce.[29]

The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried.[30]

§ 3853. Ships.—Undisputed authority exists in congress to impose tonnage duties, and such duties, to a greater or less extent, have been imposed by congress ever since the federal government was organized under the constitution. They have usually been exacted when the ship or vessel entered the port.[31]

§ 3854. Wharves.—Wharves are related to commerce and navigation as aids and conveniences, and as such come within the regulating power of congress, but being local in their nature and requiring special regulations for particular places, the regulation thereof, in the absence of congressional legislation on the subject, properly belongs to the states in which they are situated.[32]

§ 3855. Bridges.—Under its power to regulate interstate commerce and to free navigation from unreasonable obstructions, congress has power to regulate bridges that affect navigation or that are employed in the moving interstate commerce.[33]

Constructed under Power of State.—A bridge over an interstate waterway, though erected under the sanction of state, and not an illegal structure, or an unreasonable obstruction to navigation in the condition of commerce and navigation when erected, must be taken as having been constructed with knowledge of the paramount power of congress to regulate commerce among the states, and subject to the condition or possibility that congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions.[34]

§ 3856. Navigable Waters.—Under the commerce clause of the federal constitution, congress has charge of all navigable waters in the United States.[35]

constitutional duties." In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 S. Ct. 900. See, also, Louisiana *v.* Texas, 176 U. S. 1, 44 L. Ed. 347, 20 S. Ct. 251.

28. **Express companies.**—Barrett *v.* New York, 183 Fed. 793.

29. United States *v.* Popper, 98 Fed. 423.

30. Champion *v.* Ames, 23 S. Ct. 321, 188 U. S. 321, 47 L. Ed. 492.

31. **Ship's-tonnage duties.**—State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370.

32. **Wharves.**—Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732.

33. **Bridges.**—Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 27 L. Ed. 765, 2 S. Ct. 185; Union Bridge Co. *v.* United States, 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367.

34. **Constructed under power of state.**—Judgment, United States *v.* Monongahela Bridge Co., 160 Fed. 712, affirmed in 216 U. S. 177, 30 S. Ct. 356.

35. **Navigable waters.**—In re Southern Wisconsin Power Co., 140 Wis. 245, 122 N. W. 801; S. C., 140 Wis. 265, 122 N. W. 809.

§ 3857. Packing Houses.—The acts of congress whereby the secretary of agriculture was empowered to have made a careful inspection of cattle, sheep, and hogs at slaughter houses located in the several states, the products of which were intended for sale in other states or foreign countries, are void because they do not pertain to interstate or foreign commerce.[36]

§ 3858. Terminals and Stockyards.—The power of congress to regulate interstate commerce extends to the necessary switching of cars and delivery at terminal points; and an action to recover penalties imposed by a state statute upon carriers for discrimination between individuals in regard to terminal facilities can not be maintained with respect to freight brought from another state, as that matter is covered by a federal statute.[37] The transportation of cattle from a point in another state to the chutes at the stockyards at South St. Joseph, Mo., is a continuous shipment, all of which, including the transportation by the stockyards company over its own tracks, is of an interstate character and covered by Twenty-Eight Hour Law June 29, 1906.[38] The Washington Terminal Company, which exclusively manages, operates, and controls all steam railroad passenger traffic entering into and leaving the city of Washington, while within the zone occupied by its station and tracks, is engaged in interstate commerce.[39]

§ 3859. Connecting Carriers.—The Interstate Commerce Act, fixing primary responsibility on the initial carrier, and also fixing the liability of the connecting carrier, and providing for enforcing the same, is a regulation of commerce, and the act controls interstate shipments, and makes an interstate shipment one carriage as between the carriers.[40] The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss which is made by Act Feb. 4, 1887, in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.[41] The initial carrier of an interstate shipment is subject to federal regulation, and hence may not limit its liability to loss or damage occurring on its own line, but is responsible for any loss or injury caused by it or any connecting carrier.[42]

36. Packing houses.—(1 Supp. Rev. St. 937, and 2 Supp. Rev. St. 403). United States *v.* Boyer, 85 Fed. 425.

37. Terminals and stockyards.—Fielder *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 42 S. W. 362, affirmed in 46 S. W. 633, 92 Tex. 176.

38. United States *v.* St. Joseph Stock Yards Co., 181 Fed. 625.

A terminal railroad company held a common carrier engaged in interstate transportation of property, within the meaning of Interstate Commerce Act Feb. 4, 1887, § 1, as amended by Act June 29, 1906, § 1, and subject to the provisions of sections 6 and 20 of said act, as amended by §§ 2 and 7. Attorney General *v.* Union Stock Yard, etc., Co., 192 Fed. 330.

39. McNamara *v.* Washington Terminal Co., 37 App. D. C. 384.

40. Connecting carriers.—Pittsburg, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) § 20, as amended by Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1163]), giving a right of action against an initial carrier for negligence of connecting carriers in interstate shipments, notwithstanding any provision in the contract of carriage to the contrary, is within the power conferred on Congress to regulate commerce. St. Louis, etc., R. Co. *v.* Heyser, 95 Ark. 412, 130 S. W. 562.

Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), regulating liability of connecting carrier, is a valid regulation of interstate commerce. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205, affirming judgment 117 S. W. 169, and Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170.

41. Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7, affirming judgment 168 Fed. 990; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171, affirming judgment 133 Ky. 724, 118 S. W. 990, 19 Am. & Eng. Ann. Cas. 392.

42. Atlantic, etc., R. Co. *v.* Ward, 4 Ala. App. 374, 58 So. 677.

Requiring Carrier to Undertake to Carry to Destination.—The requirement that carriers who undertake to engage in interstate transportation, and as a part of that business hold themselves out as receiving packages destined to places beyond their own terminal, shall be required, as a condition of continuing in that traffic, to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation.[43] The damage caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack Amendment of June 29, 1906, to the Interstate Commerce Act, is not traceable to a violation of the statute, redress for which, under the original act, can only be had in the interstate commerce commission or in the federal courts, but such liability may be enforced by an action in a state court of competent jurisdiction.[44]

§§ 3860-3937. Power of State—§ 3860. In General.—The mere delegation by congress to the interstate commerce commission of certain powers is not equivalent to specific action by Congress in respect to the particular matters involved, which prevent a state from making regulation conducive to the welfare of its citizens that may indirectly affect commerce.[45] Nothing can be done by a state which will operate as a burden on the business of a carrier engaged in interstate commerce, or impair the usefulness of its facilities or instruments of interstate commerce.[46]

Reasonableness of Regulation.—Whether a state regulation affecting a public corporation, as a railroad company, is within the powers of the state and valid, or is invalid as beyond such powers or in violation of constitutional rights of the company, depends in the final test upon whether or not it is reasonable in view of all the circumstances.[47]

43. **Requiring carrier to undertake to carry to destination.**—A carrier voluntarily receiving property for transportation to a point on another line in another state is, under the Carmack amendment of June 29, 1906, to the Interstate Commerce Act of February 4, 1887, conclusively treated as having made a through contract of carriage, rendering it liable for the other carrier's negligent failure to deliver the shipment to the consignee. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205.

Proof of delivery of an interstate shipment to the initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise to the liability imposed by the Carmack amendment of June 29, 1906, to the Interstate Commerce Act of February 4, 1887, for loss or damage caused by it or any other carrier in the chain of transportation, and casts upon it the burden of proving that the loss resulted from some cause for which such initial carrier was not responsible in law or by contract. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205.

44. The jurisdiction of the state court was attacked, first, on the ground that § 9 of the original Act of 1887 provided the persons damaged by a violation of the statute "might make complaint before the commission * * * or in any district or circuit court of the United States." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154. It was contended that Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075, ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a state court on any cause of action created either by the original Act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of §§ 8, 9 of the act to regulate commerce. Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205; Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7.

45. **Power of state.**—Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72, affirmed in 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214.

46. Sargent *v.* Rutland R. Co., 86 Vt. 328, 85 Atl. 654.

47. **Reasonableness of regulation.**—Louisville, etc., R. Co. *v.* Railroad Comm., 191 Fed. 757.

A bill alleged that complainant railroad company operated an interstate line of road to and through the city of Mobile, Ala., where it maintained a passenger station; that upon its trains it carried the

Under Police Power.—In the absence of action by congress, the states may exercise police power over interstate carriers.[48] The grant to congress of the power to regulate interstate commerce, in the absence of action by congress, does not deprive the states of their police power to impose reasonable regulations on interstate carriers for the protection of the lives, health, and safety of the people.[49]

Carrier Engaged in Both Interstate and Intrastate Commerce.—Where a carrier was engaged in both interstate and intrastate commerce, it could not refuse to perform services connected entirely with intrastate shipments, without discrimination and for a rate established by it, on the theory that to require such service would impose an unjust and unreasonable burden on defendant's interstate commerce, in violation of the constitution of the United States, art 1, § 8, subsec. 3.[50]

§ 3861. Corporations.—Among the exceptions to the rule that the right of a foreign corporation to do business in another state depends entirely on the will of the latter is when such business constitutes interstate commerce, and is therefore under the paramount authority of congress.[51] The power of a state to discriminate between its own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established; and while it is well settled, as a general rule, that the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state, it is equally well established as an exception to that rule, that a state has no power to exclude a foreign corporation from doing business within its limits, or to impose conditions and restrictions upon its entrance, where such corporation is an instrumentality of interstate or foreign commerce, or where its business constitutes such commerce. In these cases the business of foreign corporations is solely within the paramount authority of congress, and is protected against interference by state authority.[52] A state statute

mails and interstate passengers; that it transported more passengers to and from Mobile and more interstate passengers through that City than the three other roads entering the city combined, and that the number passing through was greatly in excess of the number taking or leaving its trains there; that, by an order of the railroad commission of Alabama, it was required to stop all of its passenger trains at a so-called union station, built by an independent local corporation, which would require all of its trains to leave its own tracks and run over the tracks of another company with heavy curves for more than a mile, entailing a delay of 40 minutes or more, or to build tracks of its own, at a cost of at least $50,000, across the yards and tracks of another company, in which case its trains would be subjected to irregular delays which would derange its time schedules; that the cost of said union station and the facilities afforded thereby were greatly in excess of the demands of the business; and that, owing to the greater number of complainants trains and cars, it would be subjected to a greater part of the expense of maintaining said station. Held that, on such facts, admitted by demurrer, the order of the commission was an unreasonable regulation in violation of the interstate commerce clause of the constitution. Louisville, etc., R. Co. *v.* Railroad Comm., 191 Fed. 757.

48. Under police power.—Central, etc., R. Co. *v.* Groesbeck, 175 Ala. 189, 57 So. 380.

49. Central, etc., R. Co. *v.* Groesbeck, 175 Ala. 189, 57 So. 380.

50. Carrier engaged in both interstate and intrastate commerce.—Louisville, etc., R. Co. *v.* Higdon, 149 Ky. 321, 148 S. W. 26.

51. Foreign corporations.—Parsons-Willis Lumber Co. *v.* Stuart, 182 Fed. 779.

52. Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297, 15 S. Ct. 207; Horn Silver Min. Co. *v.* State, 143 U. S. 305, 36 L. Ed. 164, 12 S. Ct. 403; New York *v.* Roberts, 171 U. S. 658, 43 L. Ed. 323, 19 S. Ct. 58, 70; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694, 7 S. Ct. 592;

requiring a foreign railroad corporation to become a resident corporation, as a condition of its right to continue to operate that part of its road within the state, is not an interference with interstate commerce, within the inhibition of the federal constitution on that subject.[53]

Consolidation of Foreign and Domestic Corporations.—A state in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, not inconsistent with the power of congress to regulate interstate and foreign commerce, or with the powers of the general government. Therefore, where several railroad corporations organized under the laws of and operating lines through several states, consolidate under the laws of one of these states, it is competent for such state to impose upon the new corporation a charge based upon the amount of its capital stock, for the filing of the articles of consolidation with the proper officer, such filing being a prerequisite to corporate existence, and such charge constitutes no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limit.[54]

Charter Fee.—A foreign sleeping car company can not be restrained from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock, imposed by Gen. St. Kan. 1901, § 1264, for the benefit of the permanent school fund, as a condition of doing such business, since such requirement amounts to a burden or tax on the company's interstate business and on its property located and used outside the state.[55]

License for Keeping Office.—A statute imposing a tax upon the capital stock of a corporation for the privilege of keeping an office in the state for the use of its officers, stockholders, agents and employees, when applied to a foreign railroad corporation, which, by virtue of its connections and certain traffic contracts with other railroads, has become a link in a through line of road, over which, as a part of the business thereof, freight and passengers are carried into and out of the state, is unconstitutional and void as an interference with and as imposing a burden upon interstate commerce. The business of such railroad company is interstate commerce, and the tax imposed by the statute is a tax upon the business of the company, or in other words, a tax upon one of the means or instrumentalities of the company's interstate commerce business.[56]

Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380; Asher *v.* Texas, 128 U. S. 129, 32 L. Ed. 368, 9 S. Ct. 1; Stoutenburgh *v.* Hennick, 129 U. S. 141, 32 L. Ed. 637, 9 S. Ct. 256; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Pembina Consol., etc., Mill. Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 737; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 268; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657, 20 S. Ct. 518; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 30 L. Ed. 342, 7 S. Ct. 108.

53. Commonwealth *v.* Mobile, etc., R. Co., 64 S. W. 451, 23 Ky. L. Rep. 784, 54 L. R. A. 916.

54. Consolidation of foreign and domestic corporations.—In Ashley *v.* Ryan, 153 U. S. 436, 38 L. Ed. 773, 14 S. Ct. 865, the court, sustaining the statute of Ohio as to the consolidation of corporations, said that the question presented was not the power of the state to lay a charge upon interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations might be availed of, and that the payment of the charge was a condition imposed by the state upon the taking of corporate being or the exercise of corporate franchises, the right which depended wholly upon the will of the state, and hence that liability for the charge was entirely optional.

55. Charter fee.—Judgment, Coleman *v.* Pullman Co., 90 Pac. 319, 75 Kan. 664, reversed in 216 U. S. 56, 54 L. Ed. 378, 30 S. Ct. 232.

56. License for keeping office.—The statute of Pennsylvania taxing foreign corporations for the privilege of keeping offices in the state for the use of officers, etc., held void as to a foreign railroad corporation engaged in carrying on interstate commerce, the office in question being maintained solely for the furtherance of the company's interstate commerce business. Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958, citing Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158,

License for Maintaining Passenger Traffic Agency.—A municipal ordinance imposing a license tax upon a foreign railroad corporation for the privilege of maintaining an agency with the state for the purpose of soliciting passenger traffic over its road between points in other states, is in conflict with the commerce clause of the constitution, since the business of such agency constitutes interstate commerce.[57]

Filing Articles of Incorporation in State.—A state law, providing that no foreign railroad corporation may condemn land for or acquire a right of way for or purchase or hold lands for depots, tracks, or other purposes until it shall have become organized as a corporation under the laws of the state by filing articles of incorporation as provided, construed to prohibit a foreign railroad corporation from operating a railroad within the state as owner without complying with such section, is not unconstitutional as an attempted interference with interstate commerce.[58]

§ 3862. Bridges.—A state may tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself.[59] Therefore, the fact that a bridge over a navigable river flowing between two states is an instrument of interstate commerce, does not exempt from taxation by either state so much of the bridge as is within it. The taxation of such a bridge is not a regulation of commerce among the states, nor is it the taxation of any agency of the federal government. The power of the state in such case is none the less by reason of the fact that the bridge was erected under the authority or with the consent of congress, and that the act authorizing its construction declares that it shall be regarded as a post road. Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce, exempt it from taxation by the state within whose limits it is permanently located. In taxing an interstate bridge, a state can properly include the franchise it has granted the bridge company in the valuation of the company's property. The fact that the tax on such franchise is to some extent affected by the amount of the tolls received, and therefore may be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the interstate business carried on over or by means of the bridge.[60]

5 S. Ct. 826; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881.

The business of the through line of railroad consisting in a measure of carrying passengers and freight into Pennsylvania from other states and out of that state into other states, is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line. Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958.

"It is well settled by numerous decisions of this court, that a state can not, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burden upon such commerce within its limits. Some of the cases sustaining this proposition are collected in McCall *v.* California, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 392." Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958.

57. **License for maintaining passenger traffic agency.**—McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881, distinguishing Pembina Consol., etc., Mill. Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 737; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

58. **Filing articles of incorporation in state.**—Plummer *v.* Chesapeake, etc., R. Co., 143 Ky. 102, 136 S. W. 162, 33 L. R. A., N. S., 362.

59. **Bridges.**—Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 43 L. Ed. 823, 19 S. Ct. 553; Postal Telegraph-Cable Co. *v.* Charleston, 153 U. S. 692, 38 L. Ed. 871, 14 S. Ct. 1094.

60. Pittsburgh, etc., R. Co. *v.* Board, 172 U. S. 32, 43 L. Ed. 354, 19 S. Ct. 90; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 43 L. Ed. 823, 19 S. Ct. 553; S. C., 173 U. S. 624, 43 L. Ed. 835, 19 S. Ct. 877.

§§ 3863-3864. Ferries—§ 3863. In General.—The regulation of rates of ferriage of foot passengers across the Hudson River from New Jersey to New York is a regulation of interstate commerce beyond the power of New Jersey, under the federal constitution.[61]

Regulation of Rates and Tolls.—In many instances since the adoption of the constitution, the states have assumed to fix the rates or tolls upon interstate ferries, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states, but there is no case in the United States court where such right has been recognized.[62] The Interstate Commerce Act of Feb. 4, 1887, does not deprive a state of any power to fix rates of ferriage theretofore possessed.[63] The supreme court of the United States has not definitely decided that a state can not fix rates for ferriage from itself to another state, and the former decision in the courts of New Jersey sustaining such right can not be regarded as in conflict with the federal decisions.[64]

License Fees, Tolls and Taxation.—The freedom from imposition guaranteed by the constitution does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of congress. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property.[65] The right of a state to tax a ship owned by one of her citizens and having its situs within the state, although used in foreign commerce or in commerce between the states, is distinctly recognized.[66] A state has power to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the state, for boats owned by them and used in ferrying passengers and goods from a landing in the state, across a navigable river, to a landing in another state.[67] But where a ferry is incorporated in

61. Ferries.—New York, etc., R. Co. *v.* Board, 74 N. J. L. 367, 65 Atl. 860.

62. Regulation of rates and tolls.—Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

63. Judgment 74 N. J. L. 367, 65 Atl. 860, reversed in New York, etc., R. Co. *v.* Board, 76 N. J. L. 664, 74 Atl. 954, 16 Am. & Eng. Ann. Cas. 858.

64. Judgment 74 N. J. L. 367, 65 Atl. 860, reversed in New York, etc., R. Co. *v.* Board, 76 N. J. L. 664, 74 Atl. 954, 16 Am. & Eng. Ann. Cas. 858.

65. License fees, tolls and taxation.—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. Ed. 690; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732.

66. Taxation not within the constitutional restrictions.—The levying of a tax upon vessels or other watercraft or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the constitution of the United States. Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 239, 6 L. Ed. 23; Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

67. Imposition of license fee on boats.—Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Postal Telegraph-Cable Co. *v.* Charleston, 153 U. S. 692, 38 L. Ed. 871, 14 S. Ct. 1094; Ficklen *v.* Shelby County Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 12 S. Ct. 810; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Transportation Co. *v.* Wheeling, 99 U. S. 273, 25 L. Ed. 412. See, also, Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043.

When a state expressly grants to an incorporated city, the power "to license, tax, and regulate ferries," the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regula-

one state and all of its property is situated in the state incorporating it, a tax by another state is illegal as an interference with the powers of congress to regulate interstate commerce.[68] A tax, therefore, upon such receiving and landing of passengers and freight, is a tax upon the transportation; that is, upon the commerce between the two states involved in such transportation.[69] Where a license is imposed upon transportation across waters which does not constitute a ferry in its strict sense, it becomes an illegal regulation of interstate commerce.[70] The fact

tion of commerce. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

The power to license is a police power, although it may also be exercised for the purposes of raising revenue. "We can not say, as a matter of law, that when a municipal corporation is authorized 'to regulate, tax, and license ferry boats,' the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power. It follows, therefore, that the ordinance of the city of East St. Louis and the charter of the city, by which the ordinance is authorized, do not impair the obligation of any contract between the ferry company and the state." Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

Neither the free navigation of the Mississippi River, guaranteed by the ordinance of 1787, nor any right which may be supposed to arise from the exercise of the commercial power of congress, interferes with the police power of the state in granting ferry licenses. Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043.

68. Taxation on transportation.—Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

The Gloucester Ferry Company was incorporated by the legislature of New Jersey to establish a steamboat ferry from the town of Gloucester, in that state, to the city of Philadelphia, in Pennsylvania. It established, and maintained, a ferry between those places, across the river Delaware, leasing or owning steam ferry boats for that purpose. At each place it had a slip or dock on which passengers and freight were received and landed; the one in Gloucester it owned, the one in Philadelphia it leased. Its entire business consisted in ferrying passengers and freight across the river between those places. It never transacted any other business. It did not own any property, real or personal, in the city of Philadelphia other than the lease of the slip or dock mentioned. All its other property consisted of certain real estate in the county of Camden, New Jersey, needed for its business, and steamboats engaged in ferriage. These boats were registered at the port of Camden, New Jersey. It has never owned any boats registered at a port of Pennsylvania, and its boats were never allowed to remain in that state except so long as may be necessary to discharge and receive passengers and freight. The auditor general and the treasurer of the state of Pennsylvania stated an account against the company of taxes on its capital stock, based upon its appraised value. Held, that such a tax by the state was illegal as an interference with the power of congress to regulate interstate commerce. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

The ferry boats of a corporation incorporated in one state, and carrying passengers, etc., forward and back across a river to a city situated in another state, are not taxable under a law taxing boats "within the city," in a case where the relation of the boats to the city was simply that of contract, as one of the termini of their voyage. St. Louis *v.* Ferry Co. (U. S.), 11 Wall. 423, 20 L. Ed. 192.

Quære, whether the taxation by Kentucky of a ferry company's Indiana franchise to transport persons and property from Indiana to Kentucky is not, by its necessary effects, a burden on interstate commerce forbidden by the constitution of the United States. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463.

69. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

70. Taxation on transportation not a ferry in strict sense.—A statute of Illinois required a license where a company carried on a ferry for transporting railroad cars, loaded or unloaded, from a county in that state to the shore of another state. It was held that, conceding, arguendo, that the police power of a state extended to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two states, there were no decisions justifying the proposition that such power embraced transportation by water across such river which did not constitute a ferry in a strict technical sense. St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

It was held that there was an essential distinction between a ferry in the restricted and legal signification of that

that the boats of a ferry company have been enrolled, inspected, and licensed under the laws of the United States, is no protection against the exaction of a license fee by the state or by its authority.[71]

Landing and Receiving Passengers and Freight.—The only interference of the state with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations.[72]

Injunction.—An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce without the regularity or purpose of ferry trips; that remedy applies only to one which is run openly and avowedly as a ferry boat.[73]

§ 3864. Granting of Franchises and Control.—The commerce clause does not prevent a state from granting a ferry license across a navigable river or water forming one of the boundaries to a state.[74] It is true that, from the earliest period in the history of the government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them;[75] and it has been said that the power to establish and regulate ferries does not belong to congress under the power to regulate commerce, but belongs to the states, and lies within the scope of that immense mass of undelegated powers reserved by the constitution to the states.[76] However, conceding,

term and transportation of railroad cars across a boundary river between two states constituting interstate commerce, and therefore a statute requiring a license for such transportation was invalid. St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

71. **Boats enrolled and inspected under United States law.**—Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

In Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191, it was held that the fact that C. had caused his ferry boat to be enrolled and licensed, under the laws of the United States, at the custom house in Cincinnati, to carry on the coasting trade, did not authorize him to carry on business of a ferry between Cincinnati and Newport, Kentucky, in disregard of the rights of T. who has an exclusive license from the authorities of the state of Kentucky to ferry from Kentucky to the Ohio side of the river.

"This court, in Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043, has held that this right of congress 'does not interfere with the police powers of a state in granting ferry licenses.'" These authorities show that the enrollment and licensing of a vessel under the laws of the United States does not of itself exclude the right of a state to exact a license from her own citizens on account of their ownership and use of such property having its situs within the state. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

72. **Regulations of receiving and landing.**—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

73. **Injunction.**—Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191.

74. **Granting of franchises and control.**—Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043; Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

In the case of Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043, it was declared by the federal supreme court, speaking of the charter of Fanning to ferry across the Mississippi River at Dubuque, that the exercises of the commercial power by congress did not interfere with the police power of the state in granting ferry licenses. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

75. **Control by states.**—St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

Laws regulating ferries are competent parts of a mass of legislation embracing everything within the limits of a state not surrendered to the national government. Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 239, 6 L. Ed. 23; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

76. **Powers reserved by states.**—Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191.

that in many respects the states can more advantageously manage such interstate ferries than the general government, and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public,[77] still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the states of taxes or other burdens upon the commerce between them.[78]

Ferries between one of the states and a foreign country can not be deemed, therefore, beyond the control of congress under the commercial power. They are necessarily governed by its legislation on the importation and exporta-

77. In Fanning *v.* Gregoire (U. S.), 16 How. 524, 14 L. Ed. 1043, it was held that neither the free navigation of the Mississippi, guaranteed by the ordinance of 1787, nor any right which may be supposed to arise from the exercise of the commercial power of congress, interferes with the police powers of a state in granting ferry licenses. When navigable rivers within the commercial powers of the Union may be obstructed, one or both of these powers may be invoked. Cited in Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

In Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that because a state may authorize a ferry from its own territory to that of another state, it may regulate the charges upon such ferry. It is true the states have assumed the right in a number of instances, since the adoption of the constitution, to fix the rates or tolls upon interstate ferries, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But there is no case in the federal supreme court where such right has been recognized. Cited in Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

The essential distinction between a ferry in the restricted and legal signification of that term and transportation as such constituting interstate commerce was pointedly emphasized in the opinion in Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191, and the distinction between the two was necessarily involved, if it may not be said to have been controlling, in the decision of that case. St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

78. **Ferry as a means of commerce.**— Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

Ferries over watercourses separating states are not beyond the control of the commercial power of congress. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

In Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23, it was said that laws respecting ferries constitute a component part of the legislation embracing everything within the limits of a state not surrendered to the general government. "But in this language he plainly refers to ferries entirely within the state, and not to ferries transporting passengers and freight between the states and foreign countries; for the power vested in congress, he says, comprehends every species of commercial intercourse between United States and foreign countries * * * and what is true of foreign commerce is also true of commerce between states over the waters separating them." Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

The states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of the federal supreme court to annul or control them. The function is one of extreme delicacy, and only to be performed where the infraction is clear. Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191; Pennsylvania *v.* Wheeling, etc., Bridge Co. (U. S.), 13 How. 518, 14 L. Ed. 249.

tion of merchandise and the immigration of foreigners, that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of congress, neither are ferries over waters separating states.[79]

Concurrent Action of Both States.—The concurrent action of two states is not necessary to the grant of a ferry franchise on a river that divides them.[80] The ferry franchises which the state grants are confined to the transit from her own shores, and she leaves other states to regulate the same rights on their side.[81]

§ 3865. Ships.—So far as respects the ports and harbors within the United States, ships engaged in interstate or foreign commerce are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states.[82] A municipal ordinance prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other similar regulations, is not in conflict with any law of congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.[83] But a state law which requires a vessel before leaving the port to file a statement in writing, in the office of the probate judge of the county, setting forth the name of the vessel, the name of the owner or owners and his or their place of residence, and the interest each has in the vessel, is held to be in conflict with certain regulations by congress and void, so far as it applied to vessels licensed under United States laws.[84]

Compensation for Additional Facilities.—The state has a right to improve the waterways within its limits and to make reasonable charges for the use of such improvements, at least until congress interferes, and either itself assumes

79. Ferries between one of the states and foreign countries.—Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

80. Concurrent action of states.—Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300.

A ferry franchise on the Ohio is grantable, under the laws of Kentucky, to a citizen of that state who is a riparian owner on the Kentucky side; and it is not necessary to the validity of the grant that the grantee should have a right of landing on the other side or beyond the jurisdiction of the state. Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191.

A ferry franchise granted by Indiana to maintain a ferry from the Indiana shore is wholly distinct from a franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463.

81. Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191; St. Clair *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518, 24 S. Ct. 300; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463.

The authority of a ferry company, derived from a franchise granted by Kentucky, to transport persons, freight and property across the Ohio River from Kentucky, does not invest it with authority to establish and maintain a ferry from the Indiana shore to the Kentucky shore. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463.

82. Ships.—Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

83. Brig James Gray *v.* Ship John Fraser (U. S.), 21 How. 184, 16 L. Ed. 106. See, also, Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086.

84. The law of the state of Alabama passed in 1854, as set forth in the text, is in conflict with the act of congress passed on the 17th of February, 1793, so far as the state law is brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of congress for carrying on the coasting trade, and plied between New Orleans and the cities of Montgomery and Wetumpka, in Alabama. Sinnot *v.* Davenport (U. S.), 22 How. 227, 16 L. Ed. 243; Foster *v.* Davenport (U. S.), 22 How. 244, 16 L. Ed. 248; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38.

control of the improvements or compels their removal. This parallel line of decisions runs back to the early history of the federal supreme court.[85] The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, is considered merely as compensation for the additional facilities thus provided in the navigation of the waters.[86] Upon similar grounds, what are termed harbor dues or port charges, exacted by the state from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained.[87] Thus, the state may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of proper regulations prescribed for the government of vessels in order to protect the safety, convenient use and enjoyment of property, and charges incurred in enforcing such regulations may properly be considered as compensation for the facilities thus furnished to the vessels. Should such regulations interfere with the exercise of the commercial power of congress, they may at any time be superseded by its action.[88] The exaction of tolls for passage through locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream.[89]

Effect of License to Prosecute Coasting Trade.—A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States, and conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a state, or the watercourses partaking of the character of canals exclusively with the interior of a state, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end.[90]

Statute Forbidding Persuading Seamen to Desert.—A state statute forbidding any person to persuade a seaman to desert a vessel within waters under the jurisdiction of the state, is a valid exercise of police power, and is not in conflict with the constitution of the United States, granting congress power to regulate foreign and interstate commerce, since a state act regulating commerce is not void unless contravening an existing act of congress or the policy of the government.[91]

Tonnage Duties.—A city ordinance exacting from boats wharfage for each time of coming within the city harbor and landing at any public wharf, to be estimated upon the tonnage of the boats, and exempting boats from such wharfage when they land on portions of the wharf where no money has been expended by the city to facilitate the landing of vessels, does not exact a duty on tonnage within the United States constitution, prohibiting a state from laying any duty on tonnage without the consent of congress, but provides merely for wharfage.[92]

85. **Compensation for additional facilities.**—Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325; Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313.

86. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149, 8 S. Ct. 113; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325.

87. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149, 8 S. Ct. 113.

88. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

89. **Toll for passage through locks.**—Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622.

90. **Effect of license to prosecute coasting trade.**—Veazie *v.* Moor (U. S.), 14 How. 568, 14 L. Ed. 545.

91. **Statute forbidding persuading seamen to desert.**—Hill's Ann. Laws, § 1952; Young *v.* Frazier, 36 Ore. 247, 59 Pac. 707.

92. **Tonnage duties.**—St. Louis *v.* Eagle Packet Co., 214 Mo. 638, 114 S. W. 21.

Lien for Maritime Tort.—The creation and enforcement of a lien for a nonmaritime tort against a foreign vessel engaged in interstate commerce, under a state statute which embraces all vessels, whether domestic or foreign, and whether engaged in intrastate or interstate commerce, does not offend against the commerce clause of the federal constitution.[93]

Sunday Laws.—The court has jurisdiction of an offense consisting of a violation of the Sunday law by a steamboat while engaged in carrying passengers from one Indiana town to another, though the voyage begins and ends at a city in Kentucky.[94]

§§ 3866-3879. Railroads—§ 3866. In General.—Railroad companies engaged in the transportation of passengers and freight among the states and between the United States and foreign countries are instruments of interstate and foreign commerce, and their business is such commerce itself. Such transportation is a branch of interstate and foreign commerce, national in its character and exclusively within the regulating power of congress. It can not, therefore, be regulated in any manner by the several states. Every obstacle to interstate railroad transportation, or burden laid upon it by state authority, amounts to a regulation of it and is an invasion of the exclusive power of congress.[95] Any law which in its direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the commerce clause and it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.[96] Railways being instruments of interstate commerce, the states may not burden them by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction.[97] But the fact that a railroad corporation is engaged in interstate commerce does not exempt it from control by the state in respect to all business done therein not directly connected with traffic between the states.[98]

Reasonableness of Regulation.—After all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and state legislative interference therewith is unreasonable and an infringement upon that provision of the constitution which requires that commerce between the states shall be free and unobstructed.[99]

Under Police Power.—State laws passed in the exercise of the police power, are valid in the absence of congressional legislation on the same subject, though they incidentally and indirectly affect the interstate operations of railroads, provided they do not constitute regulations within the meaning of the constitution.[1]

93. **Lien for maritime tort.**—Martin *v.* West, 222 U. S. 191, 32 S. Ct. 42, 36 L. R. A., N. S., 592, affirming judgment 51 Wash. 85, 97 Pac. 1102, 21 L. R. A., N. S., 324.

94. **Sunday laws.**—Dugan *v.* State, 25 N. E. 171, 125 Ind. 130, 9 L. R. A. 321; Dorsey *v.* State, 25 N. E. 350, 125 Ind. 600.

95. **Railroads.**—Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

96. Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277.

97. **Forbidding introduction of articles from other states.**—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

98. McGuire *v.* Chicago, etc., R. Co., 108 N. W. 902, 131 Iowa 340, 33 L. R. A., N. S., 706.

99. **Provisions for through traffic.**—Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

1. **Under police power.**—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289;

A proper police regulation does not conflict with any federal or state restrictions on the legislative power, and is valid, though the road sought to be regulated is only partly within the state.[2] Thus, a state makes all needful regulations of a police character for the government of interstate railroad companies while operating within its jurisdiction, in order to insure the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce, although to some extent they control the conduct and liability of those engaged in such commerce. It is only when such laws operate as regulations of commerce in the circumstances of their application, and conflict with the expressed or presumed will of congress exerted upon the same subject, that they can be required to give way to the supreme authority of the constitution.[3]

Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191; Erb *v.* Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 S. Ct. 819; Railroad Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; New York, etc., R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418; McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722.

"In Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 40 L. Ed. 849, 16 S. Ct. 714, the court said: 'It has never been supposed that the dominant power of congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers.' But that case distinctly recognized that there was a division of power between congress and the states in respect to interstate railways, and that congress had the superior right to control that commerce and forbid interference therewith, while to the states remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests." Northern Securities Co. *v.* United States, 193 U. S. 197, 348, 48 L. Ed. 679, 24 S. Ct. 436.

"That states may not burden instruments of interstate commerce, whether railways or telegraphs, * * * by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employees, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the court in Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722." Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

The state's police power may be exercised to insure a faithful and prompt performance of duty within the state by railroads or other common carriers engaged in interstate commerce, especially with reference to the safety of persons and property. Pittsburgh, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

2. People *v.* New York, etc., R. Co., 8 N. Y. S. 672, 55 Hun 409, 608. Affirming judgment, 5 N. Y. S. 945, judgment affirmed in 123 N. Y. 635, 25 N. E. 953.

3. Regulations to secure safety of passengers and public.—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; New York, etc., R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418; Gladson *v.* Minnesota, 166 U. S. 427, 430, 41 L. Ed. 1064, 17 S. Ct. 627; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Plumley *v.* Massachusetts, 155 U. S. 461, 39 L. Ed. 223, 15 S. Ct. 154.

An enumeration of the instances in which the federal supreme court has sustained the validity of local laws intended to promote the safety and comfort of passengers, employees, persons crossing railroad tracks and adjacent property owners, is given in the opinion by Mr. Justice Brown, in Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722. See, also, Pennsylvania

In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution.[4] While the state can make reasonable police regulations affecting the operation of railroads within the state, and which are also engaged in interstate commerce, the regulation should only tend to the efficient discharge of the duties of the railroads to their patrons within the state, and to the safeguarding of persons and property therein, and should impose no considerable burden on the interstate commerce.[5] When a law regulating carriers, passed by a state under its police power incidentally affecting interstate commerce, conflicts with an act of congress on the same subject matter, or the power granted to congress has been exercised by that body, the act of the state legislature must yield and be superseded by the federal act.[6]

Regulation of Local Matters.—A state may, in the absence of congressional prohibition, enact laws on matters, local in their nature, which tend to enforce the proper performance by interstate carriers of duties arising in the state which facilitate traffic, although such laws may incidentally affect interstate commerce.[7]

Railroad Entirely within State.—The construction and operation of a railroad wholly within a state is subject to the laws of such state, though it is so connected as to form practically a through line of railroad from a point in the state to a point outside of the state.[8]

R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

"It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce." Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627, citing Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

4. Commerce incidentally affected.—Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Pittsburgh, etc., Coal Co. *v.* Louisiana, 156 U. S. 590, 39 L. Ed. 544, 15 S. Ct. 459; Crossman *v.* Lurman, 192 U. S. 189, 48 L. Ed. 401, 24 S. Ct. 234; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086.

"In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its powers, the rule of the state law, which, until displaced, covers the subject." Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

"In Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says: 'These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state, belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the constitution of the United States or by some valid act of congress, must be respected until congress intervenes.'" Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

5. Patterson *v.* Missouri Pac. R. Co., 77 Kan. 236, 94 Pac. 138, 15 L. R. A., N. S., 733.

6. St. Louis, etc., R. Co. *v.* State, 26 Okla. 62, 107 Pac. 929, 30 L. R. A., N. S., 137.

7. Local matters.—St. Louis, etc., R. Co. *v.* State, 26 Okla. 62, 107 Pac. 929, 30 L. R. A., N. S., 137.

8. Railroad entirely within state.—Wa-

Engaged in Interstate and Intrastate Traffic.—That a railroad company is engaged in interstate commerce does not deprive it of the right also to engage in intrastate traffic, or relieve it of its obligation to obey the law of the state while so engaged.[9]

Where Commerce Remotely Affected.—A statute regulating operation of trains within a state is not invalid as an interference with interstate commerce if its effect on such commerce is indirect or remote.[10]

§ 3867. Location and Plan of Construction of Railroad.—A state may prescribe the location and the plan of construction of the road.[11] The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, are matters which may be regulated by the state.[12] All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of congress exerted on the same subject, that they can be required to give way to the paramount authority of the constitution of the United States.[13]

Blocks, Switches, etc.—Since congress has not required railroads engaged in interstate commerce to fill or block switches, frogs, and guard rails on their roads, Act Mo. Feb. 28, 1907, requiring railroads so to do, does not conflict with Act Cong. April 22, 1908, commonly known as the Employer's Liability Act, whereby congress assumed jurisdiction over injuries to employees engaged in interstate commerce.[14] A statute requiring that a railroad shall, in certain cases, put in side tracks to private industrial concerns, is not an interference with interstate commerce although such a road may run through several states, and may carry freight over this side track to other states.[15]

Erection of Station.—A state law requiring a railroad to erect a depot at a particular station is an exercise of the police power, and is not a regulation of interstate commerce, in violation of the constitution of the United States.[16]

Building Spur Track.—An order of a state railroad commission, requiring a railroad to lay a spur track at a certain point on the ground of public necessity, was not a regulation of or interference with interstate commerce, but a proper exercise of the police power of the state.[17]

Automatic Bell Ringers.—A statute requiring railroad locomotives to have automatic bell ringers could not have extraterritorial effect by applying to roads without the state.[18]

bash R. Co. *v.* West Side Belt R. Co., 197 Fed. 442.

Under Laws 1899, c. 4700, providing for the organization and powers of the board of railroad commissioners, a railroad operated from a point in Florida to a point in another state is, in so far as the road is located in Florida, and in so far as its business is confined to traffic in Florida, subject to the regulation, control, and supervision of the railroad commissioners. State *v.* Jacksonville Terminal Co., 27 So. 225, 41 Fla. 377.

9. Engaged in interstate and intrastate traffic.—Shohoney *v.* Quincy, etc., R. Co., 223 Mo. 649, 122 S. W. 1025.

10. Where commerce remotely affected.—Pittsburgh, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

11. Location and plan of construction.—Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

12. Character of guage, grades, etc.—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

13. Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

14. Blocks, switches, etc.—St. Louis, etc., R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102.

15. Corporation Comm. *v.* Southern R. Co., 153 N. C. 559, 69 S. E. 621.

16. Erection of station.—St. Louis, etc., R. Co. *v.* State, 97 Ark. 473, 134 S. W. 970.

17. Building spur track.—St. Louis, etc., R. Co. *v.* State, 99 Ark. 1, 136 S. W. 938.

18. Automatic bell ringers.—State *v.* Louisville, etc., R. Co., 177 Ind. 553, 96 N. E. 340.

§ 3868. Purchase of or Consolidation with Competing Lines.—It is competent for a state, in the exercise of its police power, to forbid the purchase or consolidation of parallel and competing lines of railroad, and the application of this power with respect to interstate railroads is not an interference with the power of congress over interstate commerce.[19]

§ 3869. Requiring Recordation of Lease.—A statute of a state requiring every person operating a railroad in the state under a lease to have the same recorded is not an interference with interstate commerce.[20]

§ 3870. Requiring Railroad to Afford Transportation.—Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty imposed by a state law for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the state.[21]

Transportation of Passengers.—Interstate commerce is not directly burdened, in violation of the federal constitution, by an order of a state railroad commission directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line, although, to avoid the useless expense of establishing terminal facilities at that point, the passenger service directed by the order must be operated not only to the state line, but some twenty miles beyond, where such facilities do exist.[22]

During Strike.—A state court has no jurisdiction to compel an interstate railroad company to operate its road within the state, in the face of a general strike, on the allegation that enough competent men are willing to work for reasonable compensation.[23]

Permission to Discontinue Running of Trains.—The duty imposed on

19. **Purchase or consolidation of competing lines.**—Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 40 L. Ed. 849, 16 S. Ct. 714, reaffirmed in Ornstine *v.* Cary, 204 U. S. 669, 51 L. Ed. 672, 27 S. Ct. 788. See, also, Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436.

"While the constitutional power of the state in this particular has never been formally passed upon by this court, the power of state legislatures to impose this restriction upon the general authority to consolidate has been recognized in a number of cases. Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678; Shields *v.* Ohio, 95 U. S. 319, 24 L. Ed. 357; Wallace *v.* Loomis, 97 U. S. 146, 24 L. Ed. 895; New Buffalo *v.* Iron Co., 105 U. S. 73, 26 L. Ed. 1024; Leavenworth County Comm'rs *v.* Chicago, etc., R. Co., 134 U. S. 688, 33 L. Ed. 1064, 10 S. Ct. 708; Livingston County *v.* First Nat. Bank, 128 U. S. 102, 32 L. Ed. 359, 9 S. Ct. 18; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450, 14 S. Ct. 592; Ashley *v.* Ryan, 153 U. S. 436, 38 L. Ed. 773, 14 S. Ct. 865. In the last case it was broadly held that a state, in permitting railway companies to consolidate, might impose such conditions as it deemed proper, and that the acceptance of the franchise implied a submission to the conditions, without which it could not have been obtained." Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 40 L. Ed. 849, 16 S. Ct. 714, reaffirmed in Ornstine *v.* Cary, 204 U. S. 669, 51 L. Ed. 672, 27 S. Ct. 788.

Purchase or consolidation of competing lines.—Interstate commerce is not burdened by requiring railroad companies to operate a particular line which they selected, or represented that they had selected, in a petition to the state railroad commission for approval of a consolidation, although compliance may entail expense, or require the exercise of eminent domain. Mobile, etc., R. Co. *v.* State, 41 So. 259, 89 Miss. 724, affirmed in Mobile, etc., R. Co. *v.* Mississippi, 210 U. S. 187, 52 L. Ed. 1016, 28 S. Ct. 650.

20. **Recording lease.**—Commonwealth *v.* Chesapeake, etc., R. Co., 101 Ky. 159, 40 S. W. 250, 19 Ky. L. Rep. 329.

21. **Duty to afford transportation.**—Currie *v.* Raleigh, etc., R. Co., 135 N. C. 535, 47 S. E. 654.

22. **Transportation of passengers.** — Judgment, Taylor *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606, affirmed in Missouri Pac. R. Co. *v.* Railroad Comm'rs, 216 U. S. 262, 54 L. Ed. 492, 30 S. Ct. 330.

23. **During strike.**—State *v.* Great Northern R. Co., 14 Mont. 381, 36 Pac. 458.

railroad companies to make written application to railroad commissioners for consent before discounting intrastate passenger trains is not an unlawful burden on interstate commerce.[24]

Compelling Running of Regular Train.—The Act of Missouri, March 19, 1907, requiring the running of at least one regular passenger train each way every day over all railroad lines, is not invalid as a regulation of interstate commerce.[25] An order of a state railroad commission which requires a railroad company, operating a road continuously into an adjoining state, to operate each way daily a passenger train, in addition to the trains in operation, between the state line to a point in the state, does not interfere with interstate commerce.[26]

Compelling Running of Additional Train.—A public service commission may compel an interstate railroad to put on additional trains in certain cases, as well as companies operating wholly within the state.[27]

Operation of Particular Line.—Interstate commerce is not burdened by requiring railroad companies to operate a particular line which they selected, or represented that they had selected, in a petition to the state railroad commission for approval of a consolidation, although compliance may entail expense, or require the exercise of eminent domain.[28]

Facilities for Transportation.—While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers,[29] the absolute requirement by a state statute that a

24. **Permission to discontinue running of trains.**—Railroad Comm'rs *v.* Atlantic, etc., R. Co., 61 Fla. 799, 54 So. 900.

25. **Compelling running of regular train.**—State *v.* Chicago, etc., R. Co., 239 Mo. 196, 143 S. W. 785.

26. Chicago, etc., R. Co. *v.* Oglesby, 198 Fed. 153.

St. 1911, § 1801, providing that every railroad corporation shall maintain a station at every village having a postoffice and containing 200 inhabitants or more, and shall stop at least one passenger train each way each day at such station, if so many trains are run, and, if four or more passenger trains are run each way daily, at least two such trains each way each day shall be stopped at each and every such station, was neither illegal as applied to an interstate railroad company as interfering with interstate commerce, nor unreasonable. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

That compliance with a statute requiring an interstate railroad company to stop at least two trains each way each day at stations having population of 200 or more (St. 1911, § 1801) would require the company to put on an additional local train each way daily at a cost of $7,000 per month, which would be run at a financial loss, did not show that the requirement was illegal as confiscatory or unreasonable, where it was not shown that the whole passenger revenue of the road within the state was not ample to meet the additional expense with a fair margin of profit, since, if the required service is reasonable, it is no answer that it would have to be performed at a financial loss. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

27. **Compelling running of additional train.**—Delaware, etc., R. Co. *v.* Stevens, 172 Fed. 595.

28. **Operation of particular line.**—Judgment, Mobile, etc., R. Co. *v.* State, 89 Miss. 724, 41 So. 259, affirmed in Mobile, etc., R. Co. *v.* Mississippi, 210 U. S. 187, 52 L. Ed. 1016, 28 S. Ct. 650.

29. **Adequate facilities for transportation.**—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

Adequate facilities for transportation—Equal accommodations.—Compelling a carrier by mandamus to discharge its common-law duty to treat all shippers alike by resuming the transfer of cars loaded and unloaded between the line of a connecting carrier and the flour mill and elevator of a particular shipper is not beyond the power of the state court, at least, until congress or the interstate commerce commission takes specific action, although both carriers are engaged in interstate commerce, and three-fifths of the output of the mill are shipped out of the state. Judgment, Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 88 Pac. 72, 74 Kan. 808, affirmed in 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214.

Regulations of American Railway Association — Fairness and Sufficiency. — Power to determine the validity and sufficiency of the rules and regulations of the American Railway Association with respect to matters of interstate commerce, which rules govern ninety per cent of the railroads, and hence a vast proportion of the interstate commerce of

railroad shall furnish to shippers a certain number of cars at a specified date, regardless of every other consideration except strikes and other public calamities, and making the failure to furnish such cars punishable not only by damages actually incurred by the shipper, but also by an arbitrary penalty, as applied to interstate shipments, transcends the police power of the state and amounts to a burden upon interstate commerce.[30] It is competent for a state to require railroad companies, including those engaged in interstate commerce, whose lines or tracks intersect the lines or tracks of other companies, to provide at such points of intersection, where it is practicable and necessary for the interests of traffic, ample facilities by track connections for transferring cars from the lines or tracks of one company to those of another, and to provide at such points of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines. Such a requirement affords facilities to interstate commerce, and in no wise regulates such commerce within the meaning of the constitution.[31] A state regulation intended to facili-

the country, is vested primarily in congress and in the interstate commerce commission and, is not to be tested by state laws or by decisions of the state courts. St. Louis, etc., R. Co. *v.* Arkansas, 217 U. S. 136, 54 L. Ed. 698, 30 S. Ct. 476, 29 L. R. A., N. S., 802.

Interchange of cars—Penalty for failure to supply cars on demand.—For example the validity and sufficiency of the rules of such association with the respect of the interchange of cars by roads engaged in interstate commerce is a question which can not be tested by the decisions of state courts nor by state laws; and a state law which undertakes to compel the roads within the state to supply cars to shippers on demand under very heavy penalties in case of failure to do so, thereby putting the road in the position of having to pay such penalties or withdraw large numbers of its cars from the uses of interstate commerce and from interchange of cars with interstate roads in accordance with the rules of the American Railway Association, is unconstitutional as burdening interstate commerce. St. Louis, etc., R. Co. *v.* Arkansas, 217 U. S. 136, 54 L. Ed. 698, 30 S. Ct. 476, 29 L. R. A., N. S., 802.

Interstate commerce is unconstitutionally regulated by Kirby's Dig., Ark., §§ 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute. St. Louis, etc., R. Co. *v.* State, 107 S. W. 1180, 85 Ark. 311, 122 Am. St. Rep. 33, reversed. St. Louis, etc., R. Co. *v.* Arkansas, 217 U. S. 136, 54 L. Ed. 698, 30 S. Ct. 476, 29 L. R. A., N. S., 802.

Requiring additional train service.—Interstate commerce is not directly burdened, in violation of the federal constitution, by an order of a state railroad commission, directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line, although, to avoid the useless expense of establishing terminal facilities at that point, the passenger service directed by the order must be operated not only to the state line, but some 20 miles beyond, where such facilities do exist. Judgment, Taylor *v.* Missouri Pac. R. Co., 92 Pac. 606, 76 Kan. 467, affirmed in Missouri Pac. R. Co. *v.* Railroad Comm'rs, 216 U. S. 262, 54 L. Ed. 492, 30 S. Ct. 330.

30. Requiring certain number of cars at specified day.—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491 (construing Rev. Stat., Texas, articles 4497-5000).

31. Track connections and facilities for interchange of cars.—Wisconsin, etc., R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115; Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

In Wisconsin, etc., R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115, it was held that neither the judgment of the lower court requiring the two railroads affected by that case to provide such facilities for the interchange of cars and traffic at a particular point of intersection, nor the statute of Minnesota (General Laws of Minnesota, 1895, ch. 91) upon which such judgment was founded, constituted an interference with or a regulation of interstate commerce, it being stated in the opinion of the supreme court of Minnesota that there was

tate the receipt and delivery of freight by enlarging the carrier's facilities is not an interference with interstate commerce.[32]

Furnishing Cars.—When applied to interstate shipments, the provision of a state statute which penalizes the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing in a certain sum a day for each car not so furnished, and admits of no excuse such as arises from strikes or other public calamity, is an unconstitutional regulation of interstate commerce.[33] Interstate commerce is a statute un-

ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce when considered alone, to justify the ordering of the connection in question. The question whether any other portion of the statute was a regulation of interstate commerce was not decided.

32. North Carolina Corp. Comm. *v.* Southern R. Co., 151 N. C. 447, 66 S. E. 427.

33. Furnishing cars.—Judgment, 36 Tex. Civ. App. 606, 83 S. W. 53, reversed in Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

A rule promulgated by the state corporation commission required railway companies to furnish cars of the required kind upon four days' application, and provided for a forfeiture for each day's default. By another rule the commission reserved the right at any time or under any circumstances to suspend the operation of the rules whenever justice might demand. Held, that the rule was unreasonable and void as applied to shipments to points outside the state. Southern R. Co. *v.* Commonwealth, 107 Va. 771, 60 S. E. 70, 17 L. R. A., N. S., 364.

The legislature may prescribe a penalty for the failure of railroads to furnish cars for the shipment of freight, although the shipment in contemplation is to be an interstate shipment. Houston, etc., R. Co. *v.* Everett (Tex. Civ. App.), 86 S. W. 17, judgment reversed in 99 Tex. 269, 89 S. W. 761.

Sess. Laws 1905, c. 10, art. 2, § 2, imposing on a railroad the penalty of $1 a day for failure to furnish cars within four days after request, but excusing a company in case of certain unavoidable casualties, is not an infringement of the constitution of the United States, art. 1, § 8, relating to interstate commerce. Chicago, etc., R. Co. *v.* Beatty, 34 Okla. 321, 118 Pac. 367, 126 Pac. 736, 42 L. R. A., N. S., 984.

A state law imposing a penalty of $1 per day on each car for delay in furnishing freight cars ordered, and to permit no excuse therefor except "strikes, unavoidable accidents, and other public calamities," is not invalid, but a reasonable police regulation imposing no considerable burden on interstate commerce. Laws 1905, p. 570, c. 345; Patterson *v.* Missouri Pac. R. Co., 77 Kan. 236, 94 Pac. 138, 15 L. R. A., N. S., 733.

A rule of the railroad commission requiring a carrier to furnish cars for intrastate shipments promptly upon request is not void as imposing a burden upon interstate commerce, even if it indirectly or incidentally affects to a limited degree interstate business, where it does not directly burden it. Southern R. Co. *v.* Melton, 133 Ga. 277, 65 S. E. 665.

Since Act Feb. 18, 1907 (Laws 1907, p. 77) § 26, requiring railroads to furnish cars on demand by shippers, covers a field not occupied by the federal act of Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), known as the interstate commerce law, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), in that it regulates the manner of making the request, the excuses that may be made for a failure to deliver cars, and adds an additional penalty by way of demurrage for failure to comply with its terms, it is not superseded by nor in conflict with the federal statute. Martin *v.* Oregon R., etc., Co., 58 Ore. 198, 113 Pac. 16.

Act Feb. 28, 1907 (Acts 1907, p. 225), imposing a penalty on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand, is violative of the constitution of the United States, art. 1, § 8, providing that congress shall have the power to regulate commerce among the several states, in so far as it may affect cars which may be used in interstate commerce or may be used therein, so they can not be supplied. Central, etc., R. Co. *v.* Groesbeck, 175 Ala. 189, 57 So. 380.

Terr. Laws 1905, c. 10, art. 2, § 2, imposing upon railroads a penalty of $1 per day for failing to furnish cars under certain circumstances, is not violative of Act Cong. June 29, 1906, requiring cars to be furnished on reasonable request. Chicago, etc., R. Co. *v.* Beatty, 34 Okla. 321, 126 Pac. 736, 42 L. R. A., N. S., 984, affirming judgment on rehearing, 118 Pac. 367.

Section 22 of the act requiring railroads to furnish cars within a reasonable time for the transportation of property offered (Hurd's Rev. St. 1911, c. 114, § 84) is not violative of the commerce clause of the

constitutionally regulated by making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which governs 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute.[34]

Furnishing Passenger Trains.—A railway company may be compelled by law to furnish trains for the carriage of passengers, and loss to the railroad is no defense to the enforcement of the law.[35]

Where Congress Has Acted.—Congress has so taken possession of the subject of delivery of railroad cars for interstate commerce under Act June 29, 1906, as to invalidate, when applied to cars demanded for interstate commerce, provisions of Laws Minn. 1907, requiring railroad companies to furnish freight cars on demand under penalty.[36]

Equipment of Cars.—A state statute requiring a carrier to equip its cars furnished to haul lumber or timber with sufficient standards and other appliances to keep the cargo firmly in place, and providing that the weight of the standards shall be a part of the car, and not of the cargo, and imposing a penalty for not complying therewith, does not constitute a burden upon interstate commerce.[37]

§§ 3871-3880. Regulation of Charges for Transportation—§ 3871. In General.—A contract between a shipper and a railroad company for the carriage of goods from a point within one state to a point in another state is interstate commerce, and is not the subject of state regulation as to tolls or compensation therefor.[38]

Between Points in Same State.—A state has the legislative power to establish the rates of compensation for carriage of commodities between points within the state.[39] A state has power to regulate the amount of charges that may be exacted by a railroad for transportation of property within the state, if the rate fixed will afford reasonable compensation, and such regulation does not amount to a regulation of foreign or interstate commerce.[40] In proceedings be-

federal constitution. Mulberry Hill Coal Co. *v.* Illinois Cent. R. Co., 257 Ill. 80, 100 N. E. 151.

Rule of state railroad commission under which a per diem penalty may be exacted from an interstate carrier for delay in delivering cars to the consignee held an unreasonable burden on interstate commerce, where the requirement as to delivery is absolute, and makes no allowance for any unavoidable cause for failure to deliver. Yazoo, etc., R. Co. *v.* Greenwood Grocery Co., 227 U. S. 1, 33 S. Ct. 213, reversing judgment 96 Miss. 403, 51 So. 450.

34. Judgment, St. Louis, etc., R. Co. *v.* State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33, reversed in St. Louis, etc., R. Co. *v.* Arkansas, 217 U. S. 136, 54 L. Ed. 698, 30 S. Ct. 476, 29 L. R. A., N. S., 802.

35. Furnishing passenger trains.—State *v.* Chicago, etc., R. Co., 239 Mo. 196, 143 S. W. 785.

36. Where congress has acted.—Chicago, etc., R. Co. *v.* Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 S. Ct. 174, 46 L. R. A., N. S., 203, reversing judgment 110 Minn. 25, 124 N. W. 819, 19 Am. & Eng. Ann. Cas. 1088.

37. Equipment of cars.—King Lumber, etc., Co. *v.* Atlantic, etc., R. Co., 58 Fla. 292, 50 So. 509.

38. From point in one state to point in another.—Jennings *v.* Big Sandy, etc., R. Co., 61 W. Va. 664, 57 S. E. 272.

Act Pa. May 24, 1907 (P. L. 229), providing maximum car service charges, including car storage charges, that railroad companies may impose, is invalid as to goods and cars engaged in interstate commerce, in view of the fact that congress has legislated on the subject by the federal acts of February 4, 1887 (ch. 104, 24 Stat. 379), and June 29, 1906 (ch. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. p. 892]). Pennsylvania R. Co. *v.* Coggins Co., 38 Pa. Super. Ct. 129.

39. Between points in same state.—Southern R. Co. *v.* Hunt, 42 Ind. App. 90, 83 N. E. 721.

40. Chapman, etc., Land Co. *v.* Jones-

fore the railroad commission to fix local freight rates on coal, the fact that the coal handled by the petitioner is interstate traffic does not affect the jurisdiction of the commission to fix rates, since the matter in controversy is the local rate and not a particular shipment.[41] A carrier picked up empties from connecting carriers, hauled them to a gravel quarry, and returned them when loaded, both the point of connection with such other carriers and the quarry being in the same state. It furnished no equipment, and there was nothing to show that it issued bills of lading to destination points, or that it was in any way liable for, or concerned in the movement of, the cars after delivery to the connecting carriers, and the rate charged was a fixed sum per car. The service, being confined to the handling of cars between two points in the same state, was not interstate commerce, so as to render void an order of the state railroad commission reducing the charge therefor.[42]

Where Interstate Commerce Incidentally Affected.—To the extent that it does not regulate interstate commerce, a state may regulate intrastate commerce and the fares and rates therein within its borders, and enforce regulations which only incidentally affect interstate commerce.[43] The Railroad Commission Act of Oregon of February 18, 1907, by its terms is unmistakably limited to the regulation of carriers and rates between points within the state, and an order made by the state railroad commission under its authority is presumptively intended to be subject to the same limitation. The fact that such an order fixing rates and limited by its terms to intrastate shipments may incidentally induce a change in the movement of interstate commerce, or a change in interstate rates, does not render it, nor the statute, unconstitutional as a regulation of interstate commerce.[44] That the enforcement of intrastate freight rates estab-

boro, etc., R. Co., 97 Ark. 300, 133 S. W. 1119.

The state railroad commission does not have jurisdiction to regulate service charges in the conduct of interstate commerce. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

If the state railroad commission erroneously assumes jurisdiction to pass on the reasonableness of compensation by a railroad company for services rendered within the state, forming part of an entire interstate transit, its decision is void. Duluth-Superior Mill. Co. *v.* Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.

A statute providing the rate of compensation that railway companies shall charge for the transportation of passengers, is not a regulation of interstate commerce, as such law applies only to the rates to be charged within the state on domestic commerce. Osborn *v.* Wabash R. Co., 123 Mich. 669, 82 N. W. 526.

Laws 1891, p. 103, providing the rate of compensation that railway companies shall charge for the transportation of passengers, is not a regulation of interstate commerce, as such law applies only to the rates to be charged within the state on domestic commerce. Osborn *v.* Wabash R. Co., 82 N. W. 526, 123 Mich. 669.

41. Southern R. Co. *v.* Hunt, 42 Ind. App. 90, 83 N. E. 721.

42. Chicago, etc., R. Co. *v.* Railroad Comm., 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011.

43. Where interstate commerce incidentally affected.—Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

44. Oregon R., etc., Co. *v.* Campbell, 173 Fed. 957.

The act of the Legislature of Minnesota of April 18, 1907 (Gen. Laws 1907, c. 232 [Rev. Laws Supp. 1909, §§ 2007-11 to 2007-17]), reducing commodity rates within the state about 7.37 per cent, and the orders of its railroad and warehouse commission of September 6, 1906, reducing general merchandise rates within the state from 20 to 25 per cent, and of May 3, 1907, reducing rates within the state to distributing points, by their natural and necessary effect substantially burden and directly regulate interstate commerce, create undue and unjust discriminations between localities in Minnesota and those in adjoining states, violate the commerce clause, being Constitution of the United States, art. 1, § 8, and are void. Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

The facts considered, and held, that the unavoidable effect of the general and sweeping reductions of intrastate rates in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in Minnesota and those in other

lished by a state commission between points within the state will make it necessary for a carrier for the protection of its business to voluntarily reduce certain of its interstate rates does not render the order of the commission invalid as affecting interstate commerce.[45] But state laws, orders, and regulations concerning intrastate commerce or the fares or rates therein, which substantially regulate interstate commerce or fares or rates therein, are unconstitutional.[46]

Competition between Intrastate and Interstate Shipments.—State statutes fixing maximum fares and rates on shipments on railroads between intrastate points are not unconstitutional, as regulations of interstate commerce, because between certain cities in the state there are lines of road lying wholly within the state, and other lines which run in part through another state, and by long established custom and from the necessities of competition the latter are compelled to make the same rates as the former, where the statutes have not been construed by the courts of the state to directly apply to the interstate lines.[47]

Shipment to Foreign Country.—A contract by a railway company for through shipment to foreign seaports by way of domestic seaports for a through rate is not controlled by the interstate commerce law even though the rate paid by the railroad for the ocean transportation reduced the inland rate to less than the tariff rate to the domestic seaport.[48] A shipment of lumber destined by the purchaser for export, made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports—such shipment not being an isolated one, but typical of many others—constitutes foreign commerce, and as such is governed by the tariffs on file with the interstate commerce commission to the exclusion of the rates established by the state railroad commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment.[49]

Where Destination Not Fixed.—Where a shipment of lumber had not been made to any foreign point, and was not by the shipping contract started on its final journey from the state, nor committed to a connecting carrier for transportation beyond the state, and required a further shipment to fix its destination

states, in violation of the commerce clause of the constitution. Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

The act of the legislature of Minnesota of April 4, 1907 (Gen. Laws 1907, c. 97 [Rev. Laws Supp. 1909, §§ 2007-1 to 2007-2]), reducing passenger fares within the state about 33⅓ per cent by its natural and necessary effect substantially burden and directly regulate interstate commerce, create undue and unjust discriminations between localities in Minnesota and those in adjoining states, violate the commerce clause, being constitution of the United States, art. 1, § 8, and are void. Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

Rates established by a state for the intrastate carriage of freight or passengers necessarily indirectly affect interstate rates; but that fact does not render the establishment of such rates unconstitutional, as an interference with interstate commerce. In re Arkansas Rate Cases, 187 Fed. 290.

45. Northern Pac. R. Co. *v.* Lee, 199 Fed. 621.

46. Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

The effect, and neither the terms nor the purpose, of state regulations, determines whether they substantially or only incidentally affect interstate commerce. Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

47. Competition between intrastate and interstate shipments.—St. Louis, etc., R. Co. *v.* Hadley, 168 Fed. 317.

48. Through shipment to foreign ports.—St. Louis, etc., R. Co. *v.* Birge-Forbes Co. (Tex. Civ. App.), 139 S. W. 3.

49. Texas, etc., R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 33 S. Ct. 229.

beyond the state, it was intrastate commerce, and subject to the rates fixed by the Texas railroad commission.[50]

Matter National in Character.—The fares and rates of transportation in interstate commerce are national in character susceptible of uniform regulation, and so far as the nation has not regulated them are free from regulation by virtue of the commerce clause of the constitution.[51] The interstate transportation of passengers and freight being a matter national in its character, it is not competent for the states to regulate the rates of charges of railroads for such transportation even in the absence of any legislation by congress on the subject. And a state statute intended to regulate such charges is void even as to that part of the transportation which is within the state.[52]

50. Where destination not fixed.—Texarkana, etc., R. Co. *v.* Sabine Tram Co. (Tex. Civ. App.), 129 S. W. 198.

51. Matter national in character.—Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

52. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277. See, also, Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

Goods are transported between two points in the same state, but in course of transportation, they pass through another state. Held, this constitutes interstate commerce, and therefore the state railroad commissioners can be enjoined from fixing and enforcing rates for such transportation. Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214, distinguishing Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806, which was a tax upon freight and not regulation of transportation.

The provisions of Code 1906, § 2482, imposing a forfeiture on any railroad, corporation, or agent which shall demand or receive from any person any greater toll for compensation or transportation of freight or for weighing the same than is provided by the act, are void so far as is attempted to apply them to interstate commerce. Jennings *v.* Big Sandy, etc., R. Co., 61 W. Va. 664, 57 S. E. 272.

It is not necessary to review the cases in the federal supreme court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the constitution of the United States; nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void. Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277. And an order made by a state commission under assumed authority of the state, which directly burdens or regulates interstate commerce, will be enjoined. McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722; Railroad Comm. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 S. Ct. 653.

Power of Ohio commission to regulate rate on "lake-cargo coal."—An unconstitutional attempt directly to regulate and control interstate commerce is made by an order of the Ohio Railroad Commission establishing a freight rate on "lake-cargo coal" billed from Ohio coal fields to Ohio ports on Lake Erie, where such rate is applicable only to such coal as is in fact placed upon vessels at those ports for carriage to points outside the state, and covers the actual placing of such coal upon the vessels, and the trimming or distributing of it in the holds so that the vessels may safely proceed on their interstate journey. Railroad Comm. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 S. Ct. 653.

With reference to the character of the transportation in this case, the court says: "The question is, then, one of fact. Does the transportation, which the rate prescribed by the Railroad Commission of Ohio covers, constitute interstate commerce? The shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron on Lake Erie. The so-called 'lake cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the state, usually to upper lake ports, and then, and only then, the 70 cent rate fixed by the commission applies. This 70 cent rate covers the transportation of the coal to Huron, the placing of it on board vessels, and, if necessary, trimming it for continuance of its interstate journey. The situation then comes to this: that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels, and thence carried to upper lake ports beyond the state. By ev-

In Absence of Regulation by Congress.—Although there are some cases which seem to establish the rule that state statutes regulating rates of charges for transportation on railroads, so far as they affect interstate traffic, belong to that class of commercial regulations which may be established by the laws of the states until congress shall have exercised its power on the subject,[53] these

ery fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage. We therefore reach the conclusion that, under the fact shown in this case, the Railroad Commission, in fixing the rate of 70 cents for the transportation above described, attempted to directly regulate and control interstate commerce." Railroad Comm. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 S. Ct. 653, distinguishing, Gulf, etc., R. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 S. Ct. 360.

State law compelling carrier to receive and carry interstate shipment on through rate.—Congress has so completely taken control of the subject of rate making and charging by the provisions of the act to regulate commerce and the amendments thereof as to invalidate the provisions of Code N. C. 1905, § 2631, so far as they penalize the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state where no rate for such shipment has been established, filed, or published. Southern R. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140, followed in S. C., 222 U. S. 444, 56 L. Ed. 263, 32 S. Ct. 145.

Congress has so completely taken control of the subject of railroad rate making and charging as to invalidate the provisions of a state statute so far as they penalize the refusal of a railway carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state, where the carrier had no rate for such shipment. Southern R. Co. *v.* Burlington Lumber Co., 225 U. S. 99, 56 L. Ed. 1001, 32 S. Ct. 657.

This is an action to recover penalties under a statute of North Carolina for refusal to receive goods for shipment. As the statute is the same that was held bad, so far as it concerns commerce among the states in Southern R. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140, and S. C., 222 U. S. 444, 56 L. Ed. 263, 32 S. Ct. 145, a short statement will be enough. On January 26, 1907, the Burlington Lumber Company tendered the railway company at Burlington, North Carolina, certain machinery for shipment to Saginaw, Michigan, on a through bill of lading. Sagninaw was not on the railway company's line, the company had no rates to Saginaw, and the agent had to delay in order to inquire of his superiors. The result was that the through bill of lading was not issued until April 3. The suit, as we have said, is for the penalty, and nothing else. The supreme court of the state decided against the railway on the same ground that it did in the decisions already reversed. In the circumstances it seems unnecessary to discuss the case more at length. Southern R. Co. *v.* Burlington Lumber Co., 225 U. S. 99, 56 L. Ed. 1001, 32 S. Ct. 657.

53. **In absence of regulation by congress.**—In the case of the Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94, which directly related to railroad transportation, a bill was filed by the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington and Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi River at Burlington, thus making a continuous railroad from Chicago to Platsmouth on the Missouri River in Iowa. The language of the court is as follows: "The objection that the statute complained of is void, because it amounts to a regulation of commerce among the states, has been sufficiently considered in the case of Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77. This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce, and, until congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in doing so those without may be indirectly affected." In short, the case was treated as one of internal commerce only. Peik *v.* Chicago, etc., R.

cases, so far as they have been supposed to lay down such a rule, have been overruled by later decisions.[54]

Co., 94 U. S. 164, 24 L. Ed. 97. These cases were examined and criticised in Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

The cases of Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94, and Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97, were cited with approval in Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832, in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized. Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

In Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99, it was held that a railroad company in Wisconsin could not recover for the transportation of property more than the maximum fixed by the act of that state of March 11, 1874, by showing that the amount charged was not more than a reasonable compensation for the services rendered, and the court said that the ruling in Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97, was applicable to that case, without stating whether or not the statute included interstate transportation.

In Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99, it was held that a railroad company in Minnesota having been incorporated as a common carrier, with all the rights and subject to all the obligations which that term implies, was bound to carry, when called upon for that purpose, and charge only a reasonable compensation therefor, and that neither the act of the legislature of February 28, 1866, nor the constitution of the state, adds to or takes from the grant as contained in the original charter, and the court said that the case fell directly within the rulings of Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99, without stating whether or not the decision related to interstate transportation. See, also, Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710.

54. In Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4, the cases of Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94, and Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97, were examined, and, they were held, in view of other cases decided near the same time, not to actually establish the doctrine stated in the text. But referring to the language of these cases, the court said: "It cannot be denied that the general language of the court in these cases, upon the power of congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it. * * * These extracts show that the question of the right of the state to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by congress on the same subject. By the slighest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a state, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen states, through which they are carried without change of car or breaking bulk. * * * It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel.

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law." Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277.

Referring to the decision in Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4, the court in Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; said: "The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered

Where Congress Has Acted.—Congress has so taken control of railroad rate making as to invalidate provisions of a state statute penalizing refusal of carrier to receive freight for transportation to a point on line of another carrier outside the state, where it had no rate therefor.[55] The state can not, in view of act of congress to regulate interstate commerce and its amendments, prescribe rates of freight for interstate shipments, either directly or indirectly.[56]

Where Rates Filed with Interstate Commerce Commission.—The fact that a railroad company, in making up its schedule of through rates filed with the interstate commerce commission, has taken the sum of its local rates in each state, does not remove such local rates from the jurisdiction of the state for the purpose of regulation, nor does the fact that a reduction of local rates by the state may incidentally place the company under the business necessity of reducing its interstate rates affect the legality of such reduction.[57] Where a carrier, in the unrestrained course of business, adopted a lower schedule of charges for intrastate and interstate passenger service than the rate allowed by the state corporation commission for intrastate business, it can not object to the rates fixed by the commission as substantially burdening interstate commerce.[58]

Application of Common Law of State.—The common-law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, though the contract of carriage is made in a state where that rule prevails, since such commerce is governed solely by the laws of the United States, and the United States have never adopted the common law.[59] The interstate commerce act providing that the act shall not abridge the remedies "now existing" at common law or by statute, does not confer on the shipper the right to recover overcharges on shipments made prior to the passage of the act, on the ground that it recognizes a common-law or statutory liability on the part of the carrier therefor.[60]

Regulation in Amendment to Charter.—A state statute amending the charter of a railroad company so as to prohibit it from allowing its tracks to connect with the tracks of another railroad company, which passes through other states, unless the latter shall arrange its freight charges on coal delivered to it from the former, that the combined freight charges shall not exceed the lowest freight charges on coal shipped to the same destination over the latter line from any point in Pennsylvania or West Virginia, which is as far or further distant from the

as overruled. See, also, Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the Wabash case, and to that doctrine we still adhere."

55. Where congress has acted.—Southern R. Co. *v.* Burlington Lumber Co., 225 U. S. 99, 56 L. Ed. 1001, 32 S. Ct. 657, reversing judgment 152 N. C. 70, 67 S. E. 167.

56. State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

Since the Interstate Commerce Act of Feb. 4, 1887, as amended June 29, 1906, covers all rates with respect to interstate shipments, the state legislation fixing interstate rates is thereby superseded. Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724.

57. Where rates filed with interstate commerce commission.—Louisville, etc., R. Co. *v.* Siler, 186 Fed. 176.

58. Washington Southern R. Co. *v.* Commonwealth, 112 Va. 515, 71 S. E. 539.

59. Application of common law of state.—Swift *v.* Philadelphia, etc., R. Co., 58 Fed. 858.

Since the common law, as such, is no part of the national jurisprudence, and since the exclusive right to regulate commerce is vested in congress, overcharges for freight on an interstate shipment, involving unjust discrimination, made prior to the Interstate Commerce Act, can not be recovered. Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556.

But it has been held in an action for damages for charging unreasonable rates for transportation from one state to another, that shipments made before the adoption of the Interstate Commerce Act are governed by the common law, and those made after the adoption of that act by the common law as modified by the act. Murray *v.* Chicago, etc., R. Co., 62 Fed. 24.

60. Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556.

destination as the point where the coal is delivered to the former, is invalid as an attempt to regulate interstate commerce.[61]

Requiring Carrier to Give Notice of Charges.—A statute requiring a carrier to inform the consignee of the freight charges and to deliver the freight on tender or payment subject to a penalty for failure to do so, is not invalid as interfering with interstate commerce, failure to deliver freight not being interstate commerce.[62]

Regulating Medium of Payment of Fares.—A state statute authorizing a railway company incorporated under the laws of the state to issue transportation in payment for printing and advertising must give way, so far as interstate transportation is concerned, before the provisions of the act to regulate commerce under which a carrier can accept nothing but money in exchange for interstate transportation.[63]

Refunding Overcharge.—A state law subjecting a carrier to a penalty for failure to refund an overcharge within the time prescribed, does not impose an unlawful burden on interstate commerce, in violation of the constitution of the United States, conferring on congress the right to regulate interstate commerce.[64]

Charges for Loading and Unloading.—A so-called "lake cargo rate," made by a railroad company for the carriage of coal in carload lots from a mining district in Ohio to Huron and Cleveland, ports in that state on Lake Erie, which includes the loading of vessels with such coal for transportation to ports in other states on the Upper Lakes, is a rate for transportation in interstate commerce, and not subject to regulation by the railroad commission of Ohio.[65]

Where Goods Reshipped.—Under an order of the railroad commission fixing the freight rate on rough lumber moving on railroads wholly within the state, subject to the condition that the manufactured product should be reshipped over the same line, and fixing a minimum proportion of the tonnage of outbound manufactured product to the tonnage of inbound rough material, a shipment of rough lumber within the state with the understanding that it should be manufactured into the finished product, and then shipped out over the line of the same carrier to undetermined points beyond the state, is not a continuous shipment to the final destination out of the state, and the order affecting rates on the shipment within the state is not a regulation of interstate commerce.[66]

Where Railroad Leased by State.—A state statute, authorizing a lease by

61. In amendment to charter.—Acts 1906, p. 413, c. 257, amending the charter of the Cumberland & Pennsylvania Railroad Company so as to prohibit it from allowing its track to connect with the tracks of the Baltimore & Ohio Railroad Company, which passes through other states, unless the latter shall arrange its freight charges on coal delivered to it from the former, that the combined freight charges of the two companies shall not exceed the lowest freight charges on coal shipped to the same destination over the line of the Baltimore & Ohio Railroad Company from any point in Pennsylvania or West Virginia, which is as far or further distant from the destination as the point in Alleghany county, where the coal is delivered to the Cumberland & Pennsylvania Railroad Company, is invalid as an attempt to regulate interstate commerce. State *v.* Cumberland, etc., R. Co., 105 Md. 478, 66 Atl. 458.

62. Requiring carrier to give notice of charges.—Hockfield *v.* Southern R. Co., 150 N. C. 419, 64 S. E. 181.

63. Regulating medium of payment of fares.—Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272, affirming judgment 163 Fed. 114.

64. Refunding overcharge. — Raleigh Iron Works *v.* Southern R. Co., 148 N. C. 469, 62 S. E. 595.

65. Charges for loading and unloading.—Railroad Comm. *v.* Worthington, 110 C. C. A. 85, 187 Fed. 965.

An unconstitutional attempt to regulate interstate commerce is made by the Ohio railroad commission establishing a freight rate on "lake-cargo coal" billed from Ohio coal fields to Ohio ports on Lake Erie, applicable only to such coal as is placed on vessels at those ports for carriage to points outside the state. Railroad Comm. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 S. Ct. 653, affirming decree 110 C. C. A. 85, 187 Fed. 965.

66. Where goods reshipped.—Chapman, etc., Land Co. *v.* Jonesboro, etc., R. Co., 97 Ark. 300, 133 S. W. 1119.

the state of a railroad, and providing that the lessee shall be subject to reasonable schedules of freight prescribed by state laws and the railroad commission, and a lease pursuant thereto, so far as concerns interstate rates, are in conflict with the Interstate Commerce Act.[67]

Consent of Carrier.—An agreement by a company leasing the Western & Atlantic Railroad can not confer on the state railroad commission governmental power to regulate interstate freight rates which it does not possess as an agency of the state.[68]

Regulation Presumed Reasonable.—An order of a state railroad commission reducing class and commodity freight rates will be presumed to be reasonable, and not to interfere with interstate commerce, in the absence of a showing to the contrary.[69]

Free Passage of Owner of Goods.—A statute requiring railroad companies to carry the shipper of a car load or loads of goods to and from the point designated in the bill of lading without extra charge, but not attempting to fix the shipping rate per car, is not an attempt to regulate interstate commerce.[70]

§ 3872. Prohibiting Discriminations.—Where a railroad company bound itself by a contract with a city not discriminate in rates against the city or its inhabitants, a resolution of the city council, declaring rates charged by the company between the city and points in other states to be discriminative, and requiring their reduction under penalty of a forfeiture of the contract, is not a law attempting to regulate interstate commerce, but an attempt merely to enforce a lawful contract.[71]

67. **Where railroad leased by state.**—State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

So far as they deal with interstate freight rates, Acts 1889, p. 362, and a lease of a railroad pursuant thereto, cannot be enforced by injunction, nor by decree for specific performance to compel the railroad to charge no greater rates than are fixed by the State Railroad Commission, or to file new schedules before the Interstate Railroad Commission. State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

So far as they deal with interstate freight rates, the terms of the lease act and of the lease can not be enforced either by injunction to prevent the use of a rate or classification filed and established in accordance with the act of congress to regulate interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St Supp. 1911, p. 1284]), or by decree for specific performance to compel the railroad company to charge "no greater rate per ton per mile on through freight on that road than the local rate allowed and fixed on similar freights by the (State) Railroad Commission for said railroad," or to file new schedules and take proceedings before the Interstate Commerce Commission in respect to interstate rates, so as to make them conform to classifications and rates fixed by the State Railroad Commission. State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

The state, as the owner of the Western & Atlantic Railroad, leased it for a term of years to a company. There was a provision in the act authorizing the lease, which was also incorporated by reference in the lease itself, to the effect that the company taking the lease should "be subject to and required to obey all just and reasonable rules, orders, schedules of freight and tariffs as may be prescribed by the laws of this state and the railroad commission of this state, and said lease company shall charge no greater rate per ton per mile on through freight on said railroad than the local rate allowed and fixed on similar freights by the railroad commission for said railroad." Held that, so far as concerns the making of interstate rates, this act and agreement are in conflict with the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1284]), which was enacted by congress in pursuance of its constitutional power, and to that extent are inoperative. State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

68. **Consent of carrier.**—State *v.* Western, etc., R. Co., 138 Ga. 835, 76 S. E. 577.

69. **Presumed reasonable.**—Southern Pac. Co. *v.* Railroad Comm., 193 Fed. 699.

70. **Free passage of owner of goods.**—Laws 1897, c. 167; Atchison, etc., R. Co. *v.* Campbell, 56 Pac. 509, 8 Kan. App. 661, reversed in 59 Pac. 1051, 61 Kan. 349, 48 L. R. A. 251.

71. **Discrimination.**—Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410.

§ 3873. Prohibiting Greater Charge for Shorter than Longer Haul. —Intrastate Transportation.—A state statute, providing that, if any railroad company shall, within the state, charge or receive for transportating passengers or freight of the same class, the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination, is unconstitutional and void as a regulation of interstate commerce, so far as it includes a transportation of goods under one contract for continuous service covering the entire route, from points in the state, to points in other states, such transportation being "commerce among the state," even as to that part of the voyage which lies within the state enacting the statute.[72]

Internal Transportation.—A state statute, regulating the charges of railroad companies for the transportation of persons and property, applicable exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, is a valid regulation,[73] for the reason that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state.[74] Accordingly, a state statute prohibit-

72. **Prohibiting greater charge for short than long haul.**—A railroad company having made a discrimination in regard to goods transported over the same road or roads, from Peoria, in Illinois, and from Gilman in Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former eighty-six miles nearer to New York than the latter, this difference being in the length of the line within the state of Illionis, it was held that the statute of Illinois, April 7, 1871, Rev. Stat., Chapter 114, § 126, having been construed by the supreme court of the state to include a transportation of goods under one contract and by one voyage from the interior of the state of Illinois into and through other states, as applied to the transaction under consideration, was forbidden by the constitution of the United States, even as to that portion of the transportation within the state of Illinois. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4. See, also, Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

Section 218 of the Kentucky constitution prohibiting common carriers from charging more for a shorter than for a longer haul, having been construed by the highest court of the state as not confined to a case where the long and short hauls are both within the state, but as extending to and embracing a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state, its enforcement regulates, and immediately and directly influences and affects interstate commerce, as it requires the carrier to announce and enforce its interstate rates with reference to the rates within the state, and it is therefore unconstitutional. Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277.

73. **Internal transportation.**—Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Reagan *v.* Mercantile Trust Co., 154 U. S. 413, 38 L. Ed. 1028, 14 S. Ct. 1060; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

It is now settled in the federal supreme court that a state has power to regulate and limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191, citing Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832. See, also, Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

74. **Reason for rule.**—Wabash, etc., R.

ing carriers from charging more for a short than for a long haul, so far as it affects contracts for a carriage which begins and ends within the state, is valid, and is not subject to the constitutional prohibition concerning commerce among the states.[75] Any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce.[76] An unconstitutional regulation of interstate commerce is made by Const. Ky. § 218, prohibiting common carriers from charging more for a shorter than for a longer haul, so far as its provisions extend to a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state, as the carrier is thus compelled to adjust, regulate, or fix his interstate rates with some reference to his rates with some reference to his rates within the state.[77] A state railroad commission is without power to require a railroad company to cancel and abolish "proportional tariffs which apply only to interstate or foreign shipments, and which were adopted with approval of the interstate commerce commission, to prohibit the company from permitting export shipments of grain to be stopped in transit within the state for cleaning, grading, etc., or by similar orders to attempt to regulate interstate or foreign commerce.[78]

§ 3874. Posting Schedule of Rates.—A state statute requiring each railroad company annually to fix its rates for the transportation of passengers and freight, and to put up a printed copy of such rates at all its stations and depots, and cause it to remain posted during the year, and providing that a failure to fulfill such requirements, or the charging of a higher rate than thus posted, should subject the offending company to certain penalties, is not void as a regulation of interstate commerce so far as it affects rates for the transportation of interstate passengers and freight, but is valid as a police regulation,[79] not-

Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348.

75. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

Section 820, Kentucky Statutes, based upon § 218 of the constitution of that state adopted in 1891, does not operate as an interference with interstate commerce. The provision does not in terms embrace the case of interstate traffic, but is restricted in its regulation to those who own or operate a railroad within the state, and the longer and shorter distances mentioned are distances upon the railroad line within the state. The particular case before the court was one involving only the transportation of property from one point in the state of Kentucky to another by a corporation of that state. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95, citing New York, etc., R. Co. *v.* Commonwealth, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 41 L. Ed. 953, 17 S. Ct. 532, to the proposition that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state. See, also, Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277.

76. Judgment, 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. L. Rep. 232, 90 Am. St. Rep. 236, affirmed in Louisville, etc., R. Co. *v.* Commonwealth, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

77. Louisville, etc., R. Co. *v.* Eubank, 22 S. Ct. 277, 184 U. S. 27, 46 L. Ed. 416.

78. Rosenbaum Grain Co. *v.* Chicago, etc., R. Co., 130 Fed. 46, order affirmed Railroad Comm. *v.* Rosenbaum Grain Co., 64 C. C. A. 444, 130 Fed. 110.

79. Posting schedule of rates.—The statute of Iowa passed in 1862 held to be a valid police regulation and not unconstitutional so far as it affects interstate commerce. Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710, distinguished in Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802, in the fact that the statute there considered was in conflict with an act of congress operating upon the same subject matter. See, also, Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

While the court in Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710, was unanimously of the opinion that the statute was merely a police regulation, it said that even if the statute was a regulation of commerce, the question would arise whether it was not local in its char-

withstanding an act of congress authorizing every railroad company in the United States to carry upon and over its road all passengers, freight and property on their way from any state to another state, and to receive compensation therefor.[80]

Joint Through Rates.—Where defendant railway company, which had, in accordance with the federal statutes, published its rate for interstate traffic, and filed this rate with the interstate commerce commission and the state railroad commission, joined with other carriers in transporting marble, consigned to plaintiff, from Vermont to Kentucky, the shipment was interstate commerce, and subject to the freight rates fixed for interstate commerce, and not the local rates fixed by the state railroad commission, though defendant had no agreement with the initial carriers that it would constitute a part of a through line for interstate commerce from Vermont to Kentucky.[81]

Notice of Charges.—A law requiring a carrier to inform a consignee of the freight charges and to deliver the freight on tender or payment of the charges, subject to a penalty for failure to do so, is not an interference with interstate commerce in case of an interstate shipment, in violation of the constitution of the United States.[82]

§ 3875. Sale and Redemption of Tickets.—A state law requiring railroads to provide agents authorized to sell tickets with a certificate of authority, and making it unlawful for a person not possessed of such a certificate from a railroad to sell tickets or operate a ticket office, is not repugnant to the constitution of the United States, giving congress power to regulate commerce among the several states, because it relates to tickets of railroads without, as well as to those of railroads within, the state.[83]

Redemption of Tickets.—A state law requiring railroad companies to provide for the redemption of unused tickets on presentation in due time, and imposing a penalty for a failure to redeem, does not apply to any ticket for continuous passage from points within the state to any place beyond its limits, but to tickets issued by railroads in the state for passage from and to points within the state, and in such cases is valid.[84]

§ 3876. Commutation Tickets.—An order of a state railroad commission requiring a railroad company to afford intrastate commutation service and to sell tickets and to publish rates for such service, does not involve any interference with nor impose a burden upon interstate commerce, as the order relates solely to intrastate transportation.[85]

acter, and valid until superseded by the paramount action of congress. Cited in Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Henington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086.

80. The act of congress of June 15, 1906, c. 124, 14 Stat. 66 and the statute of Iowa passed in 1862, do not conflict, do not prescribe different rules, and only in a very general sense can be said to be in relation to the same subject matter. Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

81. Joint through rates.—Corcoran *v.* Louisville, etc., R. Co., 101 S. W. 1185, 31 Ky. L. Rep. 197.

82. Notice of charges.—Harrill Bros. *v.* Southern R. Co., 144 N. C. 532, 57 S. E. 383.

83. Sale of tickets.—State *v.* Thompson, 47 Ore. 492, 84 Pac. 476, 4 L. R. A., N. S., 480; State *v.* Bollam, 47 Ore. 639, 84 Pac. 479.

A state statute entitled "Act act to prevent fraud upon travelers," and making it unlawful for any person not an authorized agent of the carriers to sell a passenger ticket, is not violative of the constitution of the United States respecting interstate commerce in attempting to regulate the commerce among the several states, as it is not an attempt to make a rule affecting interstate commerce. Act May 6, 1863 (P. L. 582); Commonwealth *v.* Keary, 198 Pa. 500, 48 Atl. 472.

84. Redemption of tickets.—Missouri, etc., R. Co. *v.* Fookes (Tex. Civ. App.), 40 S. W. 858.

85. Commutation tickets.—The board of public utility commissioners made an order requiring (1) each railroad com-

§ 3877. Mileage Tickets.—It is not a sufficient objection to a state law requiring railroad corporations to provide mileage tickets which shall be accepted for passage and fare upon all railroad lines in the state that it may incidentally affect commerce between the states, if it does not attempt to regulate such commerce.[86] A state law requiring railroads operating "in this state" to issue mileage books entitling the holder "to travel 1,100 miles on the lines of such railroad," are intended to make such mileage books good only for passage between points within the state, and therefore do not, as regards railroads extending beyond the state, interfere with interstate commerce.[87]

§ 3878. Limitation of Charges to Amount Specified in Bill of Lading.—Where a state statute and the national law operates upon the same subject matter, and prescribe different rules concerning it, and the national law is one within the competency of congress to enact under the power given to regulate commerce between the states, the state statute must give way.[88] Accordingly, where a state statute makes it unlawful for a railroad in the state to charge and collect a greater sum for the transportation of freight than is specified in the bill of lading, and an act of congress provides that it shall be unlawful for any common carrier, subject to the provisions of the act, to charge or collect a greater or less compensation for the transportation of passengers or property than is specified in its published schedule of rates, fares and charges in force at the time, the two acts, as to interstate shipments, operate upon the same subject matter and prescribe different rules, and the state law must give way.[89]

§ 3879. Ferriage Charges.—The inclusion of railroad ferries in Act Feb. 4, 1887, § 1, regulating interstate commerce, invalidates any regulation under

pany affording intrastate commutation service from points in New Jersey to Jersey City, N. J., or to Hoboken, N. J., when request is made upon it and proper payment is tendered therefor, to sell tickets for said commutation service specifically designating in every case both termini of the journey, and to publish rates for such commutation service designating both termini specifically, and to file schedules of said rates with the commission; and (2) requiring each railroad company carrying in intrastate journeys passengers to or from Jersey City, N. J., or to or from Hoboken, N. J., at special rates to follow the same course with respect to the sale of special rate tickets, publication of rates, and filing of schedules. The order was based upon a determination of (a) the existence of "regulations" and "practices" that are unjust and unreasonable and arbitrarily or unjustly discriminatory; and (b) the subjection of persons and localities to prejudice and disadvantage. Held, that the order under review does not involve any interference with, nor impose any burden upon, interstate commerce. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

86. Mileage tickets.—Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

87. Judgment, 54 N. Y. S. 1114, 33 App. Div. 643, affirmed in Purdy *v.* Erie R. Co., 56 N. E. 508, 162 N. Y. 42, 48 L. R. A. 669.

Laws 1895, c. 1027, § 1, as amended by Laws 1896, c. 835, which provides that railroads operating "in this state" shall sell mileage books at a certain rate, does not, as regards a railroad whose lines extend beyond the state, interfere with interstate commerce, as it applies only to carrying passengers between points in the state. Dillon *v.* Erie R. Co., 43 N. Y. S. 320, 19 Misc. Rep. 116; Beardsley *v.* New York, etc., R. Co., 44 N. Y. S. 175, 15 App. Div. 251, judgment reversed in 56 N. E. 488, 162 N. Y. 230.

Pub. Acts 1891, No. 90, requiring railroad companies in the state to keep for sale 1,000-mile tickets, at certain specified rates, to be issued in the name of the purchaser, his wife and children, and valid for two years, was intended to apply only to the transportation of passengers within the state, and is therefore not invalid, as being a regulation of interstate commerce. Smith *v.* Lake Shore, etc., R. Co., 72 N. W. 328, 114 Mich. 460, reversed in 19 S. Ct. 565, 173 U. S. 684, 43 L. Ed. 858.

88. Limitation of charges to amount specified in bill of lading.—Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

89. Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802, distinguishing Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710, in the fact that the act of congress herein considered had not been passed at the time of the decision in that case.

state authority of the rates charged by a railway company of a ferry on navigable stream forming the boundary between two states.[90]

§ 3880. Demurrage Charges.—The rules prescribed by a state corporation commission with reference to storage, demurrage, car service, and car detention charges, are not void because in their operation they affect incidentally interstate and foreign commerce.[91] A state has no power to prescribe that a consignee, who has received a car the property of a common carrier of another state containing goods which have been consigned from another state, shall have practically three days of free time within which to unload the car and shall, if he wishes, have the right to retain the car, while standing upon the public sidings of the final carrier, for an indefinite period upon payment for the same at the rate of one dollar per day.[92]

Reciprocal demurrage laws imposing a penalty upon a railroad for failure to furnish cars to shippers when applied for, was designed and in operation tended to insure the prompt performance by the carrier of its common-law duty to furnish cars for transportation of freight, and, making sufficient allowance for practical difficulties in railroad movement in its enumeration of exceptions to liability, was not displaced by the Interstate Commerce Act primarily intended to secure reasonable rights and to prevent unjust discriminations.[93]

Storage Charges.—An order of the state corporation commission providing that ten days' free storage shall be allowed on less than carload shipments, when destined to consignees living at interior points, five miles or more from the railroad station, in so far as it applies to interstate commerce, is void as in conflict with and superseded by the Hepburn Act of June 29, 1906, relating to interstate

90. Ferriage charges.—New York, etc., R. Co. *v.* Board, 227 U. S. 248, 33 S. Ct. 269, reversing judgment, 76 N. J. L. 664, 74 Atl. 954, 16 Am. & Eng. Ann. Cas. 858.

91. Demurrage charges.—Atlantic, etc., R. Co. *v.* Commonwealth, 46 S. E. 911, 102 Va. 599.

92. Pennsylvania R. Co. *v.* Scroggins Co., 38 Pa. Super. Ct. 129.

93. Hardwick Farmers' Elevator Co. *v.* Chicago, etc., R. Co., 110 Minn. 25, 124 N. W. 819, 19 Am. & Eng. Ann. Cas. 1088; Gray *v.* Minneapolis, etc., R. Co., 110 Minn. 527, 124 N. W. 1100.

The state railroad commission may fix reciprocal demurrage rules, making the carrier liable for delays in delivery of interstate shipments after arrival at the point of consignment, since this imposes no additional duty on the carrier, but merely compels the fulfillment of a duty that is an incident to the contract of carriage, and is in aid of commerce, rather than an obstruction to it, and operates after the transportation is completed. Yazoo, etc., R. Co. *v.* Greenwood Grocery Co., 96 Miss. 403, 51 So. 450.

Act April 19, 1907 (Acts 1907, p. 453) § 3, requiring railroad companies, failing to give notice of arrival to the consignee within 24 hours thereafter, to forfeit to the interested party $5 a day per car on car load shipments, and 1 cent a hundred pounds per day on less than car load shipments, with a minimum and maximum charge of 5 cents and $5, respectively, on less than car load shipments, together with the other sections imposing a reciprocal demurrage on consignees for failure to remove freight, being a reasonable regulation in aid of commerce, and not a burden upon it, is valid as to interstate commerce; Congress or the Interstate Commerce Commission not having made similar regulations. St. Louis, etc., R. Co. *v.* Edwards, 94 Ark. 394, 127 S. W. 713.

The subject of the delivery of an interstate shipment to the consignee is so embraced by Act June 29, amendatory of Act Feb. 4, 1887, § 1, as to invalidate, when applied to interstate shipments, provisions of Demurrage Law of Arkansas April 19, 1907 (Laws 1907, p. 457), § 3, exacting per diem penalty from carrier failing to notify consignee of arrival of shipment. St. Louis, etc., R. Co. *v.* Edwards, 227 U. S. 265, 33 S. Ct. 262, reversing judgment, 94 Ark. 394, 127 S. W. 713.

Laws 1906, No. 122, §§ 8, 10 (P. S. 4539, 4541), and Laws 1910, No. 147, § 1, forbidding any railroad to charge demurrage on cars received or placed for loading in this state until four days, after notice to the consignee, without limiting such charges to intrastate commerce, held repugnant to the commerce clause of the constitution of the United States, art. 1, § 8, and to the Interstate Commerce Act, §§ 1, 6, 12, as amended June 29, 1906, enforced by the interstate commerce commission by demurrage rules allowing a free time of only two days. Sargent *v.* Rutland R. Co., 86 Vt. 328, 85 Atl. 654.

commerce and covering storage charges, and also as an interference with interstate commerce imposing an unreasonable burden upon it.[94]

§ 3881. Regulations to Prevent Injuries to Passengers.—Safety and comfort of passengers, whether intrastate or interstate, may be provided for by state authority when not in conflict with regulations of congress, and may not be subordinated to freight traffic.[95] As it is competent for the state to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by carriers while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon congress by the constitution, there is nothing to forbid the state, in the further exercise of the same jurisdiction, to prescribe the precaution and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has power to redress and punish.[96] As the state has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier, in not providing safe and suitable vehicles, or employees, of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, the state may also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions. It may define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carriers, or of the persons and property of others liable to be affected by them.[97] It is the state law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.[98] The rules prescribed for the construction of railroads, and for their management and operation, designed to protect person and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.[99]

Where Interstate Commerce Incidentally Affected.—The state may enforce regulations to be observed by a railroad common carrier in intrastate transportation for the safety and convenience of the public who are affected by the

94. Storage charges.—St. Louis, etc., R. Co. *v.* State, 26 Okla. 62, 107 Pac. 929, 30 L. R. A., N. S., 137.

An order of the corporation commission that ten days' free storage shall be allowed on less than carload shipments to consignees five miles or more from the railroad station, in so far as it applies to interstate commerce held void as in conflict with Act Cong. June 29, 1906, c. 3591, §§ 1, 2, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), to regulate commerce. Atchison, etc., R. Co. *v.* State, 31 Okla. 767, 123 Pac. 1065.

95. Regulations to prevent injuries to passengers.—Railroad Comm'rs *v.* Louisville, etc., R. Co., 63 Fla. 274, 57 So. 673.

96. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289.

97. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28.

98. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

99. Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

regulation even though interstate commerce is thereby indirectly and incidentally affected, without violating the interstate commerce clause of the federal constitution, where such regulations are in aid of, or do not in fact impose substantial burdens upon, lawful interstate commerce, or do not conflict with regulations of the subject that are legally prescribed or authorized by congress.[1]

Under Act of Congress Providing for Continuous Carriage.—Rev. St., § 5258, authorizing all steam railroad companies in the United States to carry freight, passengers, etc., from one state to another, and to connect with other roads so as to form continuous lines of transportation, does not in any wise interfere with the enactment of laws by the states to promote the safety of passengers, while traveling, within their respective limits, from one state to another, in cars propelled by steam.[2]

Regulations with Regard to Speed of Trains and Other Precautions.—It is within the undoubted province of the state legislature to make regulations with regard to the rate of speed of railroad trains at stations, and in the neighborhood of and through cities and towns,[3] with regard to the precautions to be taken in the approach of trains to bridges, crossings, tunnels, deep cuts and sharp curves;[4] the placing of watchmen and signals at points of special danger;[5] fencing of tracks;[6] the attaching of bells and whistles to engines and the

1. **Where interstate commerce incidentally affected.**—Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

2. **Under act of congress providing for continuous carriage.**—New York, etc., R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418.

3. **Regulating speed of trains.** — Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

A city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least congress shall take action in the matter. Erb *v.* Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 S. Ct. 819; Railroad Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

Regulations with regard to speed of trains and other precautions.—A state may regulate, at least, in the absence of congressional action upon the same subject matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the trains which shall be required under such circumstances. Southern R. Co. *v.* King, 217 U. S. 524, 54 L. Ed. 868, 30 S. Ct. 594, affirming judgment, 160 Fed. 332, 87 C. C. A. 284.

Equipment of trains—Number required in train crew, etc.—Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

Prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, operated in the state, as is done by Laws Ark. 1907, No. 116, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign company engaged in such commerce. Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275, affirming Chicago, etc., R. Co. *v.* State, 86 Ark. 412, 111 S. W. 456.

4. **Precautions in approach to bridges, etc.**—Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

5. **Watchmen and signals.**—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

6. **Fencing of tracks.**—Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191.

carriage of signal lights at night;[7] the length and frequency of stops;[8] heating, lighting and ventilation of passenger cars;[9] the furnishing of food and water to cattle and other live stock,[10] and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are strictly within the police power of the state and eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.[11]

Examination of Employees.—Accordingly a state statute prescribing as a rule of civil conduct, that engineers on railroad trains engaged in the transportation of passengers and freight shall undergo an examination by a state board as to their qualifications and obtain a license, before becoming entitled to operate locomotive engines within the state, is not, when applied to engineers on interstate trains, unconstitutional and void as a regulation of commerce among the states but is a police regulation governing the relation between carrier of passengers and merchandise and the public who employ them, valid until displaced by congressional legislation on the subject.[12]

Examination of Employees as to Power of Vision.—So, also, a state statute prohibiting under penalties the employment of persons in certain specified capacities on railroads within the state, unless such employees shall have first undergone an examination by a state board with respect to their power of vision and obtained a license therefrom, is not void as a regulation of commerce

7. **Bells, whistles and signal lights.**—Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

8. **Length and frequency of stops.**—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491; Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627.

9. **Heating and lighting of cars.**—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

10. **Furnishing food and water to live stock.**—Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

11. **Regulations local in character.** — Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

12. **Examination of engineers as to competency.**—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564, citing Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819. See, also, Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28; Anderson *v.* United States, 171 U. S. 604, 43 L. Ed. 300, 19 S. Ct. 50; Plumley *v.* Massachusetts, 155 U. S. 461, 39 L. Ed. 223, 15 S. Ct. 154; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335; Western Union Tel. Co. *v.* James, 162 U. S. 650, 40 L. Ed. 1105, 16 S. Ct. 934; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

If a locomotive engineer, running an engine, in the business of transporting passengers and goods between Alabama and other states, should, while in that state, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the state if they declare the offense in such a case to be manslaughter. The power to punish for the offense after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offense. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

It would be competent for congress to legislate upon this subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the states, Rev. Stat. Tit. 52, §§ 4399-4500, and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce. Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

among the states, when applied to the interstate operations of railroads, but is a valid exercise of the police power of the state, designed to secure the welfare and safety of the public, within the territorial limits of the state and is valid until displaced by congressional legislation on the subject. So far as such statute affects interstate commerce, it does so only indirectly, incidentally and remotely, so as not to amount to a regulation of that commerce within the meaning of the constitution.[13]

Inspection of Locomotives.—The passage by congress of an act regulating interstate commerce from the date of such passage excludes the power of the states to legislate and supersedes state laws, though the Federal Act is not to take effect until a subsequent date. Act Ohio May 20, 1910, and regulations made thereunder providing for the equipment and inspection of locomotive boilers used on railroads in the state, held superseded as to locomotives used in interstate commerce by the federal boiler inspection act of February 11, 1911.[14] The equipment of seagoing barges, which steamboat inspectors are required to inspect by Act of Congress, May 28, 1908, is not limited to the appliances which barges are required to carry by § 11, but includes a steam boiler used only for loading and unloading and weighing anchor, and hence, as to such boiler, a state inspection law can not operate.[15] The inspection of boilers used solely for loading and unloading the cargo and weighing anchor, and not for purposes of propulsion on barges or lighters, having no means of progress except by being towed, but which are used exclusively upon tidewater is a matter as to which the United States may assume jurisdiction, but not within its exclusive jurisdiction, and hence, unless congress has legislation relative thereto, such boilers are subject to St. 1907, c. 465, as amended by St. 1909, c. 393, § 1, requiring the inspection of all steam boilers, except those under the jurisdiction of the United States.[16] It is a

13. Examination of employees as to power of vision.—Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28. See, also, Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

14. Inspection of locomotives.—Louisville, etc., R. Co. *v.* Hughes, 201 Fed. 727.

The inspection of boilers used solely for loading and unloading and weighing anchor on barges or lighters, used exclusively on tidewater, is not within the exclusive jurisdiction of Congress, and hence, unless congress has legislated relative thereto, such boilers are subject to St. 1907, c. 465, as amended by St. 1909, c. 393, § 1, requiring the inspection of all steam boilers, except those under the jurisdiction of the United States. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

15. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

St. 1907, c. 465, as amended by St. 1909, c. 393, § 1, concerning inspection of steam boilers, construed to apply to boilers on barges used on tidewater, unless congress has legislated relative thereto, is not invalid as an interference with interstate or foreign commerce. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

16. Where congress has not acted.—Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

Act May 28, 1908, c. 212, § 10, 35 Stat. 428 (U. S. Comp. St. Supp. 1911, p. 1243), requires local steamboat inspectors to inspect the hull and equipment of seagoing barges, and to satisfy themselves that they are of a structure suitable for the service in which they are employed, have suitable accommodations for the crew, and are in a condition to warrant the belief that they may be used in navigation with safety to life. Section 11 requires barges to be equipped with at least one lifeboat, one anchor with chain and cable, and one life preserver for each person on board. Held, that the "equipment" required to be inspected is not limited to the matter specified in section 11, but includes a steam boiler used only for loading and unloading and weighing anchor, since the inspectors are required to certify that the barge may be used in navigation with safety, and "navigation" may include a vessel at anchor or at dock, under some circumstances, as well as in motion. Commonwealth *v.* Break-

question for the jury whether a barge, from its design and construction, may reasonably be expected to encounter and ride out the ordinary perils of the sea, even though it lacks means of self-propulsion, and whether it, in fact, does go to sea, and hence whether it is a seagoing barge within Act May 28, 1908, requiring steamboat inspectors to inspect the hull and equipment of seagoing barges.[17]

Headlights on Locomotives.—A state statute which requires a railroad company to equip and maintain its locomotives with good and sufficient headlights of a certain size is not in violation of the commerce clause of the United States constitution, because it would require at the state line a change of headlights on locomotives doing an interstate business, if other states should require headlights different from those prescribed by the statute.[18] Congress not having passed any act regulating headlights on engines used in interstate commerce, the Indiana legislature was authorized to pass Act March 6, 1909, authorizing the Indiana railroad commission to investigate the subject and require installation of efficient headlights.[19]

§§ 3882-3887. Regulating Relation of Master and Servant—§ 3882. In General.—The laws of the several states are determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce so long as congress, although empowered to regulate that subject, has not acted thereon, because the subject is one which falls within the police power of the states in the absence of action by congress.[20]

water Co., 214 Mass. 10, 100 N. E. 1034.

Vessels propelled in whole or part by steam.—Rev. St. U. S. § 4427 (U. S. Comp. St. 1901, p. 3030), requiring the hull and boiler of every freight boat to be inspected under the provisions of that title, applies only to vessels propelled, in whole or in part, by steam, in view of § 4399 (U. S. Comp. St. 1901, p. 3015), defining steam vessels to which that title relates as vessels propelled, in whole or in part, by steam. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

The word "barge," as used in Act May 28, 1908, c. 212, § 10, 35 Stat. 428 (U. S. Comp. St. Supp. 1911, p. 1243), requiring steamboat inspectors to inspect the hull and equipment of seagoing barges, is of somewhat comprehensive signification, and includes a barge or lighter having no means of self-propulsion, and able to make progress only by being towed. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

Seagoing barge.—Under Act May 28, 1908, c. 212, § 10, 35 Stat. 428 (U. S. Comp. St. Supp. 1911, p. 1243), requiring steamboat inspectors to inspect the hull and equipment of seagoing barges, a barge is "seagoing" if, from its design and construction, it may be expected with fair reason to encounter and ride out the ordinary perils of the sea, and which, in fact, does go to sea, but, if not so designed, is not seagoing merely because, by selecting smooth water and fair weather, it is able, upon occasion, to go to sea without mishap, but, if so designed, is seagoing, although it has no means of self-propulsion, and is adapted to go only by tow. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

17. Commonwealth *v.* Breakwater Co., 214 Mass. 10, 100 N. E. 1034.

18. **Headlights on locomotives.**—The headlight law (Act Aug. 17, 1908; Laws 2908, p. 50), requires a railroad company to equip and maintain every locomotive running on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, with a reflector not less than 23 inches in diameter, and to keep such headlight in good condition, and provides that any railroad company violating the act shall be liable to indictment and punishment, and that the act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills. Held, that the act does not violate the constitution of the United States, art. 1, § 8, par. 3, giving congress power to regulate commerce among the states, etc., because it would require at the state line a change of headlights on locomotives doing an interstate business, if other states required head lights different from those prescribed by the act, though such change might involve some loss of time and expense on the part of the railroad company. Atlantic, etc., R. Co. *v.* State, 135 Ga. 545, 69 S. E. 725, 32 L. R. A., N. S., 20.

19. Vandalia R. Co. *v.* Railroad Comm. (Ind.), 101 N. E. 85.

20. **Regulating relation of master and servant—Employers' Liability Acts.**—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

Applying to interstate transportation

Power of Congress to Supersede State Law.—The inaction of congress, however, in nowise affects its power over the subject, and where congress has acted, the law of the state, in so far as it covers the same field, is superseded, since that which is not supreme must yield to that which is.[21]

Prescribing Amount of Wages.—Labor laws of a state requiring payment of wages in cash weekly to employees of practically all corporations except steam railroads, which are required to pay semimonthly, does not, as to a steam railroad, interfere with and constitute a restriction upon interstate commerce so as to be void.[22] Though labor laws of a state requiring that railroads shall pay their employees wages semimonthly in cash, relate to the wages of railway servants employed entirely within the state, and also to the wages of those whose duties take them from New York into other states, congress not having passed any legislation dealing with the same subject-matter, such act is not invalid as an unconstitutional interference with interstate commerce.[23]

§ 3883. Number and Character of Employees.—The law of a state providing the number and character of employees to be carried on trains operated within the state, did not relate to a subject over which congress was invested with exclusive powers to legislate, and hence the failure of congress to pass any law

the provisions of Act Pa. April 4, 1868, restricting, as against a railway company, the rights of persons injured in the course of their employment in or about the railroad to those which an employee of the railway company would have under like circumstances, does not make such statute repugnant to the commerce clause of the federal constitution. Judgment, 76 N. E. 1129, 72 O. St. 659, affirmed in Martin *v.* Pittsburgh, etc., R. Co., 203 U. S. 284, 51 L. Ed. 184, 27 S. Ct. 100, 8 Am. & Eng. Ann. Cas. 87.

Nebraska statute modifying rules as to comparative and contributory negligence.—Until congress acted in the matter, there was no repugnancy to the commerce clause of the federal constitution in the provisions of Neb. Comp. Stat., chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged in interstate commerce did not bar a recovery from the company, where his negligence was slight and that of the company was gross in comparison, the damages being diminished in proportion to the amount of negligence attributable to the injured employee. Missouri Pac. R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606.

Since, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by congress affecting the liability of railway companies to their employees, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employees engaged in interstate commerce. Missouri Pac. R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606. See Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289.

The validity of Neb. Comp. Stat., chap. 21, §§ 3, 4, in so far as they impose liability upon a railway company for an injury to an employee engaged in interstate commerce, arising from the negligence of a coemployee, and modify the rule of contributory negligence, is not affected because such statute also covers subjects dealt with by the Safety Appliance Act of March 2, 1893 (27 Stat at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), such as acts of negligence of railway companies in respect of their cars, roadbed, machinery, etc. Missouri Pac. R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606.

21. Power of congress to supersede state law.—Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44.

22. Prescribing amount of wages.—New York, etc., R. Co. *v.* Williams, 118 N. Y. S. 785, 64 Misc. Rep. 15.

Labor Law (Consol. Laws, c. 31) § 10, requiring payment of wages in cash weekly to employees of practically all corporations except steam railroads, which are required by § 11 to pay semimonthly, does not, as to a steam railroad, interfere with and constitute a restriction upon interstate commerce so as to be void. Judgment, 118 N. Y. S. 785, 64 Misc. Rep. 15, affirmed in New York, etc., R. Co. *v.* Williams, 120 N. Y. S. 1137, 136 App. Div. 904.

23. New York, etc., R. Co. *v.* Williams, 199 N. Y. 108, 92 N. E. 404, affirming judgment 120 N. Y. S. 1137, 136 App. Div. 904, which affirms 118 N. Y. S. 785, 64 Misc. Rep. 15.

on the subject did not prohibit the states from passing proper legislation thereon.[24] A state law prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, operated in the state, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce.[25] A state statute which makes it an offense for one to act as a conductor on a railroad train without two years' previous service as brakeman or conductor, is not unconstitutional as an unreasonable interference with employment contracts or the right to pursue a vocation. Nor is the act unconstitutional as an unlawful interference with interstate commerce.[26]

Citizenship of Employee.—Whether a state statute for protection of railway employees is invalid as an interference with interstate commerce does not depend upon the citizenship of such employees.[27] In determining whether a state statute for the protection of railway employees is invalid as an interference with interstate commerce, it is immaterial whether such employees are citizens of that state or not; a state having the same right and power to protect citizens of another state within its borders as to protect its own citizens.[28]

§ 3884. Safety Appliance Acts.—A state statute requiring carriers to use automatic couplers on locomotives or cars in moving state traffic, does not directly regulate interstate commerce or conflict with regulation thereof enacted by congress, but requires the use of the same kind of couplers required by congress, and therefore is not void as in contravention of the power of congress to regulate commerce among the states.[29] Congress may enact laws requiring all railroads to equip their cars with safety appliances, but the exercise of that power does not preclude a state from making similar regulations as to roads engaged in intrastate commerce.[30] The Federal Automatic Coupler Act, providing that it shall apply to all trains used in interstate commerce, and to all other locomotives, cars, etc., used in connection therewith, is not repugnant to Laws 1905, p. 350, making

24. Number and character of employees.—Pittsburgh, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

Acts of congress requiring cars engaged interstate trains to be equipped with automatic couplers; the Act of June 1, 1898, c. 370, 30 Stat. 424 (U. S. Comp. St. 1901, p. 3205), relating to the adjustment of controversies between railroad companies engaged in interstate commerce and their employees; the Act of March 3, 1901, c. 866, 31 Stat. 1446 (U. S. Comp. St. 1901, p. 3176), requiring reports of accidents to the interstate commerce commission; the Act of March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), limiting the orders of service of employees; and the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), relating to reports of employees and salaries, etc., do not show an intention of congress to enter the field of legislation relating to the number of employees to be carried on trains operated within the state though engaged in interstate commerce, and hence the passage of those acts did not prevent the passage of Acts 1907, p. 18, c. 11, regulating such crews. Pittsburg, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

Acts 1907, p. 18, c. 11, requiring all trains to have a certain number of operatives in accordance with the character of the train, applies only to the operation of trains within the state. Pittsburg, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

Acts 1907, p. 18, c. 11, known as the "Full Crew Act," requiring a certain number of operatives on trains within the state according to the character of the train, contains no restrictions as to the persons or things carried by such trains, or regulations of fares or freights, and was not an attempt to regulate interstate commerce in violation of the constitution of the United States, art. 1, § 8, conferring such power on congress, but was a proper exercise of police power. Pittsburgh, etc., R. Co. *v.* State, 172 Ind. 147, 87 N. E. 1034.

25. Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275, affirming judgment Chicago, etc., R. Co. *v.* State, 86 Ark. 412, 111 S. W. 456.

26. Smith *v.* State (Tex. Cr. App.), 146 S. W. 900.

27. Citizenship of employee.—Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

28. Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

29. Safety appliances.—Detroit, etc., R. Co. *v.* State, 82 O. St. 60, 91 N. E. 869.

30. Luken *v.* Lake Shore, etc., R. Co., 248 Ill. 377, 94 N. E. 175, 21 Am. & Eng. Ann. Cas. 82.

the same regulations as to cars engaged in intrastate commerce, and providing that the act shall apply to common carriers engaged in moving traffic by railroad between points in the state, except those used in interstate commerce.[31] A state law providing that where a railroad employee is injured by a defect in the railroad company's cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, contributory negligence shall not be a bar to recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to the employee, was not invalid, even though construed as an attempt to regulate interstate commerce, but would only be in suspension as to such commerce while there was a federal statute in force relating to the same subject, such subject not being one over which the power of congress is exclusive, in the sense that the states are without power to act with reference thereto while congress takes no action.[32]

§ 3885. Employers' Liability Act.—A state Employers' Liability Act which in part relieves employees engaged in operating railroads from the consequences of their own negligence in suits for personal injuries, is not invalid, under the commerce clause of the federal constitution, as an attempt to regulate interstate commerce.[33]

§ 3886. Hours of Service.—A law of a state prohibiting any corporation operating a line of railroad in whole or in part in the state from requiring or permitting any telegraph operator, including train dispatcher, to remain on duty for more than one period of eight consecutive hours, is within the field of legislation by the states, notwithstanding the interstate commerce clause in the federal

31. Luken *v.* Lake Shore, etc., R. Co., 248 Ill. 377, 94 N. E. 175, 21 Am. & Eng. Ann. Cas. 82.

Plaintiff, a switchman, was injured while endeavoring to uncouple a car from an engine. The locomotive and tender were used only in switching in the state, and the immediate work in which they were employed when plaintiff was injured was the moving of three freight cars from one place to another in defendant's yard, which was also within the state. Held, that the Safety Appliance Act approved May 12, 1905, forbidding any common carrier after passage of the act to use on its line any locomotive, tender, or car used in moving traffic not equipped with automatic couplers, was applicable. Patten *v.* Faithorn, 152 Ill. App. 426.

32. Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126.

Regulation in aid of federal statute.—Burns' Ann. St. 1908, § 5280, requiring railroad locomotives, cars, etc., to be provided with grabirons or handholds in the sides or ends thereof, and § 5287, imposing penalties for violations thereof, can not be upheld as in aid of the federal statute on the subject; Federal Safety Appliance Act March 2, 1893, c. 196, § 4, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act March 2, 1903 (Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), requiring grabirons and handholds in the ends and sides of each car, thus being broader in its scope than the state law. Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

Where no additional burdens imposed.—Burns' Ann. St. 1908, § 5280, requiring railroad locomotives, cars etc., to be equipped with grabirons or handholds in the sides or ends thereof, and § 5287, imposing a penalty for a violation, is not invalid as an attempt to regulate interstate commerce, since it merely imposes an additional penalty for the same omission, requires no new duty, imposes no limit on the free use of cars, and contains no new or different restrictions than those required and imposed by the federal statute, and the hazards against which it is directed are not hazards of such commerce, but of the operation of the car within the state. Southern R. Co. *v.* Railroad Comm., 179 Ind. 23, 100 N. E. 337.

33. **Employers' liability act.**—Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App.), 149 S. W. 1188.

The Federal Employer's Liability Act of April 22, 1908, supersedes state legislation and is exclusive as to the right of recovery for the death of a railroad employee, where the company at the time and place of the accident was engaged in interstate commerce. Eastern R. Co. *v.* Ellis (Tex. Civ. App.), 153 S. W. 701.

Employer's Liability Act, 1909, is not an invalid interference with interstate commerce, but is inoperative so far as it affects interstate commerce while the federal statute remains in force. Houston, etc., R. Co. *v.* Bright (Tex. Civ. App.), 156 S. W. 304.

constitution, until congress exercises its power to regulate the hours of labor of employees engaged in interstate commerce; and under the constitution of the United States declaring that the constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, the regulation of congress on the subject is supreme, and is an assertion of the federal power and a declaration of policy that the subject shall be under federal, and not state, regulation.[34] A state law regulating the hours of service of trainmen, not being restricted to intrastate commerce, and therefore embracing interstate commerce, is nullified by the Act of Congress, March 4, 1907, covering the same subjects or classes of legislation, though limited to interstate commerce.[35]

§ 3887. Fellow-Servant Doctrine.—Laws of Nebraska of 1907, which provides, inter alia, that railroad companies operating trains within the state shall be liable for injuries to employees resulting from the negligence of other employees, is comprehensive in its terms, and applies to railroads doing an interstate business, and governs the liability of such companies to employees operating trains engaged in interstate commerce in the absence of valid legislation by congress covering such liability.[36]

§ 3888. Regulating Rights and Privileges of Passengers.—A state statute requiring those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjecting to an action for damages the owner of such a vessel who excludes colored passengers, on account of their color, from

34. Hours of service.—State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A., N. S., 326.

Hours of Service Law (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), is not unconstitutional, because not limited in terms to employees engaged in interstate commerce. St. Louis, etc., R. Co. *v.* McWhirter, 145 Ky. 427, 140 S. W. 672.

Act 30th Leg. c. 122, which prescribes the hours of labor of railroad telegraph operators, and by its terms is applicable to all of such employees whether engaged in interstate or intrastate commerce, is void as being in conflict with Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), upon the same subject though the act of the Legislature only lessens the hours of labor prescribed by the act of Congress. State *v.* Texas, etc., R. Co. (Tex. Civ. App.), 124 S. W. 984.

The right of the state in the exercise of its police power to protect its citizens from perils resulting from excessive hours of labor by railroad employees is in no way impaired by the federal constitution, except as such legislation shall restrain interstate commerce in a respect in which congress has deemed wise to regulate it. State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A., N. S., 326.

Laws 1907, p. 1188, c. 575, prohibiting any corporation operating a line of railroad in whole or in part in the state from permitting any telegraph operator, including train dispatcher, to remain on duty for more than one period of eight consecutive hours, etc., is in conflict with and in negation of Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), regulating the hours of labor of employees engaged in interstate commerce, and providing that no operator or train dispatcher shall be permitted to remain on duty for a longer period than nine hours in any twenty-four hours, in places continuously operated night and day, nor for a period longer than thirteen hours in places operated only during the daytime, with exceptions in case of emergencies, etc., and the state statute can not be enforced as to such employees; the act of congress being a declaration by it of a will and policy that, so far as the regulation and safe-guarding of interstate commerce may be affected by prescribing hours of labor for such employees, the subject shall be under control of congress, and not of the states. State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A., N. S., 326.

It is within the power of the state, in absence of congressional legislation on the subject, to enact laws operative within its boundaries limiting the number of hours railway employees can be required to remain on continuous duty, even if the railway be a common carrier engaged in interstate commerce. Atkinson *v.* Northern Pac. R. Co., 53 Wash. 673, 102 Pac. 876, 17 Am. & Eng. Ann. Cas. 1013.

35. State *v.* Wabash R. Co., 238 Mo. 21, 141 S. W. 646.

36. Fellow-servant doctrine.—Missouri Pac. R. Co. *v.* Castle, 172 Fed. 841.

the cabin set apart by him for the use of whites during the passage, is a regulation of foreign and interstate commerce, affecting a matter national in its character, requiring uniformity of regulation, and is, therefore, unconstitutional and void, though not in conflict with any regulation prescribed by congress.[37]

Equal, but Separate Accommodations for White and Colored Passengers.—A state statute requiring railroads carrying passengers within the state to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the cars by a partition, so as to secure separate accommodations, applicable solely to commerce within the state, does not interfere with commerce between the states, and therefore does not violate the commerce clause of the federal constitution.[38]

37. Interstate transportation.—Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547. And see Chesapeake, etc., R. Co. *v.* Kentucky, 179 U. S. 388, 45 L. Ed. 244, 21 S. Ct. 101; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465.

38. Equal, but separate accommodations for white and colored passengers.—Statutes of Mississippi, Louisiana and Kentucky providing for separate accommodations for the two races, having been construed by the highest state courts to apply solely to commerce within the state, the supreme court of the United States, accepting such construction, held that the statutes in no way interfered with interstate commerce, and were not, therefore, unconstitutional as regulations thereof. Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348; Plessy *v.* Ferguson, 163 U. S. 537, 41 L. Ed. 256, 16 S. Ct. 1138; Chesapeake, etc., R. Co. *v.* Kentucky, 179 U. S. 388, 45 L. Ed. 244, 21 S. Ct. 101. See also, Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Railroad Comm. Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 1191; Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547.

The provisions of the statute are fully complied with, when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question arises under the statute, as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348. See, also, Chesapeake, etc., R. Co. *v.* Kentucky, 179 U. S. 388, 45 L. Ed. 244, 21 S. Ct. 101.

A statute requiring railroad companies to furnish separate coaches for white and colored passengers does not violate the commerce clause of the federal constitution. Chesapeake, etc., R. Co. *v.* Commonwealth, 51 S. W. 160, 21 Ky. L. Rep. 228, affirmed in Chesapeake, etc., R. Co. *v.* Kentucky, 21 S. Ct. 101, 179 U. S. 388, 45 L. Ed. 244.

A statute requiring passengers of the different races to occupy separate coaches is not rendered invalid as a violation of the interstate commerce clause of the constitution by reason of the fact that a railroad in the state has a terminus without the state, as such statute can only apply to transportation within the state. Ohio Valley R. Co. *v.* Lander, 104 Ky. 431, 47 S. W. 344, 882, 20 Ky. L. Rep. 913, rehearing denied in 48 S. W. 145.

Though Acts 1904, p. 186, c. 109, requiring carriers to provide separate coaches for the transportation of white and colored passengers, and making it an offense for a passenger to refuse to occupy the car to which he is assigned by the conductor, is valid in so far as it affects commerce wholly within the state, it is invalid as to interstate passengers under the commerce clause of the federal constitution. Hart *v.* State, 60 Atl. 457, 100 Md. 595.

Acts 1891, c. 52, providing under penalty that railroads shall provide equal, but separate, accommodations for the white and colored races, and attend to the separation of the passengers of the two races, though applying both to intra and interstate travel, is not objectionable as a "regulation" of interstate commerce. Smith *v.* State, 46 S. W. 566, 100 Tenn. (16 Pickle) 494, 41 L. R. A. 432.

Laws 1891, p. 44, c. 41, requiring every railroad to provide separate coaches for white and negro passengers, is not in conflict with the federal constitution, as the act applies only to railroads doing business in the state. Southern Kansas R. Co. *v.* State, 44 Tex. Civ. App. 218, 99 S. W. 166.

An order of the board of railroad commissioners requiring a railroad company to operate separate passenger service within the state is in the exercise of its police power and is not an attempt to regulate interstate commerce, nor does it directly cast a burden on such commerce. Taylor *v.* Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606.

§ 3889. Regulating Speed of Running Trains.—A reasonable exercise by a city of the police power vested in it by the legislature, in regard to the speed of trains within its limits, is not invalid as an interference with interstate commerce, though it may incidentally limit the speed of such traffic.[39]

Mail Train.—An ordinance limiting the speed of trains, on an interstate railway which carries United States mail to ten miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the transportation of mail.[40]

Carriers of Live Stock.—A state law requiring carriers to transport live stock within the state at a speed not less than fifteen miles per hour unless unavoidably prevented, does not apply to inerstate commerce, and a shipment of live stock between points in the state which passes for a short distance over territory of another state is interstate commerce, and noncompliance with the act in such a shipment affords no ground for recovery against the carrier.[41]

§ 3890. Running Trains on Sunday.—A state statute prohibiting the running of freight trains in the state on Sunday, applying alike to all trains, whether domestic or interstate, though in a limited degree, affecting interstate commerce when applied to freight trains running into and out of, or passing through the state from and to adjacent states, and laden exclusively with freight received on board before the trains entered the state, and consigned to points beyond its limits, is not for that reason an unreasonable interference with, nor strictly a regulation of interstate commerce, but is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state, and therefore, not invalid by force alone of the constitution of the United States, in the absence of any congressional legislation on the subject.[42] The Act of Missouri, March 19, 1907, requiring the running of at least one regular passenger train each way every day over all railroad lines, is not invalid as a regulation of interstate commerce.[43]

§ 3891. Heating of Passenger Cars.—The states having authority to establish reasonable regulations appropriate for the protection of the health, lives and safety of their people, may enact laws, the purpose of which is to protect all persons traveling in the state on passenger cars moved by the agency of steam

39. **Speed of running trains.**—Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391.

40. **Mail train.**—Peterson *v.* State, 79 Neb. 132, 112 N. W. 306, 14 L. R. A., N. S., 292.

41. **Carriers of live stock.**—Leibengood *v.* Missouri, etc., R. Co., 83 Kan. 25, 109 Pac. 988, 28 L. R. A., N. S., 985.

42. **Running of trains on Sunday.**—The statute of Georgia, Code 1882, §§ 4578, 4310, making it unlawful to run any freight train on any railroad in the state on Sunday, and providing that the superintendent of transportation of any railroad shall be liable for indictment for a misdemeanor for any violation of the statute by his railroad, is not so far as it affects interstate trains, a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state by which it was established, and, therefore, not invalid by force alone of the constitution of the United States, in the absence of any congressional legislation upon the subject. Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086. See, also, Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

Code, § 1973, making it a misdemeanor to run railroad trains (with certain exceptions) between certain hours on Sunday, is not unconstitutional as applied to trains carrying freight between points in different states. State *v.* Southern R. Co., 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689.

Pen. Code 1895, § 420, forbidding, with certain exceptions, the running of freight trains on Sunday, is not unconstitutional as a violation of interstate commerce. Seale *v.* State, 126 Ga. 644, 55 S. E. 472.

43. State *v.* Chicago, etc., R. Co., 239 Mo. 196, 143 S. W. 785.

against the perils attending a particular mode of heating such cars. Accordingly, a state statute forbidding under penalties the heating of passenger cars in the state by stoves or furnaces kept inside the cars or suspended therefrom, is a valid police regulation, and is not repugnant to the commerce clause of the constitution, when applied to the cars of interstate trains, in the absence of congressional legislation on the subject. Such statute is not a regulation of commerce within the meaning of the constitution, although it controls in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce.[44]

§ 3892. Requiring Trains to Stop at Certain Stations.—A state statute providing that each railroad company operating lines within the state shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient and let off passengers, is not, as applied to interstate trains of a railroad company organized under the laws of the state, repugnant to the commerce clause of the federal constitution, in the absence of congressional legislation upon the subject. Such statute is not directed against interstate commerce, but is a reasonable provision for the public convenience enacted under the police power of the state, and only remotely and incidentally affects commerce between the states.[45] So also a state statute, expressly declaring that

44. Heating of passenger cars.—New York, etc., R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418. See, also, Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488.

45. Requiring certain number of trains to stop at stations.—The statute of Ohio (§ 3320, Rev. Stat.), as amended by the act of April 13, 1889, sustained as a valid police regulation. Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465, cited in Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565, distinguishing Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4, in each of which cases certain state enactments were adjudged to be inconsistent with the grant of power to congress to regulate commerce among the states; distinguished from the case of Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722, in the fact that the statute of Illinois required all regular passenger trains to stop at county seats. See, also, Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90.

The case of Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096, is not inconsistent with the conclusion stated in the text, for the particular question was not involved in that case, the court stating in its opinion that "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, is not presented, and cannot be decided, upon this record." The above extract shows the full scope of that decision. Any doubt upon the point is removed by the reference made to that case in Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465.

The statute of Ohio is not inconsistent with § 5258 of the Revised Statutes of the United States authorizing every railroad company in the United States operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." The above statutory provision was not intended to interfere with the authority of a state to enact such regulations, with respect at least to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public. Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct.

it shall not apply to through trains entering the state from any other state, or to transcontinental trains, requiring railroad companies to stop all their regular passenger trains running wholly within the state, at stations in all county seats long enough to take on and discharge passengers with safety, is a reasonable exercise of the police power of the state, even as applied to a train connecting with a train of the same company running into another state, and carrying interstate passengers, as well as the mail.[46] But a state statute requiring all regular

465, citing Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 S. Ct. 488.

Requiring interstate trains to stop at certain stations.—When an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. Atlantic, etc., R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

The extent of the right to control through interstate transportation of passengers by state legislation, or under orders of a commission authorized by the state, has been recently before the federal supreme court. Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; Atlantic, etc., R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public, such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers, through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hinderance of interstate traffic, is an unlawful regulation and burden upon interstate commerce. Herndon *v.* Chicago, etc., R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 S. Ct. 633.

An order made under state authority, requiring a railroad company to stop on signal two of its through fast mail trains running between Jersey City, New Jersey, and Tampa, Florida, at a small town in South Carolina which is also the junction point with a small branch road, is void as a direct regulation of interstate commerce, where, in addition to several local trains daily, the residents of such towns are furnished daily one slower through train each way. Judgment, Railroad Comm'rs *v.* Atlantic, etc., R. Co., 54 S. E. 224, 74 S. C. 80, reversed in Atlantic, etc., R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

The requirement that passenger trains shall stop at all junction points of other roads, which is made by Act Mo. March 19, 1907 (Laws 1907, p. 185), amending Rev. St. Mo. 1899, § 1075 (Ann. St. 1906, p. 923), amounts to an unnecessary and unlawful burden upon interstate commerce if such requirement is construed to necessitate the stoppage of through interstate trains for the transfer of passengers from one road to another, when ample facilities for the traveling public are already provided, and severe detriment and hindrance to interstate traffic will result. Herndon *v.* Chicago, etc., R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 S. Ct. 633; Roach *v.* Atchison, etc., R. Co., 218 U. S. 159, 54 L. Ed. 978, 30 S. Ct. 639. Affirming decree Chicago, etc., R. Co *v.* Swanger, 157 Fed. 783.

This statute, Act Mo. March 19, 1907 (Laws 1907, p. 185), amending Rev. St. Mo. 1899, § 1075 (Am. St. 1906, p. 923), is not of that class passed in the exercise of the police power of the state for the promotion of the public safety, and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad; this statute, as its second section shows, was passed for the purpose of providing greater facilities of travel, and not for the protection of life and limb. Herndon *v.* Chicago, etc., R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 S. Ct. 633.

46. Requiring intrastate trains to stop at county seats.—The statute of Minnesota of March 31, 1893, c. 60, Laws of 1893, p. 173, was held to be a valid police regulation and not an interference with interstate commerce. Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627, cited in Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722, distinguished from Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096, in that the statute in that case required a fast train, carrying interstate passengers and the United States mail, over an interstate highway established under authority of congress, to turn aside from the direct interstate route in order to stop

passenger trains including interstate trains as well as trains running wholly within the state, to stop a sufficient length of time at the stations of county seats to receive and let off passengers with safety, when applied to a through train used exclusively for interstate traffic, is an unreasonable regulation, and a direct burden upon interstate commerce, the railroad company furnishing other passenger trains, sufficient in number to accommodate all the local and through business along the line of the road, all of which stopped at county seats.[47] A fortiorari,

at a county seat, the present question not having been presented or decided in that case. See, also, Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90.

47. Requiring interstate trains to stop at county seats.—The statute of Illinois passed March 31, 1874, § 26, Rev. Stat. 1889, ch. 114, § 88, was held void as an unreasonable and direct burden upon interstate commerce, when applied to a through train engaged exclusively in interstate traffic. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722, distinguished from the case of Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465, in the fact that the Ohio statute required only that three regular passenger trains should stop at every station containing three thousand inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loop hole which the statute of Illinois effectually closed. See, also, Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

The statute in effect required every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains might pass by day or night, and regardless also of the fact whether another train designated especially for local traffic stopped at the same station within a few minutes before or after the arrival of the train in question. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722, citing Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096.

While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547, that "while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * * If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others." Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

A state railroad commission, in the absence of congressional legislation, has the power, under a state statute, to compel a railroad company to stop its interstate trains where it has failed to furnish adequate accommodation to a particular locality; but where such accommodation had been furnished by the company, it was held that the railroad commission had no such right, and an attempt to assume such power would be a violation of the commerce clause of the constitution. Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90.

St. 1911, § 1801, providing for the stopping of passenger trains at stations, held applicable to interstate passenger trains as well as to domestic trains. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

It is only after a carrier has provided adequate domestic and interstate local service that it may inaugurate special through or interstate service which shall be free from state regulation as interfering with interstate commerce. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

A state through which the line of an interstate railroad is operated may demand reasonably adequate interstate as well as domestic service. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

That a state regulation requiring additional domestic service from an interstate railroad may indirectly or in a slight degree affect or interfere with interstate commerce does not render the regulation void if that is not its purpose, and it has another legitimate object. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

St. 1911, § 1801, requiring at least two passenger trains daily each way to be stopped at stations having 200 or more inhabitants, if four trains daily each way are run, was neither illegal as to an interstate railroad, as interfering with interstate commerce nor unreasonable. Chicago, etc., R. Co. *v.* Railroad Comm., 152 Wis. 654, 140 N. W. 296.

such statute so far as it requires a fast mail train, carrying interstate passengers and the United States mail, over an interstate highway established by authority of congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station of a county seat three and a half miles away from a point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course, before proceeding on its way, and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which the railroad company furnishes others and ample accommodation, is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States.[48]

Mail Train.—Interstate commerce is unconstitutionally interfered with by an order of the Mississippi railroad commission, made in the exercise of its discretionary authority, requiring a railway company to stop its interstate mail trains at a specified county seat, where proper and adequate railway passenger facilities are otherwise afforded that station.[49]

Where Accommodation Furnished by Other Trains.—An order made under state authority, requiring a railroad company to stop on signal two of its through fast mail trains running between Jersey City, New Jersey, and Tampa, Florida, at a small town in South Carolina which is also the junction point with a small branch road, is void as a direct regulation of interstate commerce, where, in addition to several local trains daily, the residents of such town are furnished daily one slower through train each way.[50] A statute of a state requiring the stoppage at a given station of a train engaged in interstate commerce is void, where it appears from the undisputed evidence that there are eight daily trains carrying passengers on defendant's road which stop at such town, and are such as to afford adequate and reasonable facilities for the accommodation of travel to and from that place.[51]

§ 3893. Regulating Duty to Accept Goods.—A state law, providing a penalty for refusal to accept freight for shipment, is not invalid as applying to interstate traffic, the gist of the offense being the carrier's refusal to receive the goods for shipment, which is an act done wholly within the state, and no part of the act of transportation.[52] The act of congress, requiring the publication by

48. **Requiring trains to turn aside from interstate route and run to county seats.**—The line of railroad owning and operating the train in question, having been established by congress as a national highway for the accommodation of interstate commerce and of the mails of the United States, and as such having been recognized and promoted by the state of Illinois, it was held that the statute of Illinois, Rev. Stat. 1889, ch. 114, § 88, in the particulars set out in the text, was unconstitutional and void as an hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States. Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096, distinguished from Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627, in that the train in question in that case ran wholly within the state, and could have stopped at the county seat in question without deviating from its course, and also the statute of Minnesota expressly provided that the act should not apply to through railroad trains entering the state from any other state, or to transcontinental trains, distinguished from Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722, in that case the question was not presented whether the statute was constitutional so far as it required the train in question to stop at county seats without deviating from its interstate course. See, also, Mississippi R. Comm. *v.* Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

49. **Mail train.**—Judgment, Illinois Cent. R. Co. *v.* Mississippi R. Comm., 70 C. C. A. 617, 138 Fed. 327, affirmed in 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90.

50. **Where accommodations furnished by other trains.**—Judgment, Railroad Comm'rs *v.* Atlantic, etc., R. Co., 74 S. C. 80, 54 S. E. 224, reversed in Atlantic, etc., R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

51. St. Louis, etc., R. Co. *v.* State, 85 Ark. 284, 107 S. W. 989.

52. **Duty to accept goods.**—Reid *v.*

carriers of freight rates for interstate shipments, and the orders of the interstate commerce commission thereunder, do not constitute such action by the federal government as to prevent proper and reasonable state regulations imposing penalties upon interstate carriers for failure to receive shipments or transport promptly.[53]

§ 3894. Regulating Time, Place and Manner of Delivery.—A state, in the exercise of its police power, may confer on an administrative agency power to make reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in interstate commerce.[54] A state railroad commission's order intended to enforce a state statute, requiring intracity transportation of carload freight between junction, intersection, and transfer points, and delivery sidings, could not necessarily and immediately affect interstate commerce as a matter of law, and was therefore not objectionable as a violation of the commerce clause of the federal constitution, in that its enforcement would result in congesting the carrier's terminal facilities to the detriment of interstate commerce.[55] A state may, in the exercise of its police authority, confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, but any regulation of such subject made by a state or under its authority, which directly burdens interstate commerce, is a regulation of such commerce and repugnant to the constitution of the United States.[56] Accordingly an order of a state corporation commission requiring a railroad company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way and to a private siding, was held to impose a direct burden upon interstate amounting to a regulation of it and therefore void.[57]

Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Revisal 1905, § 2631, imposing a penalty on carriers for refusal to accept shipments of freight, is not invalid as applying to interstate commerce, as the penalty is incurred by the violation of a common-law duty to accept freight whenever tendered, which is an act done entirely within the state and no part of the act of transportation. Burlington Lumber Co. *v.* Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Revisal 1905, § 2631, imposing a penalty upon railroad companies for refusing to accept freight for shipment, is not unconstitutional when applied to an interstate shipment; not being an interference with or burden upon interstate commerce. Reid *v.* Southern R. Co., 153 N. C. 490, 69 S. E. 618.

Revisal 1905, § 2631, imposing a penalty for a carrier's refusal to receive freight for shipment, as applied to an intrastate shipment, and in absence of specific action by congress or the interstate commerce, though it may indirectly affect interstate commerce. Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

That Revisal 1905, § 2631, may in certain cases affect interstate shipments, does not invalidate it, but merely gives an additional excuse to the carrier for nonperformance. Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Revisal 1905, § 2631, penalizing any carrier $50 for each day it refuses to receive freight for shipment, is not invalid as a burden on interstate commerce, the statute permitting excuses in proper cases for failure to comply therewith, and the federal government not having acted directly on the subject. Reid *v.* Southern R. Co., 150 N. C. 753, 64 S. E. 874, 17 Am. & Eng. Ann. Cas. 247.

53. Reid *v.* Southern R. Co., 150 N. C. 753, 64 S. E. 874, 17 Am. & Eng. Ann. Cas. 247.

54. Time, place and manner of delivery.—North Carolina Corp. Comm. *v.* Southern R. Co., 151 N. C. 447, 66 S. E. 427.

A state, under its police power, may make reasonable regulations as to the place, manner, and delivery of merchandise moving in the channels of interstate commerce, but must not make such regulations as will interfere with such commerce. St. Louis, etc., R. Co. *v.* State, 26 Okla. 62, 107 Pac. 929, 30 L. R. A., N. S., 137.

55. Grand Trunk R. Co. *v.* Michigan R. Comm., 198 Fed. 1009.

56. McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722. See, also, Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491; American Steel, etc., Co. *v.* Speed, 192 U. S. 500, 48 L. Ed. 538, 24 S. Ct. 365.

57. Requiring delivery of cars beyond right of way.—McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26

Placing Car on Particular Track.—Where car loads of coal are shipped from one state into another, an order of a state corporation commission directing the railroad company to place the cars on a certain track for unloading, as requested by the consignee, is void as an interference with interstate commerce.[58]

Delivery on Private Siding.—An order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers, or of its power to make the order in a particular case in favor of a given person or corporation.[59]

Refusal to Deliver on Payment of Charges.—A statute imposing a penalty on a railroad company for a refusal to deliver freight to the owner or consignee on payment or tender of the freight charges due, as shown by the bill of lading, is in conflict with the Act of February 4, 1887, regulating commerce, and, as to interstate commerce, and, as to interstate shipments of freight, can not be enforced.[60]

Reshipment.—Where, after the arrival of stock in the carrier's "break-up" yards at the point of destination, the shipper demanded that the stock be delivered in the car to a connecting carrier, with whose road the initial carrier had physical connection, for shipment to another point within the state, such reshipment did not constitute interstate commerce, though the original shipment was from a point within the state.[61]

Penalty for Failure to Deliver Freight.—A statute providing against railroads for each day freight is held after payment or tender of freight charges, or holding freight for collection of excess of freight thereon, is in conflict with Act Cong. Feb. 4, 1887, regulating interstate commerce, and as to interstate shipments of freight is void.[62]

§ 3895. Care of Live Stock.—A statute providing, inter alia, that "no railroad company, in the carrying or transportation of animals, shall overload its cars," when applied to shipments made from a point within to a point without the state, is not unconstitutional, as violative of the provision in the constitution of the United States (article 1, § 8) granting congress power to regulate interstate commerce.[63]

§ 3896. Routing Goods.—A state law providing that a common carrier shall pay a penalty of $500 for shipping freight by a route other than that designated by the shipper, is unconstitutional when applied to goods shipped from a foreign state, as in violation of the interstate commerce section of the federal constitution.[64] The rule of the railroad commission of the state of Arkansas, which provides that, "in case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate," as applied to interstate shipments, is unconstitutional as an interference with interstate commerce.[65]

S. Ct. 722, construing order and decision of the corporation commission of North Carolina, and the statutes of that state upon which the same was based.

58. **Placing car on particular track.**—Southern R. Co. *v.* Greensboro, etc., Coal Co., 134 Fed. 82, modified and affirmed in McNeill *v.* Southern R. Co., 26 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142.

59. **Delivery on private siding.**—Decree, Southern R. Co. *v.* Greensboro, etc., Coal Co., 134 Fed. 82, modified and affirmed in McNeill *v.* Southern R. Co., 26 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142.

60. **Refusal to deliver on payment of charges.**—Houston, etc., R. Co. *v.* Peters, 40 S. W. 429, 15 Tex. Civ. App. 515.

61. **Reshipment.**—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 97 S. W. 778, 30 Ky. L. Rep. 18.

62. **Penalty for failure to deliver freight.**—Trinity, etc., R. Co. *v.* Geppert (Tex. Civ. App.), 135 S. W. 164.

63. **Care for live stock.**—Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80.

64. **Routing goods.**—Lowe *v.* Seaboard, etc., Railway, 63 S. C. 248, 41 S. E. 297, 90 Am. St. Rep. 678.

65. St. Louis, etc., R. Co. *v.* Allen, 181 Fed. 710.

§ 3897. Cartage and Drayage.—One conveying liquor shipped in interstate commerce from the railroad depot to the home of the consignee held engaged in interstate commerce and not subject to state law prohibiting the conveying of intoxicating liquor.[66]

§ 3898. Compelling Railroad to Elevate Bridge.—A requirement compelling railroad companies to elevate bridges over the Kansas river does not, by reason of the consequent expense and difficulty, violate the commerce clause of the federal constitution.[67]

§ 3899. Collection of Purchase Price for Consignor.—A state statute which makes it a criminal offense for any railroad company, express company or other common carrier or any other person, in connection with transportation of intoxicating liquors in interstate commerce, to collect the purchase price or any part thereof before, on, or after delivery from the consignee, or in any manner act as the agent of the buyer or seller of any such liquor for the purpose of buying or selling or completing the sale thereof, applies to a bank to which a draft for the purchase price of a shipment of liquor is sent by the seller in another state, with a bill of lading for such liquor attached, and which collects the draft from the consignee, and delivers the bill of lading to him upon which he obtains the liquor from a carrier.[68]

§ 3900. Regulations with Respect to Limitation of Liability of Carriers.—The liability of a railroad company for an injury resulting from its negligence, in the absence of any controlling federal statute relating to interstate commerce, is governed by the law of the state where the injury occurred, whether statutory or the common law, as construed by its courts.[69] A statute of a state affirming and extending, as applied to railroad corporations, the principle of the common law, by enacting that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into," as applied to a claim, for an injury happening within the state, under a contract for interstate transportation, does not contravene the provision of the constitution of the United States empowering congress to regulate interstate commerce.[70] A state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible for the full measure of loss resulting from their negligence, a contract to the contrary notwithstanding, and such requirement with respect to interstate shipments, is not an unlawful attempt to regulate interstate commerce in the absence of congressional action providing a different measure of liability.[71]

66. **Cartage and drayage.**—Sheppard *v.* State, 8 Okla. Cr. App. 54, 126 Pac. 267.

67. **Compelling railroad to elevate bridge.**—Kaw Valley Drainage Dist. *v.* Kansas City Terminal R. Co., 87 Kan. 272, 123 Pac. 991.

68. **Collection of purchase price for consignor.**—United States *v.* First Nat. Bank, 190 Fed. 336.

69. **Liability for negligence.**—Weir *v.* Rountree, 97 C. C. A. 500, 173 Fed. 776, 19 Am. & Eng. Ann. Cas. 1204.

70. **Prohibiting contracts exempting carrier from common law liability.**—The statute of Iowa, Code, 1873, § 1308, Stat. 1866, ch. 113, affirming and extending, as applied to railroads, the principle of the common law regarding the liability of common carriers, was held not to be invalid so far as it affected interstate commerce, and under it a stipulation in a contract for interstate transportation, under which a shipper and the cattle in his charge were carried by a railroad, that the company should "in no event be liable to the owner or person in charge of said stock in any amount exceeding the sum of $500," was held void and unenforceable by the courts. Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289. See, also, Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

71. **Statute imposing upon carrier full liability for negligence.**—Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

Power of Congress Supreme.—The validity of a limited liability contract of a carrier, in so far as it relates to interstate commerce, is governed by the federal law, and not by the law of the state.[72]

Where Congress Has Not Acted.—In the absence of legislation by congress permitting interstate carriers to limit liability to a stipulated valuation, a state may hold an interstate carrier liable for the whole loss resulting from its negligence, notwithstanding a contract limiting liability, whether the rule as to degree of care is statutory or judicial.[73] The Pennsylvania rule that a carrier can not contract for exemption from or limitation of its liability arising from its negligence, or that of its servants, applies to commerce between Pennsylvania and other states, the act of Congress of June 29, 1906, requiring carriers receiving property for interstate transportation to reduce the contract for transportation to writing, and that such carrier shall be liable to the lawful holder thereof for any loss or injury to such property caused by it or any common carrier to which such property may be delivered, or over whose line such property may pass, and that no contract or rule shall exempt the carrier from such liability, but that nothing in the section shall deprive any holder of such contract of any remedy which he has under existing law, not being such congressional legislation as requires the state courts to follow, as to interstate commerce, the rule adopted by the federal courts that a carrier may limit its liability to an agreed valuation in consideration of a lower rate for carriage.[74]

Under Interstate Commerce Act.—The refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of the Act of Feb. 4, 1887, making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines.[75] A state law providing that no contract, receipt, rule, or regulation shall exempt any railway corporation from the liability of a common carrier, and thereby invalidating contracts between railroads and shippers, whereby the former attempt, by means of an agreed valuation of the goods shipped, to limit their liability for negligence, having been passed before congress acted in the matter of interstate commerce and assumed control thereof, is not invalidated by the action of congress, for such action does not deprive the states of their right to enact such rules by virtue of their police

72. **Power of congress supreme.**—O'Connor *v.* Great Northern R. Co., 120 Minn. 359, 139 N. W. 618.

73. **Where congress has not acted.**—Atchison, etc., R. Co. *v.* Smythe, 55 Tex. Civ. App. 557, 119 S. W. 892.

Until there is some valid regulation by congress or the interstate commerce commission directly affecting the matter, a state may establish a policy that common carriers cannot limit their liability against negligence, and enforce it with reference to interstate shipments. Kissenger *v.* Fitzgerald, 152 N. C. 247, 67 S. E. 588.

While Rev. St. 1895, art. 320, prohibiting a carrier from limiting its common-law liability does not affect contracts for interstate shipments, yet in the absence of congressional legislation the common law prohibits an interstate carrier from limiting its liability. Atchison, etc., R. Co. *v.* Smythe, 55 Tex. Civ. App. 557, 119 S. W. 892.

Congress not having acted on the subject, Acts Ex. Sess. Va. 1902-04, p. 980, c. 609, pars. 24, 25 (Code 1904, § 1294l), prohibiting carriers from limiting their liability for negligence, was applicable to an interstate shipment of horses and mules, and invalidated a provision limiting the amount of the carrier's liability in case of loss. Elliott *v.* Atlantic, etc., R. Co., 94 S. C. 129, 75 S. E. 886, judgment reversed on rehearing 77 S. E. 718.

74. Wright *v.* Adams Exp. Co., 230 Pa. 635, 79 Atl. 760.

The Pennsylvania rule that a common carrier can not contract for exemption from or limitation of liability arising from his negligence or that of his servant is applicable to commerce between Pennsylvania and other states, and the contrary rule permitting a limitation of liability applied by the federal courts is not binding upon the courts of this state, in the absence of congressional action upon the subject. Windolph *v.* Adams Exp. Co., 48 Pa. Super. Ct. 304.

75. **Under Interstate Commerce Act.**—Judgment, Hughes *v.* Pennsylvania R. Co., 51 Atl. 990, 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, affirmed 24 S. Ct. 132, 191 U. S. 477, 48 L. Ed. 268.

power.[76] Intent of congress to take possession of the subject of the liability of a carrier under contracts for interstate commerce so clearly appears from Carmack Amendment of June 29, 1906, as to invalidate, as to interstate shipments, the provisions of any state law nullifying contracts limiting liability of the carrier to the agreed or declared value.[77] The Act of Congress of June 29, 1906, requiring carriers to reduce the contract for transportation to writing, and enacting certain other rules for the regulation of interstate commerce, is not such congressional legislation as will require the courts of Pennsylvania to follow the rule laid down by the federal courts that a carrier may limit his liability to an agreed valuation in consideration of a lower rate for carriage.[78]

Agreements as to Valuation of Property.—Congress has enacted no law prohibiting agreements regarding the value of the property offered to carriers for interstate shipments, and limiting the amount for which they will be liable if the property is lost while in their custody, and the national courts have sanctioned agreements between carriers and owners of property limiting the liability of the carrier as an insurer of property received for shipment and lost during transit, provided such agreements are just, reasonable, and fairly entered into by the owner, and for a consideration; and such courts enforce state statutes regulating

76. Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 123 N. W. 387.

77. Amendment of June 29, 1906.—Adams Exp. Co. *v.* Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 S. Ct. 148, 44 L. R. A., N. S., 257; Chicago, etc., R. Co. *v.* Latta, 226 U. S. 519, 57 L. Ed. 328, 33 S. Ct. 155, reversing judgments 97 C. C. A. 198, 172 Fed. 850, and 106 C. C. A. 664, 184 Fed. 987.

Rights and remedies conferred by existing state laws, where a shipment accepted by carrier for interstate transportation has been lost or damaged, were not continued in force by proviso in Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20. Adams Exp. Co. *v.* Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 S. Ct. 148, 44 L. R. A., N. S., 257; Chicago, etc., R. Co. *v.* Latta, 226 U. S. 519, 57 L. Ed. 328, 33 S. Ct. 155, reversing judgments, 97 C. C. A. 198, 172 Fed. 850, and 106 C. C. A. 664, 184 Fed. 987.

Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, supersedeas all state regulations on the subject of liability of railway carrier for injury to interstate shipment, and of all state laws invalidating contracts limiting liability of carrier to an agreed value. Chicago, etc., R. Co. *v.* Miller, 226 U. S. 513, 57 L. Ed. 323, 33 S. Ct. 155, reversing judgment, 85 Neb. 458, 123 N. W. 449; Chicago, etc., R. Co. *v.* Latta, 226 U. S. 519, 57 L. Ed. 328, 33 S. Ct. 155, reversing judgments, 97 C. C. A. 198, 172 Fed. 850, and 106 C. C. A. 664, 184 Fed. 987.

Extent of a carrier's liability for loss of an interstate shipment of goods is governed by the Federal Interstate Commerce Act and its amendments, including Act June 29, 1906, and the decisions of the supreme court construing the same, independent of state laws. American Silver Mfg. Co. *v.* Wabash R. Co., 174 Mo. App. 184, 156 S. W. 830.

State laws nullifying contracts limiting liability of carrier for loss or damage to agreed value was superseded, so far as interstate shipments are concerned, by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20. Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397, reversing judgment, 128 S. W. 932.

Act of 1905, making any limitation of contract of a carrier's common-law liability a matter of defense and requiring the company to show that the contract is upon sufficient consideration reasonable and fairly entered into, was superseded by the Interstate Commerce Act of Feb. 4, 1887, as amended June 29, 1906, as to interstate shipments. Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724.

78. Wright *v.* Adams Exp. Co., 43 Pa. Super. Ct. 40.

Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), enacting certain rules for the regulation of interstate commerce, does not prevent the Pennsylvania courts from continuing to apply the rule that a common carrier can not contract for exemption from his own negligence, or that of his servants, nor for a limited liability in case of loss from such negligence. Davidson *v.* Adams Exp. Co., 43 Pa. Super. Ct. 53.

Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), relating to interstate commerce, in no way affects the Pennsylvania rule that a carrier can not limit the amount of his liability for an injury caused by his own negligence. Blackburn *v.* Adams Exp. Co., 43 Pa. Super. Ct. 276.

limitations of liability of carriers for interstate shipments in the absence of legislation by congress.[79]

Liability as to Emigrant Movables.—The designation of a typewriter, dictionary, wearing apparel, trunk, and personal effects as emigrant movables was not a violation of the Interstate Commerce Act and that act does not prevent the state from enforcing its regulations, against limitation of liability by carriers.[80]

Shipment of Live Stock.—The right of a state to refuse to enforce a special live stock shipping contract limiting the liability of a carrier, made in a foreign state, is not affected by the Interstate Commerce Act.[81]

For Personal Injuries.—A state statute providing that no contract or regulation shall exempt any corporation carrying persons or property by rail from its liability as a common carrier is not void as an attempt to regulate interstate commerce, as applied to a contract of interstate transportation, whereby the carrier attempts to limit its liability for personal injuries resulting from the negligence of its servants to the sum of five hundred dollars.[82]

Duty to Trace Goods as Condition of Exemption.—The provision of the South Carolina Code in so far as it imposes on a common carrier the duty to trace shipments as a condition of exemption from liability for loss, is not unconstitutional, as a violation of the interstate commerce clause of the federal constitution.[83]

Valuation in Bill of Lading.—The Interstate Commerce Act does not prevent enforcement of a railroad company's liability for the full value of goods damaged in interstate carriage, notwithstanding a valuation clause in the bill of lading.[84]

Liability beyond Carrier's Own Lines.—Although an attempt on the part of a state to prohibit a carrier, as to interstate shipments, from limiting its liability to its own lines, would be a regulation of interstate commerce and therefore void, yet it is within the power of the states to legislate as to the form of contracts limiting a carrier's liability to its own lines, even as to contracts for interstate transportation.[85] It is within the power of the state, even as to interstate shipments, to establish a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation be-

79. **Agreements as to valuation of property.**—Robert *v.* Chicago, etc., R. Co., 148 Mo. App. 96, 127 S. W. 925.

80. **Liability as to emigrant movables.**—O'Connor *v.* Great Northern R. Co., 118 Minn. 223, 136 N. W. 743.

81. **Shipment of live stock.**—Louisville, etc., R. Co. *v.* Smith, 123 Tenn. 678, 134 S. W. 866.

82. **For personal injuries.**—Judgment 63 N. W. 692, 95 Iowa 260, 28 L. R. A. 718, affirmed in Chicago, etc., R. Co. *v.* Solan, 18 S. Ct. 289, 169 U. S. 133, 42 L. Ed. 688.

83. **Duty to trace goods as condition of exemption.**—Winslow Bros. & Co. *v.* Atlantic, etc., R. Co., 79 S. C. 344, 60 S. E. 709.

84. **Valuation in bill of lading.**—Pace Mule Co. *v.* Seaboard, etc., R. Co., 160 N. C. 215, 76 S. E. 513; Herring *v.* Atlantic, etc., R. Co., 160 N. C. 252, 76 S. E. 527.

Act June 29, 1906, c. 3591, 34 Stat. 593, § 7 (U. S. Comp. St. Supp. 1907, p. 909), continuing any existing right of action of a holder of a bill of lading under existing laws, preserved for enforcement in the state courts a right of action against a carrier for full damages, notwithstanding a valuation clause in the bill of lading. Pace Mule Co. *v.* Seaboard, etc., R. Co., 160 N. C. 215, 76 S. E. 513; Herring *v.* Atlantic, etc., R. Co., 160 N. C. 252, 76 S. E. 527.

Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), provides that any common carrier receiving property for interstate transportation shall issue a bill of lading and be liable to the lawful holder thereof for any damage caused by any carrier, and no contract or regulation shall exempt such carrier from such liability, and nothing herein shall deprive the holder of the bill of lading of any right of action under existing laws. Held that, even if Congress had legislated on the question of the right of a carrier to exempt itself from liability for negligence, a right of action for damages for the full value of the freight injured, notwithstanding a valuation clause in the bill of lading, could be enforced in the state courts, having been reserved by the statute. Pace Mule Co. *v.* Seaboard, etc., R. Co., 160 N. C. 215, 76 S. E. 513.

85. **Prohibiting limitation of liability to own lines.**—Richmond, etc., R. Co. *v.* Pat-

yond its own line, nevertheless, by agreement, its liability was limited to its own line.[86] Where a carrier has the right to make a contract with the shipper, to limit its liability as a carrier, to damage or loss occurring on its own line, the imposition, by a state statute, upon the initial or any connecting carrier, in case of the loss, damage or destruction of freight, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established is, when applied to an interstate shipment of freight, an interference with and a regulation of interstate commerce, and therefore void.[87]

Each Road Liable on Own Line Only.—The Georgia Code provides that when there are several connecting railroads under different companies, and goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to its connecting road, that the last company which has received the goods as in good order shall be responsible to the consignee for any damage, and that such companies shall settle among themselves the question of ultimate responsibility. Such section did not violate United States constitution conferring on congress power to regulate interstate commerce.[88]

Penalizing Delay in Settlement of Claims.—A state law which penalizes failure to adjust and pay within a specified time claims for loss or damage to goods by carriers while in their possession is not an unlawful interference with interstate commerce, even as applied to an interstate shipment. In so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent, prompt settlement of proper claims for damages.[89]

§ 3901. Regulating Liability for Delay.—The statute subjecting railroads to penalties for delay in shipment of freight within the state is not a bur-

terson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335; Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755.

Quære, whether a state would have the right, with regard to interstate commerce, to prohibit a carrier from making a contract with the shipper to limit its liability as a carrier to damage or loss occurring on its own line. Central, etc., R. Co. *v.* Murphey, 196 U. S. 194, 49 L. Ed. 444, 25 S. Ct. 218.

86. **Proof of contract limiting liability.**—The statute of Virginia, Code 1887, § 1295, regulating the liability of carriers beyond their own lines, held to be a valid regulation even as applied to interstate shipments. Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 S. Ct. 335, followed in Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755. See, also, Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Central, etc., R. Co. *v.* Murphey, 196 U. S. 194, 49 L. Ed. 444, 25 S. Ct. 218; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

87. **Requiring carrier to trace freight and notify shipper where loss occurred.**—Central, etc., R. Co. *v.* Murphey, 196 U. S. 194, 49 L. Ed. 444, 25 S. Ct. 218, holding statute of Georgia (Ga. Code 1895, §§ 2317, 2318), imposing such duty on common carrier, void as to shipment made from points in Georgia to other states. See, also, Houston, etc., R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491.

88. **Each road liable on own line only.**—Civ. Code 1895, § 2298. Kavanaugh & Co. *v.* Southern R. Co., 47 S. E. 526, 120 Ga. 62.

89. Penalizing the failure to adjust and pay within a specified time claims for loss or damage, as is done by Act S. C. Feb. 23, 1903 (24 St. at Large, p. 81), § 2, does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state courts as affecting only the liability of carriers doing business in the state, for property lost or damaged while in their possession. Atlantic, etc., R. Co. *v.* Mazursky, 216 U. S. 122, 54 L. Ed. 411, 30 S. Ct. 378, affirming judgments. Charles *v.* Atlantic, etc., R. Co., 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762; McTeer *v.* Southern Exp. Co. (S. C.), 58 S. E. 930; Mazursky *v.* Atlantic, etc., R. Co. (S. C.), 58 S. E. 931; Von Lehe *v.* Atlantic, etc., R. Co., 78 S. C. 168, 59 S. E. 1135.

den on interstate commerce, though railroads are liable for those delays in interstate shipments which occur wholly within the state, as the statute instead of creating a burden, aids such commerce by seeking to compel performance by the carrier of its duty to deliver freight with reasonable diligence.[90]

§ 3902. System of Bookkeeping.—Since bookkeeping by railroads engaged in both interstate and intrastate commerce does not of itself constitute commerce, the delegation to congress of the exclusive right to regulate interstate commerce does not preclude the state from prescribing a system of bookkeeping to be followed by railroads within the state for the purpose of apportioning expenses between freight and passenger traffic, and between intrastate and interstate commerce, to afford a basis for the establishment of intrastate rights.[91]

§ 3903. Reports.—Section 6 of the Railroad and Warehouse Commission Act of Illinois requiring every railroad company "incorporated or doing business in the state, or which shall hereafter become incorporated or do business under any general or special law in the state," to report before a certain day in each year to the commissioners as to the affairs of the corporation with respect to certain subjects, which are designated, is not void under the commerce clause of the federal Constitution; and this, notwithstanding Interstate Commerce Law 1887 which requires a report to the interstate commerce commission substantially the same as required by § 6.[92]

§ 3904. Regulations as to Crossings.—Under a Code provision, requiring railroad companies to sound a whistle before a railroad crossing is reached, a railroad company, though engaged in interstate commerce and in conveying the mails, can not escape liability for disobeying the statute, though the whistle was out of order through no negligence of the company, and to have procured another would have delayed the train, as such provision is a valid police regulation, and its enforcement does not interfere with interstate commerce.[93]

Electric Lights.—Where a railroad was built by the authority of the state, the company, whether an interstate carrier or otherwise, must, so long as congress does not interfere, submit to reasonable local regulations in the use of its property, and a municipal ordinance requiring it to maintain electric lights where its tracks intersect streets is not invalid as an interference with interstate commerce.[94]

90. Liability for delay.—Traynham *v.* Charleston, etc., R. Co. (S. C.), 71 S. E. 813.

The rule of the railroad commissioners making a carrier liable to a shipper in the sum of $1 for each day a headed car is detained has no application to interstate commerce, and can not legally be so applied as to directly and materially burden it. State *v.* Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A., N. S., 639.

91. System of bookkeeping.—Railroad Comm. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 140 S. W. 829.

Act Feb. 25, 1909, c. 193, 35 Stat. 648 (U. S. Comp. St. Supp. 1909, p. 1165), declaring that it shall be unlawful for carriers engaged in interstate commerce to keep any other accounts, records, or memoranda than those prescribed by the interstate commerce commission does not prevent the states from prescribing additions to the system specified by the interstate commerce commission to supply deficiencies therein in so far as necessary to enable the state to apportion expenses between freight and passenger traffic and interstate and intrastate commerce, so as to afford a basis for the establishment of intrastate rates. Railroad Comm. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 140 S. W. 829.

92. Reports.—People *v.* Chicago, etc., R. Co., 223 Ill. 581, 79 N. E. 144, 7 Am. & Eng. Ann. Cas. 1.

93. As to crossings.—Willfong *v.* Omaha, etc., R. Co., 116 Iowa 548, 90 N. W. 358.

A state may regulate, at least, in the absence of congressional action upon the same subject-matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be required under such circumstances. Southern R. Co. *v.* King, 217 U. S. 524, 54 L. Ed. 868, 30 S. Ct. 594, affirming judgment 87 C. C. A. 284, 160 Fed. 332.

94. Electric lights.—Pittsburgh, etc., R. Co. *v.* Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A., N. S., 461.

Checking Speed.—A state law requiring locomotive engines to simultaneously check and keep the speed of their trains so as to stop in time should any person or thing be crossing the track on said road at a public road crossing, was not invalid in so far as it applied to trains engaged in interstate commerce, as an invalid regulation thereof by the street, but was within the state's police power to provide regulations for public safety.[95]

§ 3905. As to Liability of Officers and Agents.—A state law which in substance provides that any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier and shall knowingly and willfully, by false billing, false representation of the contents of the shipment, or false report or weight, obtain transportation for such property at less than the regular rates, shall be deemed guilty of fraud and subject to a fine, is not unconstitutional because in conflict with the Interstate Commerce Act.[96]

§ 3906. Street and Electric Railways.—A city ordinance permitting a street railroad company engaged in interstate commerce under franchises granted by the city to make discrimination in rates in favor of residents of the city against residents of another state is unconstitutional, because it conflicts with the interstate commerce clause of the federal constitution.[97] Regulation by a municipality of a street railway operated by a state corporation and which carried passengers only to the state line where they were delivered to a foreign corporation, is not an interference with interstate commerce.[98] In granting the right to appropriate waters of a running stream for power purposes, a limitation preventing the transmission or use of the power beyond the confines of the state does not violate the federal constitution as interfering with interstate commerce.[99]

§ 3907. Express Companies.—As it is the general duty of a carrier by express to deliver parcels received by it to the consignee at his residence or place of business, a statute of a state requiring express companies to deliver express matters "to persons to whom the same is directed" within the limits of cities having a specified population, merely requires the carrier, under compulsion of a penalty, to observe its general duty, and is not invalid as an attempt to regulate interstate commerce.[1]

95. Checking speed.—Southern R. Co. *v.* King, 87 C. C. A. 284, 160 Fed. 332.

Civ. Code 1895, § 2222, requiring an engineer to check the speed of his locomotive on approaching a public crossing so as to stop in time should any person be crossing, is not, as to a railroad company doing an interstate business, violative of the constitution of the United States, art. 1, § 8, as being a regulation of interstate commerce, but is a valid exercise of the police power of the state. Southern R. Co. *v.* Grizzle, 131 Ga. 287, 62 S. E. 177.

96. As to liability of officers and agents.—Interstate Commerce Acts Feb. 4, 1887, c. 104, § 10, 24 Stat. 382, amended by Act March 2, 1889, c. 382, § 2, 25 Stat. 857 (U. S. Comp. St. 1901, 1, p. 3160), provides that "any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, * * * and shall knowingly and willfully, by false billing, false representation of the contents of the package, or false report or weight, * * * obtain transportation for such property at less than the regular rates then established, * * * shall be deemed guilty of fraud, * * * and shall, upon conviction, * * * be subject for each offense to a fine. * * *" Va. Code 1904, § 1294c, cl. 10, is practically identical with the above, except that the punishment prescribed by it is less severe than that imposed by the federal statute. Held, that the state law is not unconstitutional, as in conflict with the provisions of the federal law. Adams Exp. Co. *v.* Charlottesville Woolen Mills, 109 Va. 1, 63 S. E. 8.

97. Street and electric railways.—State *v.* Omaha, etc., Bridge Co., 113 Iowa 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

98. South Covington, etc., R. Co. *v.* Covington, 146 Ky. 592, 143 S. W. 28.

99. Kirk *v.* State Board, 90 Neb. 627, 134 N. W. 167.

1. Express companies.—Burns' Ann. St. 1901, § 3312a; United States Exp. Co. *v.* State, 164 Ind. 196, 73 N. E. 101.

Discriminations.—A state statute prohibiting unjust discrimination by any express company against any other company engaged in the same business, and prescribing a penalty for its violation, recoverable by the state, is not invalid as an interference with interstate commerce.[2] A state law provides that express companies shall grant to all consignors, including other responsible express companies as consignors, equal terms and accommodations in the carriage and continuance of carriage of goods, and prohibits them from granting to any one carrier any privileges or accommodations not granted to all others, and provides that any carrier failing to comply with the statute may be convicted in a prosecution brought by the state, that it shall be liable in a civil action for damages, and that any person injured by such violation shall have a remedy by injunction. The statute is not an attempt to regulate interstate commerce.[3]

Delivery of Goods.—The Act of 1901 of Alabama imposing a penalty on an express company refusing to deliver express matter, is not merely in aid of the common law requiring carriers of goods to make personal delivery and if the act were so construed as applied to interstate shipments, it would be a regulation of interstate commerce and in conflict with the power of regulation reposed in the interstate commerce commission.[4]

Regulation of Use of Streets.—That the delivery wagons of express companies operating in New York and using the public streets were engaged in interstate commerce did not make them immune from the operation of general ordinances adopted under greater New York charter granting to the board of aldermen power to regulate the use of the streets for animals, vehicles, etc., and to make all such regulations with reference to the running of stages, trucks, and cars as might be necessary for the convenient use and accommodation of the streets, etc.[5]

Between Intrastate Points.—Carriage of shipments by an express company from one point in the state to another point in the state does not constitute interstate commerce, even where the shipments are forwarded over a line of railroad that for a part of its route lies outside the state.[6]

Requiring Bond of Express Drivers.—Code of ordinances of New York, requiring a bond of express drivers for each licensed vehicle, conditioned for the safe and prompt delivery of all packages, parcels, and other articles, was a legitimate exercise of the city's police power and applicable to wagons of express companies engaged in interstate commerce.[7]

§ 3908. Sleeping Cars.—A state law applicable only to intrastate com-

2. **Discriminations.**—Acts 1901, p. 149 (Burns' Rev. St. 1901, § 3312b et seq.); Adams Exp. Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

3. Acts 1901, p. 149, c. 93 (Burns' Ann. St. 1901, §§ 3312b, 3312e); American Exp. Co. *v.* Southern Indiana Exp. Co., 167 Ind. 292, 78 N. E. 1021; American Exp. Co. *v.* State, 167 Ind. 707, 79 N. E. 353.

4. **Delivery of goods.**—Rehearing, 85 N. E. 337, denied in State *v.* Railroad Comm., 171 Ind. 138, 85 N. E. 966, 19 L. R. A., N. S., 93.

Acts 1901, p. 97, c. 62 (Burns' Ann. St. 1901, § 3312a), imposing a penalty on an express company refusing to deliver express matter, is not merely in aid of the common law requiring carriers of goods to make personal delivery, and, if the act were so construed, the fact that the express companies might cast upon interstate traffic the expense of burdensome free deliveries would operate to suspend it in view of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by the Railroad Act (Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 899]), forbidding carriers to give any unreasonable preference or advantage to any shipper or locality, since any state statute which imposes a local burden of transportation which in its operation would require the carrier to adjust his interstate rate with reference thereto amounts to an attempted regulation of interstate commerce, and is void as to such transactions. Rehearing, 85 N. E. 337, denied in State *v.* Railroad Comm., 171 Ind. 138, 85 N. E. 966, 19 L. R. A., N. S., 93.

5. **Regulation of use of streets.**—Barrett *v.* New York, 183 Fed. 793.

6. **Between intrastate points.**—State *v.* United States Exp. Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A., N. S., 1127.

7. **Requiring bond of express drivers.**—Barrett *v.* New York, 189 Fed. 268.

merce, requiring the upper berth in a sleeping car to be kept closed till engaged or occupied, when the lower berth is engaged and occupied, is not an interference with interstate commerce carried on in cars doing both intrastate and interstate business.[8] Notwithstanding the regulation by the interstate commerce commission of the rates for sleeping car berths in interstate traffic, Laws 1911, c. 272, applicable only to intrastate commerce, requiring the upper berth in a sleeping car to be kept closed till engaged or occupied, when the lower berth is engaged or occupied, does not conflict with the Interstate Commerce Act.[9]

§ 3909. Warehouses and Elevators.—Where grain warehouses and elevators are situated and their business is carried on exclusively within a state, the state may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate, as well as intrastate, commerce; and, until congress acts in reference to their interstate relations, such regulations can be enforced, even though they indirectly operate upon commerce beyond the immediate jurisdiction of the state.[10] The

8. **Sleeping cars.**—State *v.* Chicago, etc., R. Co., 152 Wis. 341, 140 N. W. 70.

9. State *v.* Chicago, etc., R. Co., 152 Wis. 341, 140 N. W. 70.

10. **Regulation of warehouses and elevators—In general.**—Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247, 12 S. Ct. 468; Brass *v.* Stoeser, 153 U. S. 391, 38 L. Ed. 757, 14 S. Ct. 857; Cargill Co. *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423. See, also, Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

Particular regulations.—The statute of Minnesota (Gen. Laws of Minn. 1895, ch. 148, §§ 1, 2) requiring a license, and the payment of a fee therefor, for the privilege of engaging in the business of receiving, storing and shipping grain at public elevators and warehouses in the state, is not a regulation of interstate commerce in violation of the constitution, from the fact that grain so received or stored is to be shipped out of the state. Cargill Co. *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423.

Statute of Illinois.—A state can, under the limitations upon the legislative power of the states imposed by the constitution of the United States, fix by law the maximum of charges of public elevators and warehouses used for the reception, storage and delivery of grain, and the statute of Illinois of April 25, 1871, regulating public warehouses and the warehousing and inspection of grain, and giving effect to article 13 of the constitution of the state, which provides that those who conduct such public warehouses and elevators located in cities containing not less than one hundred thousand inhabitants shall procure licenses and shall give bond conditioned for compliance with the law, and which prescribes maximum rates of charges for storing and handling grain, and declares certain penalties for the failure to procure licenses, is not repugnant to the provision of the constitution of the United States which confers upon congress the power to regulate commerce with foreign nations and among the several states. Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77, followed in Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247; 12 S. Ct. 468; Brass *v.* Stoeser, 153 U. S. 391, 38 L. Ed. 757, 14 S. Ct. 857.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77, in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

The statute of New York of June 9, 1888, ch. 581, regulating the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state, whereby maximum charges were fixed for elevating, receiving, weighing, and discharging grain, when the business was carried on in a city containing 130,000 inhabitants or upwards imposing penalties for disregard of the provisions of the statute, is not invalid as a regulation of interstate commerce. The court said: "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state, of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn *v.* Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates

authority to make such requirements and regulations is to be referred to the general power of the state to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. It is a proper exercise of the police power of the state.[11]

Allowance to Shipper for Elevation of Grain.—The allowance by railroad companies of certain charges as elevator charges to terminal elevators on shipments of grain from points in the state to points without the state is an incident of interstate commerce, and the state supreme court has no jurisdiction to limit or control the same.[12]

§ 3910. Packing Houses.—An ordinance creating a packing house inspector, whose duty it is to inspect all meats shipped into the city or brought from outside the county, and requiring him to visit all packing houses daily and places of importers of meat stuff, and secure their bills of lading to determine whether the shimpents have been made in proper time, and whether cars containing such meat have been properly iced during transit, and imposing upon the importers an inspection charge, while it imposes no such charge on others engaged in like business, is invalid as an unlawful interference with interstate commerce.[13]

§ 3911. Wharves.—The regulation of wharves belongs prima facie, and in the first instance, to the state in which they are situated, subject to the power of congress to assume control when the power of the states is exercised in a manner incompatible with the interests of commerce.[14]

Regulation of Places for Landing.—A municipal ordinance prescribing places for the landing of different classes of vessels, and placing the matter under the control of a wharfmaster or other officer, whose duty it shall be to look after it, if a regulation of commerce at all, comes within that class in which the states may prescribe rules until congress assumes to do so.[15]

Wharfage.—A municipal corporation, owning improved wharves, piers, and other artificial means which it maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the commerce clause of the constitution of the United States

within the state, and other kindred laws." Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247, 12 S. Ct. 468.

The statute of North Dakota regulating grain warehouses and the weighing and handling of grain, providing that all elevators, warehouses, etc., in the state, erected and operated for the purpose of storing, handling, etc., grain for profit shall be deemed public warehouses, and providing that the person operating such public warehouse or elevator shall fine a bond with good and sufficient securities, conditioned for the faithful performance of duty as public warehousemen, and providing a maximum schedule rate of charges for storing and handling of grain, and providing that the grain shall be kept insured at the expense of the warehousemen for the benefit of the owner, is substantially similar to the statutes of the state of Illinois and New York regulating the affairs of grain warehouses and elevators within those states, and is not repugnant to the clause of the constitution of the United States, which confers upon congress power to regulate commerce with foreign nations and among the several states. Brass *v.* Stoeser, 153 U. S. 391, 38 L. Ed. 757, 14 S. Ct. 857.

11. Source of authority.—Cargill Co. *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423; Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247, 12 S. Ct. 468.

12. Allowance to shipper for elevation of grain.—State *v.* Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874.

13. Packing houses.—Armour & Co. *v.* City Council, 134 Ga. 178, 67 S. E. 417, 27 L. R. A., N. S., 676.

14. Of the general power of the state to regulate wharves.—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732. See, also, Morgan's, etc., Steamship Co. *v.* Louisiana Board, 118 U. S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325.

15. Regulation of places for landing.—Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169.

from charging and collecting from parties using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of the property.[16]

Reasonableness as Affected by the Existence of a Surplus and the Disposition of the Same.—Since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charge therefor, provided, always, that the charges are reasonable and not exorbitant.[17]

Rule as to Reasonableness Not Applicable to Private Wharves.—It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable, but a private wharf, that is, a wharf which the owner has construed and reserves for his private use, is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain. That such wharves may be had and owned, even on a navigable river, is not open to controversy.[18]

State Must Not Discriminate against Interstate Commerce in the Matter of Charges.—Wharfage fees must be exacted equally from all those who use the improved wharves, and a municipality can not, by exacting discriminatory fees, employ the property it thus holds for public use so as to hinder, obstruct, or burden interstate commerce in the interest of the wholly internal commerce of the state. Therefore an ordinance whereunder vessels laden with the products of other states are required to pay for the use of the public wharves of a city, fees which are not exacted from vessels landing thereat with the products of the state, is a regulation of interstate commerce in conflict with the power of congress over that subject.[19]

Wharfage Distinguished from Tonnage Duties.—There is a well-recognized distinction between tonnage duties, which the states are prohibited from levying without the consent of congress, and wharfage dues, properly so called, imposed in good faith and to the extent only of fair remuneration for wharf accommodations furnished for the convenience of trade and commerce. A duty of

16. **Wharfage; Power of state or city to exact.**—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. Ed. 690; Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732. See, also, Morgan's, etc., Steamship Co. *v.* Louisiana Board, 118 U. S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907.

There is no valid objection to the recovery from any vessel landing at a wharf or pier owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417.

17. **Effect of surplus and disposition of same.**—Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Morgan's, etc., Steamship Co. *v.* Louisiana Board, 118 U. S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907.

18. **Private wharves not within rule as to reasonableness.**—Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732, citing Dutton *v.* Strong (U. S.), 1 Black 23, 17 L. Ed. 29; Yates *v.* Milwaukee (U. S.), 10 Wall. 497, 19 L. Ed. 984.

19. **Discriminatory fees.**—Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754. See, also, Minnesota *v.* Barber, 136 U. S. 313, 34 L. Ed. 455, 10 S. Ct. 862.

A state can not by law authorize a municipal corporation to exact such wharfage as it may deem reasonable from vessels using certain designated wharves, and laden with articles not the products of the state, while vessels laden with such products of the state are exempted from any charge whatever. Such a statute, and an ordinance enacted by the corporation to carry it out, are void. They are a regulation of commerce. Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754.

tonnage is a charge for the privilege of entering, or trading, or lying in, or departing from, a port or harbor; wharfage is a charge against a vessel for the use of a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue, the other is a rent charged by the owner of the property for its temporary use.[20] If the charge imposed by the state law or ordinance is exacted merely by way of compensation for the use of wharves or other facilities afforded by the state or city, or as a return for services actually rendered, it is sustainable; but otherwise if it is imposed merely as a charge for the privilege of entering or trading or lying in or departing from a port or harbor.[21]

Power to Exact Wharfage Not to Be Used as a Subterfuge to Impose Tonnage Duty.—The rule here stated implies that the power to exact wharfage fees must be exercised in good faith; that it can not be used for the purpose of imposing, under the name of a wharfage charge, that which is in fact a mere tonnage duty.[22] Clearly, a city could not collect wharfage for the use of the unimproved share of the river, or for that which was not, in any fair business sense, a wharf.[23]

But Legislative or Municipal Intent Not Open to Inquiry.—But whether a charge imposed is a charge of wharfage, or a duty of tonnage, must be determined by the terms of the ordinance or regulation which imposes. An allegation that it is not real wharfage, but a duty of tonnage, in the name and under the pretext of wharfage, can not be received against the terms of the ordinance itself. This would open the door to an inquiry in every case of wharfage alleged to be unreasonable, which would lead to great inconvenience and confusion, since neither courts nor juries would have any practicable criterion by which to judge of the secret intent with which the charge was made, whether as wharfage or as a duty of tonnage. Such an inquiry, if allowed, would bring into question not only the intent of municipal, but of legislative bodies, in violation of the well-known rule that the legislative motives and intent are not open to judicial inquiry.[24]

20. Distinction between tonnage duties and wharfage.—Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688.

21. Steamship Co. *v.* Portwardens (U. S.), 6 Wall. 31, 18 L. Ed. 749; Peete *v.* Morgan (U. S.), 19 Wall. 581, 22 L. Ed. 201; Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Inman Steamship Co. *v.* Tinker, 94 U. S. 238, 24 L. Ed. 118; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. Ed. 690; Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Morgan's, etc., Steamship Co. *v.* Louisiana Board, 118 U. S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325.

22. Power not to be used as subterfuge to impose tonnage duties.—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. Ed. 690; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688.

23. No wharf, no wharfage.—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. Ed. 690.

24. Intent or motive not open to inquiry.—Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732.

The fact that exorbitant wharfage may have a similar effect as a burden upon commerce as a duty of tonnage has is not sufficient. If it is exorbitant, it is exorbitant wharfage, and not a duty upon tonnage; and the remedy for the one is different from the remedy for the other. The question whether it is the one or the other is not one of intent, but one of fact and law; of fact, as whether the charge is made for the use of a wharf, or for entering the port; of law, as whether according as the fact is shown to exist, it is wharfage or a duty of tonnage. The intent is not material, and is not traversable. Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732.

Objectionable Charge Void, though Not Proportioned According to Tonnage of Vessel.—When the constitution declares that "No state shall, without the consent of congress, lay any duty of tonnage;" and when congress, in § 4220 of the Revised States, declares that "No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the banks, whale, or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed, registered, or enrolled," they mean by the phrases, "duty of tonnage," and "tonnage tax or duty," a charge tax or duty, on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, the prohibition is not confined to that method of rating the charge. Therefore a charge which is otherwise objectionable as a tonnage duty, is none the less so because fixed in some other way than in proportion to the cubical capacity of the vessel.[25]

Remedy for Unreasonable Regulations.—It is within the power of the state to regulate the compensation for the use of wharves and piers; so as to prevent extortion, a power which is often very properly delegated to the local municipal authority.[26] So, also, while the statute authorizes the trustees to estab-

25. **Objectionable charge void, though not proportioned to tonnage.**—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Steamship Co. *v.* Portwardens (U. S.), 6 Wall. 31, 18 L. Ed. 749; State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370.

Wharfage charge not void because proportioned to tonnage.—On the other hand, the city having the right to compensation for the use of the improved wharf or landing which it has made, it is no objection to the law or ordinance fixing the amount of this compensation that it is measured by the size of the vessel, and that this size is ascertained by the tonnage of each vessel. Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688; Guy *v.* Baltimore, 100 U. S. 434, 25 L. Ed. 743; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907; Head Money Cases, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247.

By the Keokuk ordinance wharfage fees were charged whenever a steamboat should make fast to any part of the wharf of that city, or to any vessel, or other thing at or upon said wharf, or should receive or discharge any passengers or freight thereon, or should use any part of the wharf for the purpose of discharging, receiving, or landing any freight or passenger—the fees, in such cases, to be measured by the tonnage of the boat using the wharf. The unanimous judgment of the court was that the Keokuk ordinance was not repugnant to the constitution of the United States—that the wharfage fees collectible thereunder were by way of compensation to the city for the use of its property and were not duties, taxes, or burdens for the mere privilege of entering the port of Keokuk, or remaining in it, or departing from it. Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. Ed. 377. Accord: Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. Ed. 688.

And in Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732, speaking of a charge of wharfage according to the tonnage of a vessel, and a duty of tonnage prohibited by the constitution, the court said: "They are not the same thing; a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf." And again, "The fact that the rates (of wharfage) charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the constitution and the acts of congress." Citing Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169. See, also, Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313.

In Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417, the ordinance objected to was held invalid not on account of the provision graduating the charge in proportion to the tonnage, but because it undertook to impose levee duties "on all steamboats which shall moor or land in any part of the port of New Orleans;" it being in evidence that not more than one-tenth of the river front in the city of New Orleans had any wharf, and that vessels often landed at various places within the city where no wharfage facilities existed.

26. **Remedies; powers of states and state courts.**—Cannon *v.* New Orleans (U. S.), 20 Wall. 577, 22 L. Ed. 417.

lish the rates of wharfage, if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive, and an abuse of the power thus conferred, the courts could in some way appropriate relief.[27]

Powers of Federal Courts.—Wharfage, until congress shall pass some law to regulate it, is governed by local state laws. By those laws it is generally required to be reasonable, and by those laws its reasonableness must be judged. If it does not violate them, the courts of the United States can not interfere to prevent its exaction. If the charges are unreasonable, remedy must be sought by invoking the laws of the state, which can not be done in the federal courts when the jurisdiction of the court is rested upon the supposed unconstitutionality of the charges for wharfage and not on the citizenship of the parties. If the state laws furnish no remedy, in other words, if the charges are sanctioned by them, then it is for congress, and not for the federal courts, to regulate the matter and provide a proper remedy. Until congress has acted, the courts of the United States can not assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject.[28]

§ 3912. Pipe Lines.—Interstate commerce in natural gas, including the transportation of pipe lines, is national in character, and inaction of congress regarding it is conclusive that it intends that interstate commerce therein should be free, and laws of states and acts of its officers prohibiting or burdening it are unconstitutional and void.[29] Prohibiting the construction of pipe lines for nat-

27. Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169.

28. **Powers of federal courts.**—Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907; Olsen *v.* Smith, 195 U. S. 332, 49 L. Ed. 224, 25 S. Ct. 52; Thompson *v.* Darden, 198 U. S. 310, 49 L. Ed. 1064, 25 S. Ct. 660.

The city of Parkersburg, in West Virginia, built a wharf and established certain rates of wharfage which the P. & O. Transportation Co. complained of as extortionate, and as being merely a pretext for levying a duty of tonnage; the company thereupon filed a bill in the circuit court of the United States to restrain proceedings in a suit brought in the state court to collect the wharfage, and prayed that the wharfage ordinance might be declared void, and for other relief. Held: 1. That, as the ordinance on its face imposed charges of wharfage only, though these charges might be unreasonable and exorbitant, the court will not entertain an averment that they were not intended as wharfage, but as a duty of tonnage. An inquiry into the secret intent of the body imposing the charge is inadmissible; whether it is one thing or the other must be determined by the ordinance or regulation itself. 2. The ordinance in this case imposed certain rates of wharfage on vessels "That may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the city, for the purpose of discharging or receiving freight;" held, that the ordinance only intended to charge for the use of a wharf, and not for entering the port, or lying at anchor in the river. 3. Wharfage is a charge for the use of a wharf, made by the owner therefor by way of rent, or compensation; a duty of tonnage is a tax or duty charged for the privilege of entering, or loading or lying in, a port or harbor, and can only be imposed by the government. Whether a charge is wharfage or a duty of tonnage, is a question, not of intent, but of fact and law; of fact, whether it is imposed for the use of a wharf, or for the privilege of entering a port, of law, whether, according as the fact is, it is wharfage or a duty of tonnage. 5. That, although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations, for particular places, in the absence of congressional legislation on the subject, the regulation thereof properly belongs to the states in which they are situated. 6. That a suit will not lie in the circuit court of the United States for relief against exorbitant wharfage, as a case arising under the constitution or laws of the United States, even though it be alleged that the wharfage was intended as a duty of tonnage, the alleged intent not being traversable. Transportation Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732.

29. **Pipe lines.**—Haskell *v.* Cowham, 109 C. C. A. 235, 187 Fed. 403.

ural gas, or the transportation of the gas by such lines except by domestic corporations, whose charters shall provide that the gas shall only be transported between points in the state, and shall not be transported to, nor delivered to, any person or corporation engaged in transporting or furnishing gas to points outside of the state, and giving to such domestic corporations the exclusive right of eminent domain and the use of the highways, all of which is attempted by a statute of Alabama, unconstitutionally interferes with interstate commerce, and can not be justified as an exercise of the police power of the state to conserve its natural resources.[30] Neither a state nor its officers may prevent or unreasonably burden interstate commerce in natural gas by preventing the use of pipe lines to transport it across the highways of the state by exercise or refusal to exercise the police powers or the proprietary powers of the state over them.[31]

§ 3913. Levees.—The construction of a levee across a railroad's right of way under statutory authority, which could be constructed without interfering with the movements of complainant's trains, does not constitute an illegal interference with complainant as an interstate carrier of freight, passengers, and mail.[32]

§ 3914. Terminals and Stockyards.—Power to Prescribe Rates.—Conceding that the business of a stockyards company in handling live stock in transit from other states is so intimately related to interstate commerce which is transacted in its yards by other persons that congress might lawfully prescribe maximum charges for yarding, feeding, and caring for stock coming from other states, yet this power is not of such an exclusive character as to prevent the state from prescribing such rates, in the absence of any legislation on the subject by Congress.[33]

30. West *v.* Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716, 31 S. Ct. 564, 35 L. R. A., N. S., 1193, affirming decree Kansas Natural Gas Co. *v.* Haskell, 172 Fed. 545.

31. Haskell *v.* Cowham, 109 C. C. A. 235, 187 Fed. 403.

Laws Okl. 1907, c. 67, preventing all interstate commerce in natural gas by preventing the use of pipe lines across the highways of that state to transport such gas out of the state, is in violation of the interstate commerce clause of the constitution, and void. Haskell *v.* Cowham, 109 C. C. A. 235, 187 Fed. 403.

Acts of state officers to prevent an owner of natural gas from operating pipes to transport it out of the state across highways of the state will be enjoined. Haskell *v.* Cowham, 109 C. C. A. 235, 187 Fed. 403.

32. Levees.—St. Louis, etc., R. Co. *v.* Miller Levee Dist. No. 2, 197 Fed. 815.

A levee district having been expressly authorized by Act Ark. March 3, 1911 (Sp. & Priv. Laws 1911, p. 89), to construct certain levees along the banks of Red River, in M. County, the fact that, on account of the construction of such levees, the plaintiff railroad company, which had previously, at great expense, built a bridge across the river, may be compelled to change the same, at its own expense, in order to raise it above the new high-water mark resulting from the confinement of the waters by the levees, does not constitute an unlawful interference with interstate commerce. St. Louis, etc., R. Co. *v.* Miller Levee Dist. No. 2, 197 Fed. 815.

33. Terminals and stockyards.—Cotting *v.* Kansas City Stockyards Co., 82 Fed. 850, reversed in Cotting *v.* Godard, 22 S. Ct. 30, 183 U. S. 79, 46 L. Ed. 92.

Neither the act of congress concerning the unloading of live stock for feeding, watering, and resting (Rev. St. §§ 4386-4388), nor the act of May 29, 1884, to prevent the exportation of diseased cattle (23 Stat. 31), nor the act of March 3, 1891, in reference to the inspection of cattle, sheep, and hogs which are the subjects of interstate commerce, etc. (26 Stat. 1089), are of such a nature as to show that congress has assumed the exclusive regulation of interstate commerce in live stock, to such an extent as will prevent a state legislation from prescribing reasonable maximum charges and other regulations in respect to the yarding, feeding, care, and sale of stock by a stockyards company. Cotting *v.* Kansas City Stockyards Co., 82 Fed. 839.

A stockyard business, located in a large city, at the junction of many railroad lines, which furnishes the only proper facilities for the unloading, resting, and feeding of live stock in transit, and for the sale of cattle within said city, is affected with a public use, so as to be subject to legislative control, and the proper legislative body may prescribe

Yards Located in Different States.—The business of a stockyards company is not "interstate commerce," so as to be exempt from state regulation, merely because its yards are located in two states, and it does business in both, though, as to stock billed from one state to another, its business may be interstate commerce, and to that extent exempt from state regulation.[34] The fact that the yards of a stockyards company are located on both sides of a line between two states, so that the stock may pass to and fro over the state line, in the yards, in feeding, handling, etc., does not of itself impress the traffic with the character of interstate commerce.[35]

Rules and Regulations.—The business of stockyards is of such a public nature as to justify a state legislature in imposing rules and regulations for its government.[36]

Feed and Water.—The Kansas statute of March 3, 1897, regulating stock yards, fixing compensation for yarding, feeding, and watering live stock, and fixing a limit for the prices of feed, etc., is not in violation of any provision of the federal constitution, as applied to the Kansas City Stockyards Company.[37]

Where shipments both intrastate and interstate.—The business of a stockyards company in receiving, yarding, and feeding live stock, and making sales thereof, for the owners, though performing these services for a mixed interstate and local traffic, is such an incident to commerce as may be subject to restriction in its charges by state legislation.[38]

Shipment for Sale at Yards.—Live stock shipped from other states to the stock yards at Kansas City, to be either sold there, or, if the market is unsatisfactory, to be shipped to other markets, is a subject of interstate commerce, and remains such until it reaches its destination, and is sold and mingled with the general mass of property of the state.[39]

Under Interstate Commerce Act.—The interstate commerce law applies only to common carriers, and its provisions in respect to reasonable and just charges are not applicable to the business of a stockyards company which neither operates nor uses any railway, motive power, or rolling stock, nor otherwise engages in any transportation.[40]

Compelling Company to Admit Railroad Privileges and Benefits.—A regulation made by state railroad commissioners, requiring a terminal company organized under the laws of a state, and operating a common passenger terminal station wholly within a state for the purpose of furnishing terminal facilities to railroad common carriers entering therein, to admit a railroad company operating a railroad from a point in that state to a point in another state to the privileges and benefits of its said passenger station or terminal, and fixing just and reasonable rates for the uses and privileges of such terminal, to be paid by such railroad company, is not an unconstitutional interference with interstate commerce.[41]

§ 3915. Navigable Waters.—A state has plenary power, in the absence of congressional action, to regulate navigable streams entirely within its borders, subject to the right of congress, under the commerce clause of the federal con-

a maximum rate of compensation for the care and handling of stock thereat. Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 850, reversed in Cotting *v.* Godard, 22 S. Ct. 30, 183 U. S. 79, 46 L. Ed. 92.

34. **Yards located in different states.**—Cotting *v.* Kansas City Stock Yards Co., 79 Fed. 679.

35. Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 839.

36. **Rules and regulations.**—Cotting *v.* Kansas City Stock Yards Co., 79 Fed. 679.

37. **Feed and water.**—Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 839.

38. **Where shipments both intrastate and interstate.**—Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 839.

39. **Shipment for sale at yards.**—Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 839.

40. **Under Interstate Commerce Act.**—Cotting *v.* Kansas City Stock Yards Co., 82 Fed. 839.

41. **Compelling company to admit railroad privileges and benefits.**—State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

stitution, thereafter to assume entire control, and to abate any erections which may have been made, and prevent others from being made.[42]

§ 3916. Connecting Carriers.—Facilities for Interchange of Traffic.—The requirement of track connections and facilities for the interchange of cars and traffic at railroad intersections, does not constitute an unconstitutional regulation of commerce.[43] Where a railroad company chartered by the state, one of its purposes being to transport intrastate commerce, was ordered by the state railroad commission to join in the construction of a connection with an intersecting railroad, under an act of Indiana, providing that the act authorizing the commission to order such connections should apply only to the transportation of passengers and property between points within the state, and to switching, delivering, storing, and handling of such property, the order was not void as a regulation of interstate commerce, the subject being one on which congress had not expressly acted.[44] A state statute requiring all railroads to switch for a reasonable compensation, and to deliver without discrimination or unreasonable delay any freight or cars, loaded or empty, destined to any point on their tracks or connecting lines, includes interstate as well as intrastate commerce, and makes exchange of all kinds of freight mandatory on connecting railroads and is invalid as inter-

42. **Navigable waters.**—In re Southern Wisconsin Power Co., 140 Wis. 245, 122 N. W. 801; S. C., 140 Wis. 265, 122 N. W. 809.

In the absence of congressional legislation on the subject, a state statute, authorizing a dam across a navigable river wholly within the state, is constitutional; a direct statute of the United States being required in order that such erections may be declared an invalid obstruction and nuisance. In re Southern Wisconsin Power Co., 140 Wis. 245, 122 N. W. 801; S. C., 140 Wis. 165, 122 N. W. 809.

43. **As to connecting carriers.**—Gen. Laws Minn. 1895, c. 91, § 3. Judgment, Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389, affirmed in Wisconsin, etc., R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115.

Under Pub. Acts 1907, No. 312, § 7, subd. "b," which provides that, where it is practicable, the railroad commission created may require railroads to interchange cars, freight, and passenger traffic, and may require track connection upon such terms as it may determine, and which, by § 26, provides that any railroad being dissatisfied with any order of the commission fixing any regulations may within 60 days commence an action against the commission to vacate such order as unreasonable, an order regularly entered by the Commission, requiring two railroads to connect their tracks at such point in a certain village as they should agree upon as most desirable, and thereafter interchange cars and passenger traffic, does not violate the constitution of the United States art. 1, § 8, vesting in congress the power to regulate interstate commerce. Michigan R. Comm. *v.* Michigan Cent. R. Co., 168 Mich. 230, 132 N. W. 1068.

A state Code provides that: When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon delivery to the next in good order, has been lost, damaged or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight and inform said applicant in writing, when, where, how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established. If the carrier to which application is made shall fail to trace said freight and give said information in writing, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line. This provision does not constitute a regulation of interstate commerce beyond the power of the state. Central, etc., R. Co. *v.* Murphey, 43 S. E. 265, 116 Ga. 863, 60 L. R. A. 817, reversed in 25 S. Ct. 218, 196 U. S. 194, 49 L. Ed. 444.

The provision in the constitution of Kentucky requiring interchange and switching of cars between connecting carriers in the transfer and delivery of freight, is not invalid as an interference with interstate commerce, its effect on such commerce being purely incidental and indirect. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 97 S. W. 778, 30 Ky. L. Rep. 18.

44. Burns' Ann. St. 1908, § 5551; Pittsburgh, etc., R. Co. *v.* Hunt (Ind.), 86 N. E. 328.

fering with interstate commerce, and an order of the state railroad commission to enforce the provision is invalid.[45]

Delivery to Connecting Carriers.—A state is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the state, where the shipment was received in another state, and is, therefore, a subject of interstate commerce.[46]

Limiting Liability to Loss on Carrier's Own Line.—Rev. St. Mo. 1889, c. 26, § 944, provides that "whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass." The supreme court of the state construed this statute as not preventing a carrier engaged in interstate commerce traffic, receiving goods for shipment, and issuing a through bill of lading therefor, from limiting its liability, either as to carriage or for negligence, to its own lines, by contract, but that its purpose was to regulate the form in which such contract should be expressed, so as to require the carrier to embody the limitation directly, and in unambiguous terms, in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract in order to reach a proper understanding of its meaning. Held that, as thus construed, the statute was not unconstitutional, as imposing a burden on interstate commerce, it being within the power of the state to legislate as to the form of contracts for interstate commerce carriage.[47] A state statute declaring that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point, unless otherwise provided by a written contract signed by the shipper, merely establishes a rule of evidence, and does not restrict the right of the carrier to limit his obligation by contract, and hence is not, as applied to interstate commerce, a regulation thereof so as to be void under the federal constitution.[48] A stipulation as to carriage of freight within the state, limiting the liability of a carrier to its own line, has no application to interstate shipments.[49] The statute prohibiting common carriers from limiting their liability by stipulations in a bill of lading is valid, as applied to contracts for interstate transportation of property.[50] A state statute prohibiting common carriers from limiting their common-law liability by contract is not in itself a regulation of interstate commerce, when applied to an interstate shipment, which will enable the carrier to so limit its liability on goods shipped to a point without the state.[51] A statute providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any loss, damage, or injury to the property caused by its negligence or the negligence of any other carrier, when construed as depriving a carrier of the right to contract for a limitation of its liability beyond its own line, is not in conflict with the constitution of the United States, authorizing Congress to regulate interstate commerce.[52]

45. Southern Pac. Co. *v.* Campbell, 189 Fed. 696.

46. Delivery to connecting carriers.—Central Stock Yards Co. *v.* Louisville, etc., R. Co., 55 C. C. A. 63, 118 Fed. 113, 63 L. R. A. 213, affirmed in 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

47. Limiting liability to loss on carrier's own line.—Missouri, etc., R. Co. *v.* McCann, 19 S. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093.

48. Judgment, 24 S. E. 261, 92 Va. 670, affirmed in Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 18 S. Ct. 335, 169 U. S. 311, 42 L. Ed. 759.

49. Dodge *v.* Chicago, etc., R. Co., 111 Minn. 123, 126 N. W. 627.

50. Galveston, etc., R. Co. *v.* Fales, 77 S. W. 234, 33 Tex. Civ. App. 457.

51. Pittman *v.* Pacific Exp. Co., 59 S. W. 949, 24 Tex. Civ. App. 595.

52. Western Sash, etc., Co. *v.* Chicago, etc., R. Co., 76 S. W. 998, 177 Mo. 641.

Liability of Initial Carrier.—A state statute making the initial carrier liable for loss of goods shipped over its line and connecting lines unless a receipt in writing is produced from the connecting carrier, is not unconstitutional, as seeking to impose any burden on interstate commerce.[53]

Duty to Trace Freight.—The imposition upon the initial or any connecting carrier as a condition of availing itself of a valid contract of exemption from liability beyond its own line, of the duty of tracing the freight, and informing the shipper, in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official positions, if any, by whom the truth of the facts set out in the information can be established, is, when applied to an interstate shipment, a violation of the commerce clause of the federal constitution.[54]

Liability as Agent for Other Carrier.—A state statute which makes each carrier the agent of its connecting carrier from whom it receives freight, and makes each liable for any freight lost, damaged, or destroyed by the connecting carrier, is an infringement of the interstate commerce clause of the federal constitution.[55]

Where Through Rate Is Aggregate of Local Rates.—Where freight is received to be transported over a carrier's own and a connecting line to a point beyond a state, and the rate charged is the aggregate of the local rates of the two lines, and the connecting line had previously adopted and filed with the interstate commerce commission a tariff under which its proportion of the charge on the through shipment was collected, and there is a claim that the charge is excessive, the shipper's redress must be through the interstate commerce commission and not in a state court.[56]

Platforms and Stations.—A state law requiring all railroads at points of intersection with other railroads to unite therewith in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage, and freight when the same shall be ordered by the Railroad Commission, etc., affords added facilities for all kinds of commerce over the routes of intersecting roads, and the requirement that such railroads shall connect their lines is not a regulation of interstate commerce.[57]

53. Liability of initial carrier.—Jonesville Mfg. Co. *v.* Southern Railway, 77 S. C. 480, 58 S. E. 422.

54. Duty to trace freight.—Judgment, 43 S. E. 265, 116 Ga. 863, 60 L. R. A. 817, reversed in Central, etc., R. Co. *v.* Murphey, 25 S. Ct. 218, 196 U. S. 194, 49 L. Ed. 444.

Civ. Code 1902, vol. 1, §§ 1710, 2176, and Laws 1903, Act No. 1 (24 St. at Large, p. 1), requiring a carrier to trace freight shipped over it or a connecting carrier, and making the carrier liable for shipments over it and connecting lines unless it produces a receipt from a connecting carrier, and making a bill of lading prima facie evidence of liability for loss or damage to goods in transit, are not regulations of interstate commerce and unconstitutional. Skipper *v.* Seaboard Air Line Railway, 75 S. C. 276, 55 S. E. 454, 7 L. R. A., N. S., 388, 9 Am. & Eng. Ann. Cas. 808.

55. Liability as agent for other carrier.—Venning *v.* Atlantic, etc., R. Co., 78 S. C. 42, 58 S. E. 983, 12 L. R. A., N. S., 1217.

Where it was not shown that the routing of freight shipped over several roads so as to take it out of the state for a part of the route was usual or necessary, it would be treated as an intrastate shipment, so that the agent of the terminal carrier was the agent of the initial carrier for the purpose of receiving a claim for loss filed with it under Act May 13, 1903 (24 St. at Large, p. 1). Harter *v.* Charleston, etc., R. Co., 85 S. C. 192, 67 S. E. 290.

The Act of May 13, 1903, of South Carolina making each carrier the agent of its connecting carrier from whom it receives freight, and liable for freight lost, damaged, or destroyed by such connecting carrier, is invalid, as violation of the interstate commerce clause of the federal constitution. Winslow Bros. & Co. *v.* Atlantic, etc., R. Co., 79 S. C. 344, 60 S. E. 709.

56. Where through rate is aggregate of local rates.—Missouri, etc., R. Co. *v.* New Era Milling Co., 80 Kan. 141, 101 Pac. 1011.

57. Platforms and stations.—Southern Pac. Co. *v.* Campbell, 189 Fed. 696.

§ 3917. Particular Articles of Commerce.—Fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between state and state, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress and the decisions of courts.[58] And congress, under its general power to regulate interstate and foreign commerce, may prescribe what article of merchandise shall be admitted and what excluded; and may, therefore, admit or not, as it shall deem best, the importation of ardent spirits,[59] and where the laws of congress authorize their importation, no state has a right to prohibit it.[60] By its omission to enact an express statute on the subject, congress is considered to intend that the regulation of interstate commerce, in intoxicating liquors as well as other articles of commerce, shall be free from the regulation and interference of the different states.[61] Hence, a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the interstate commerce clause of the constitution of the United States, and void.[62] Yet, in the exercise of its police

58. **Intoxicating liquors — Article of commerce.**—License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; Mugler *v.* Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Lyng *v.* Michigan, 135 U. S. 161, 34 L. Ed. 150, 10 S. Ct. 725; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865; Rhodes *v.* Iowa, 170 U. S. 412, 42 L. Ed. 1088, 18 S. Ct. 664; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Scott *v.* Donald, 165 U. S. 58, 41 L. Ed. 632, 17 S. Ct. 265; Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132; Vance *v.* Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674; Adams Exp. Co. *v.* Commonwealth, 206 U. S. 129, 51 L. Ed. 987, 27 S. Ct. 606.

A state statute prohibiting carriers from carrying intoxicating liquors into any county or district therein where the sale of such liquors is prohibited by law, as applied to shipments from other states, is void as an attempted regulation of interstate commerce, and affords no justification for the refusal of a railroad company, although a corporation of such state, to receive and carry such shipments. Louisville, etc., R. Co. *v.* Cook Brewing Co., 96 C. C. A. 322, 172 Fed. 117, 40 L. R. A., N. S., 798.

59. **Power of congress exclusive.**—License Cases (U. S.), 5 How. 504, 12 L. Ed. 256.

The right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and, hence, a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the constitution of the United States. Vance *v.* Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674.

The interstate and foreign traffic in intoxicating liquors is one requiring uniformity of regulation by national legislation. Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454.

60. License Cases (U. S.), 5 How. 504, 12 L. Ed. 256.

61. **Nonaction of congress.**—Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062. See, also, License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132.

62. **State can not regulate.**—Vance *v.* Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674; Adams Exp. Co. *v.* Commonwealth, 206 U. S. 129, 51 L. Ed. 987, 27 S. Ct. 606.

A state law is void if it merely regulates the introduction of intoxicating liquors, although it does not amount to a prohibition thereof. Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454.

Whenever a law of a state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to be an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681, followed in Lyng *v.* Michigan, 135 U. S. 161, 34 L. Ed. 150, 10 S. Ct. 725.

In Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062, it was held that the statutes of Iowa, forbidding common carriers from bringing intoxicating liquors into the state of Iowa from another state or territory without obtaining a certificate required by the laws of Iowa, was void, as being a regulation of commerce between the states,

power, for the protection of the health and morals of its citizens, a state may refuse a market for intoxicating liquors,[63] and may pass such laws in regard thereto as do not control or interfere with the power possessed by congress to regulate interstate commerce.[64] But, as long as a state continues to recognize intoxicating liquors as lawful articles of consumption and commerce, it is the duty of the federal courts to afford such articles of commerce the same protection as is given to other articles.[65]

§§ 3918-3923. Particular Regulations—§ 3918. Charges.—A state has no power by statute to regulate rates upon traffic between different states.[66] No common carrier doing an interstate business derives its right to charge tolls or fares for interstate transportation or for services therefor or in connection therewith from the state, but from the federal government; hence the state has no power or authority to forfeit such right or franchise, or to oust any such common carrier from the exercise of any such right.[67]

Reshipment to Point within State.—Where a shipper shipped goods from a point without the state to a point within the state, and from that point without unloading or opening the car to another point within the state to which he originally intended to ship them, the entire shipment is an interstate shipment, so that he is not entitled to the rate fixed by the state railway commission between

and, therefore, that those laws did not justify a common carrier in Illinois from refusing to receive and transport intoxicating liquors consigned to a point within the state of Iowa. See American Exp. Co. *v.* Iowa, 196 U. S. 133, 49 L. Ed. 417, 25 S. Ct. 182. See, also, Norfolk, etc., R. Co. *v.* Sims, 191 U. S. 441, 48 L. Ed. 254, 24 S. Ct. 151; O'Neil *v.* Vermont, 144 U. S. 323, 36 L. Ed. 450, 12 S. Ct. 693; Lyng *v.* Michigan, 135 U. S. 161, 34 L. Ed. 150, 10 S. Ct. 725; Rhodes *v.* Iowa, 170 U. S. 412, 42 L. Ed. 1088, 18 S. Ct. 664; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 S. Ct. 767; Scott *v.* Donald, 165 U. S. 58, 41 L. Ed. 632, 17 S. Ct. 265; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 45 L. Ed. 847, 21 S. Ct. 603; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722.

63. Power of state under police power.—License Cases (U. S.), 5 How. 504, 12 L. Ed. 256. But see Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681.

64. Power of states.—Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 S. Ct. 132; Mugler *v.* Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; Thomas *v.* Kansas, 205 U. S. 535, 51 L. Ed. 919, 27 S. Ct. 789; Walling *v.* People, 116 U. S. 446, 29 L. Ed. 691, 6 S. Ct. 454; Emert *v.* Missouri, 156 U. S. 296, 39 L. Ed. 430, 15 S. Ct. 367; Bartemeyer *v.* Iowa (U. S.), 18 Wall. 129, 21 L. Ed. 929; Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. Ed. 989; License Cases (U. S.), 5 How. 504, 12 L. Ed. 256; Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 S. Ct. 681; Lyng *v.* Michigan, 135 U. S. 161, 34 L. Ed. 150, 10 S. Ct. 725; Ambrosini *v.* United States, 187 U. S. 1, 47 L. Ed. 49, 23 S. Ct. 1; Matter of Heff, 197 U. S. 488, 49 L. Ed. 848, 25 S. Ct. 506; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865; Vance *v.* Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674.

65. Recognized as article of commerce by state.—When a state recognize the manufacture, sale and use of intoxicating liquors as lawful, it can not discriminate against the bringing of such articles in, and importing them from other states; such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states. Scott *v.* Donald, 165 U. S. 58, 41 L. Ed. 632, 17 S. Ct. 265.

By permitting the manufacture of intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes, the law of Iowa does not recognize such liquors legitimate articles of commerce for all purposes. Kidd *v.* Pearson, 128 U. S. 18, 32 L. Ed. 346, 9 S. Ct. 6.

66. Particular regulations.—Sheldon *v.* Wabash R. Co., 105 Fed. 785.

67. Crow *v.* Atchison, etc., R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761; Attorney General *v.* St. Louis, etc., R. Co., 176 Mo. 718, 75 S. W. 888; Attorney General *v.* Missouri Pac. R. Co., 176 Mo. 721, 75 S. W. 888.

Code 1887, § 1215, in so far as it undertakes to fix the rate of charges to be received within the state by common carriers engaged in interstate commerce, violates the federal constitution (article 1, § 8, cl. 3), which gives to congress power to regulate commerce among the several states. Southern Exp. Co. *v.* Goldberg, 44 S. E. 893, 101 Va. 619, 62 L. R. A. 669.

the points within the state, especially in view of the provision of the federal Interstate Commerce Act, making it unlawful for any carrier to prevent by carriage in different cars or by other means, the carriage of freights from being continuous, unless the interruption was for some necessary purpose and not intended to evade the provisions of the act.[68]

§ 3919. Discrimination.—Any state statute which in its direct result regulates the interstate transportation of a single individual carrier violates the commerce clause of the United States constitution.[69] Compelling a carrier by mandamus to discharge its common-law duty to treat all shippers alike by resuming the transfer of cars loaded and unloaded between the line of a connecting carrier and the flour mill and elevator of a particular shipper is not beyond the power of the state court, at least, until congress or the interstate commerce commission takes specific action, although both carriers are engaged in interstate commerce, and three-fifths of the output of the mill are shipped out of the state.[70]

§ 3920. Bills of Lading.—Transfer of Bills of Lading.—A state statute, providing that bills of lading may be transferred in writing thereon and the transferee shall be deemed the owner of the goods specified therein and no goods shall be delivered except on surrender of bills of lading, and, making a violation of the preceding section a criminal offense and authorizing a person aggrieved by a violation to recover the damages sustained, are not, when applied to interstate traffic, in conflict with the commerce clause of the federal constitution, and are valid, in the absence of congressional legislation on the subject; the object of the statute being to enforce the existing duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof.[71]

Statute Making Recitals Conclusive.—A statute, making specifications of weights in bills of lading issued by railroads conclusive is not unconstitutional, as assuming to regulate commerce between the states.[72]

False Billing of Goods.—A code provision, punishing the carriage and transportation of liquors under any other name than the proper name, is not in violation of the interstate commerce law as applied to the carriage and transportation of liquors, it not applying to liquor transported from another state into the state for private use.[73]

Conclusiveness of Bill.—A state law providing that every bill of lading acknowledging the receipt of property for transportation shall be conclusive evidence in the hands of a bona fide holder, as against the carrier issuing it, that the property had been received, is not invalid as a regulation of interstate commerce.[74]

Uniform Bills of Lading.—Uniform Bills of Lading Act, providing what effect domestic indorsements shall have on foreign bills of lading, is not an interference with interstate commerce, in violation of the constitution of the United States, art. 1, § 8.[75]

§ 3921. Description of Goods.—A statute requiring all veal shipped to have annexed thereto a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping, and the destination and age of

68. **Reshipment to point within state.**—Porter *v.* St. Louis, etc., R. Co., 78 Ark. 182, 95 S. W. 453.

69. **Discrimination.**—Louisville, etc., R. Co. *v.* Eubank, 22 S. Ct. 277, 184 U. S. 27, 46 L. Ed. 416.

70. Judgment, Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72, affirmed in 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214.

71. **Bills of lading.**—Arkansas, etc., R. Co. *v.* German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160.

72. **Statute making recitals conclusive.**—Missouri, etc., R. Co. *v.* Simmons, 64 Kan. 802, 68 Pac. 653, 91 Am. St. Rep. 248, 57 L. R. A. 765.

73. **False billing of goods.**—State *v.* Moody, 70 S. C. 56, 49 S. E. 8.

74. **Conclusiveness of bill.**—Yazoo, etc., R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805, 22 L. R. A., N. S., 821.

75. **Uniform bills of lading.**—Baker Co. *v.* Brown, 214 Mass. 196, 100 N. E. 1025.

the calf, is not violative of the constitution of the United States, conferring on congress power to regulate commerce among the several states, as the prohibition against shipping without a tag, though broad enough to apply to veal intended to be shipped to another state, does not interfere with the regulation of interstate commerce.[76]

§ 3922. Disposal of Freight Refused by Consignee.—Congress having passed no law regulating the disposition of freight shipped from a point without a state to a consignee within a state, where such consignee declines to receive the freight, and the shipper refuses to give directions for its disposition or assume further control over the same, a state statute authorizing a carrier, warehouseman, etc., after the expiration of six months to sell the freight on twenty days' notice after advertising, etc., was not in violation of the commerce clause of the federal constitution.[77]

§ 3923. Reshipment of Goods.—The fact that the owner of merchandise offered a carrier for transportation from one point to another in the same state intends to have it further transported by a second carrier into another state, does not make such first transportation interstate commerce rather than intrastate commerce, even though the first carrier may be informed of the ultimate destination, so as to deprive such first transportation of the protection of rule 36 of the railroad commission of Georgia, requiring carriers in the conduct of their intrastate business to afford all persons equal facilities without unjust discrimination.[78]

§ 3924. Regulation of Relation of Consignor and Consignee.—The Interstate Commerce Act in no way attempts to regulate or change the law of Illinois as to the relation of a consignor and consignee in interstate shipments. Until congress shall exercise its power in this respect, the law of the state, whether common or statutory, will govern. It is only a direct regulation of interstate commerce by the states, not a regulation incidentally affecting, but not directly burdening it, that is prohibited even in the absence of congressional legislation.[79]

§§ 3925-3937. As to Remedies—§ 3925. Prerequisites to Bringing Suit.—A state law which provides that no foreign corporation doing business in the state shall maintain an action in any of the courts thereof without filing certain statements with the secretary of state, does not violate the commerce clause of the federal constitution, even when applied to corporations engaged solely in interstate commerce.[80]

76. **Description of goods.**—Laws 1902, p. 59, c. 30, § 70f. Judgment, 89 N. Y. S. 709, 44 Misc. Rep. 12, affirmed in People *v.* Bishopp, 94 N. Y. S. 773, 106 App. Div. 266.

Laws 1902, p. 59, c. 30, §§ 70e, 70f, requiring carcasses of calves shipped in the state to be tagged, is not violative of the interstate commerce provisions of the federal constitution. People *v.* Bishopp, 89 N. Y. S. 709, 44 Misc. Rep. 12, affirmed in 94 N. Y. S. 773, 106 App. Div. 266.

77. **Disposal of freight refused by consignee.**—St. Louis, etc., R. Co. *v.* Arkansas, etc., Grain Co., 42 Tex. Civ. App. 125, 93 S. W. 656.

78. **Reshipment of goods.**—Augusta Brokerage Co. *v.* Central, etc., R. Co., 5 Ga. App. 187, 62 S. E. 996.

The intention of the consignee as to the future disposition of his property by shipping it over another line under a new bill of lading into another state can not change an intrastate shipment to an interstate shipment so as to deprive it of the protection of rule 36 of the railroad commission of Georgia, requiring carriers in the conduct of their intrastate business to afford all persons equal facilities without unjust discrimination. Augusta Brokerage Co. *v.* Central, etc., R. Co., 5 Ga. App. 187, 62 S. E. 996.

79. **Regulation of relation of consignor and consignee.**—Plaff *v.* Pacific Exp. Co., 159 Ill. App. 493, judgment affirmed in 95 N. E. 1089.

80. **Prerequisites to bringing suit.** — Deere Plow Co. *v.* Wyland, 76 Pac. 863, 69 Kan. 255, 2 Am. & Eng. Ann. Cas. 304.

§ 3926. Jurisdiction and Venue of Suits.—The Act of March 13, 1905, of Texas prescribes the parties to, and venue of, suits against railroad corporations operating within the state, or having an agent or representative therein, and provides that whenever freight has been transported by two or more such corporations, or partly by one or more of them, suit for damages or loss, or any clause of action arising out of such carriage, may be brought against any one or all of the carriers in any court of competent jurisdiction in any county in which either operates or does business, or has an agent or representative. Such act was the proper exercise of the state's police power, and was not invalid as to an interstate carrier, as imposing burdens on interstate commerce greater than those imposed on commerce within the state, and as amounting to an infringement on the power of congress to regulate interstate commerce.[81] The Act of 1905 of Texas regulating the venue of suits against common carriers was a proper exercise of the state's police power, and was not invalid as to interstate carriers, in that it imposed such burden on interstate commerce as distinguished from commerce within the state as amounts to an infringement upon the power of congress to regulate interstate commerce.[82]

§ 3927. Parties to Suits.—The Act of March 13, 1905, of Texas prescribes the parties to, and venue of, suits against railroad corporations operating within the state, or having an agent or representative therein, and provides that whenever freight has been transported by two or more such corporations, or partly by one or more of them, suit for damages or loss, or any cause of action arising out of such carriage, may be brought against any one or all of the carriers in any court of competent jurisdiction in any county in which either operates or does business, or has an agent or representative. Such act was not unconstitutional as a discriminatory burden on interstate commerce.[83]

§ 3928. Summons and Process.—A state law which provides that all corporations carrying on business in a state shall have one or more known places of business in the state, and an authorized agent thereat upon whom process can be served, and making it unlawful for such corporation to carry on any business in the state without complying with the requirements of the section, and filing a statement with the secretary of state, etc., is void, in so far as it affects steamship companies engaged in interstate traffic, because in conflict with the constitution of the United States providing that congress shall have the exclusive power to regulate commerce among the several states.[84]

§ 3929. Evidence.—A state law giving a right of action for damages to persons injured by the communication of Texas fever to their cattle, and prescribing a rule of evidence in certain cases, is not a regulation of interstate commerce, so as to be void under the federal constitution.[85]

§ 3930. Proceeding by Attachment and Garnishment.—A railroad car, loaded with freight from another state in West Virginia and to be returned loaded

81. **Jurisdiction and venue of suits.**—St. Louis, etc., R. Co. *v.* Wester (Tex. Civ. App.), 96 S. W. 769.

82. St. Louis, etc., R. Co. *v.* Boshear (Tex. Civ. App.), 108 S. W. 1032, judgment affirmed in 113 S. W. 6.

83. **Parties to suits.**—St. Louis, etc., R. Co. *v.* Moon, 47 Tex. Civ. App. 209, 103 S. W. 1176.

The Act of March 13, 1905, of Texas, providing that when freight has been transported by two or more railroad corporations operating within the state or having an agent therein, or partly by one or more of them, suit for damages may be brought against any one or all of the carriers in any court of competent jurisdiction in any county in which either does business or has an agent, is not invalid as to an interstate carrier as imposing burdens on interstate commerce. Texarkana, etc., R. Co. *v.* Shivel (Tex. Civ. App.), 114 S. W. 196.

84. **Summons and process.**—Ryman Steamboat Line Co. *v.* Commonwealth, 101 S. W. 403, 30 Ky. L. Rep. 1276, 10 L. R. A., N. S., 1187.

85. **Evidence.**—Judgment, 44 Pac. 632, 56 Kan. 694, affirmed in Missouri, etc., R. Co. *v.* Haber, 18 S. Ct. 488, 169 U. S. 613, 42 L. Ed. 878.

to the former state, can not be levied on under an attachment in West Virginia; nor will such railroad company, having such cars in its possession, be liable to garnishment, by reason of such possession, because of the interstate commerce clause of the constitution.[86] Where a railroad company of a state received from a connecting railroad company of another state a railroad car loaded with freight, consigned from a point in another state to a point in the first-named state, under a prevailing custom among railroads, and under a contract between the two roads at interest that, instead of unloading and reloading at the point of intersection outside of the first-named state, the domestic company, upon payment for the use, should have the right to bring the foreign car loaded into the state and to the point of destination, there to be unloaded and afterwards reloaded with freight, and then returned, in the direction from which it came, to a point beyond the limits of the state, such car, while in the state, is not exempt from attachment sought to be executed by service of summons of garnishment for the collection of a debt alleged to be due by the owner, upon the ground that the impounding of the car is such an interference with interstate commerce as to be violative of the constitution of the United States.[87]

Interstate Commerce Incidentally Affected.—The fact that a creditor of a foreign railroad, in the prosecution of his rights to collect a debt by attachment, may, by levy and sale of an empty and idle freight car of the debtor, incidentally affect future interstate commerce, will not render such proceeding illegal.[88]

86. Proceeding by attachment and garnishment.—Wall *v.* Norfolk, etc., R. Co., 44 S. E. 294, 52 W. Va. 485, 64 L. R. A. 501, 94 Am. St. Rep. 948.

Cars owned by a steam railroad company and delivered by it to other companies, loaded with freight, to be used in the transportation of such freight over their lines to points of destination in other states, and then returned within a reasonable time, either loaded or empty, to the owner in the state where received, pursuant to agreements between the companies for the continuous carriage of interstate shipments of freight, as authorized by Rev. St., § 5258 [U. S. Comp. St. 1901, p. 3564], and in conformity to the policy of the statutes regulating interstate commerce, are, until their return to the owner, instruments of interstate commerce, and are not subject to attachment under the laws of a state into which they may be carried by such other companies. Davis *v.* Cleveland, etc., R. Co., 146 Fed. 403.

Pub. St. 1901, c. 220, §§ 1, 2, making all property liable to be taken in execution, subject to attachment, and defining exempt property is valid, and an attachment of a freight car of a railroad not in actual use does not directly affect interstate commerce. De Rochemont *v.* New York, etc., Railroad, 75 N. H. 158, 71 Atl. 868, 29 L. R. A., N. S., 529.

Rev. St. U. S., § 5258 (U. S. Comp. St. 1901, p. 2564), authorizing railroads to carry freight and property on their way from any state to another state, and to connect with roads of other states so as to form a continuous line for the transportation of the same to the place of destination, gives railroads the right to engage in interstate business, and to become jointly interested with roads in other states in interstate business originating on their lines; and a foreign railroad contracting with a domestic railroad for the through shipment of cars, stands on the same footing as the domestic railroad, and the statute does not forbid the attachment of a car of the foreign railroad when in the state and not in actual use. De Rochemont *v.* New York, etc., Railroad, 75 N. H. 158, 71 Atl. 868, 29 L. R. A., N. S., 529.

The object of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), forbidding railroads from giving preferences to persons or places, etc., is to compel railroads to carry for all on equal terms and for a fair price, without unnecessary delay, and the act is not in conflict with a state statute permitting the attachment of freight cars when not in actual use. De Rochemont *v.* New York, etc., Railroad, 75 N. H. 158, 71 Atl. 868, 29 L. R. A., N. S., 529.

Sequestration of a fund due by a resident carrier, summoned as trustee in garnisheed proceedings, to a foreign corporation representing its share of proportionate freights for interstate carriage, only constituted an incidental interference with interstate commerce, and was not objectionable on that ground. Cavanaugh *v.* Chicago, etc., R. Co., 75 N. H. 243, 72 Atl. 694.

87. Southern Flour, etc., Co. *v.* Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742, 9 L. R. A., N. S., 853, 9 Am. & Eng. Ann. Cas. 437.

88. Interstate commerce incidentally affected.—Southern R. Co. *v.* Brown, 131 Ga. 245, 62 S. E. 177.

Freight money in the hands of a final carrier belonging to a nonresident initial carrier is a mere debt, with no special character on account of being earned in interstate commerce, is subject to suit at law by the creditor road, if not paid, and is liable to garnishment as a simple contract or book indebtedness.[89]

Where a car of a foreign carrier is on a side track empty after having come into the state loaded with an interstate shipment, and is there temporarily in the possession of another carrier, under contract with the foreign carrier to promptly return it within a reasonable time and to pay per diem demurrage for delay, and for the purpose of taking back freight, if it is ready for shipment within a reasonable time, it may not be attached, as this would be an interference with interstate commerce.[90]

Indebtedness Arising from Interstate Commerce.—The fact that an indebtedness due to a nonresident railroad company arose out of the conducting of interstate commerce does not exempt it from garnishment under a foreign attachment.[91]

Under Interstate Commerce Act.—The acts of Congress relating to interstate commerce were not intended to abrogate the attachment laws of the state, but within their proper sphere the federal acts are paramount.[92] A sleeping car company, by furnishing sleeping cars under contract with a railroad company, to be used by the traveling public, does not acquire the status of a common carrier of goods or passengers unless so declared by constitutional or statutory provision. A sleeping car en route from a point in one state to a point in another state, while waiting at a junction with its passengers, both interstate and intrastate, aboard to be picked up by a through train and carried to destination, was attached under a state writ and detained by the sheriff by force, compelling the passengers to disembark and accept other accommodations. Under the Interstate Commerce Act extending the term "common carrier" to include sleeping car companies, the car, at the time of its attachment, was an instrumentality of interstate commerce and was not subject to attachment under a state writ which would directly interfere with its operation in such commerce.[93]

89. Johnson *v.* Union Pac. R. Co., 29 R. I. 80, 69 Atl. 298.

90. Seibels *v.* Northern Cent. R. Co., 80 S. C. 133, 61 S. E. 435, 16 L. R. A., N. S., 1026.

Where a car owned by a foreign railroad, and loaded with interstate freight, to be unloaded at its destination within the state, and again loaded with interstate freight and returned in course of interstate commerce, arrives in the state, it can not be attached at its destination before being unloaded, in a suit by a resident against the foreign railroad company, it being engaged in interstate commerce. Shore & Bro. *v.* Baltimore, etc., R. Co., 76 S. C. 472, 57 S. E. 526, 11 Am. & Eng. Ann. Cas. 909.

Cars owned by a foreign railway company, which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the Interstate Commerce Act and of Rev. St., § 5258 (U. S. Comp. St. 1901, p. 3564), securing continuity of transportation. Davis *v.* Cleveland, etc., R. Co., 217 U. S. 157, 54 L. Ed. 708, 30 S. Ct. 463, 27 L. R. A., N. S., 823, 18 Am. & Eng. Ann. Cas. 907.

91. **Indebtedness arising from interstate commerce.**—Johnson *v.* Union Pac. R. Co., 29 R. I. 80, 69 Atl. 298.

Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments may be garnished under the state laws, despite the provisions of the interstate commerce act and of Rev. St., § 5258 (U. S. Comp. St. 1901, p. 3564), securing continuity of transportation. Davis *v.* Cleveland, etc., R. Co., 217 U. S. 157, 54 L. Ed. 708, 30 S. Ct. 463, 27 L. R. A., N. S., 823, 18 Am. & Eng. Ann. Cas. 907.

The garnishment of a debt due from a railroad company doing business in the state to a railroad company not doing business in the state, embracing traffic balances arising out of interstate commerce, is not an interference with interstate commerce. Starkey *v.* Cleveland, etc., R. Co., 114 Minn. 27, 130 N. W. 540.

92. **Under Interstate Commerce Act.**—Pullman Co. *v.* Linke, 203 Fed. 1017.

93. Pullman Co. *v.* Linke, 203 Fed. 1017.

§ 3931. Removal of Cause to Federal Court.—A state law providing that a foreign railroad corporation engaged in business in a state shall forfeit its right to engage in intrastate commerce within the state on removing any action against it in the state court to the federal court, is not invalid under the commerce clause of the federal constitution, on the ground that the prohibition of intrastate commerce will affect injuriously the interstate commerce of the corporation, as the whole earnings of the corporation from all sources must be taken as the basis for measuring the reasonableness of the interstate rates, and deprivation of profits from domestic business will reduce the gross earnings, since the statute does not deal with the regulation of rates, but with the right to engage in domestic business.[94]

§ 3932. Equitable Remedies.—To charge a railroad company as trustee of goods delivered to it as a carrier for interstate shipment would not be an unlawful interference with interstate commerce.[95]

§ 3933. Requiring Claim for Damages to Be Made in Prescribed Time.—The provision of a state law that a stipulation in a contract for a shorter limitation than two years in which to sue, and of that a stipulation requiring notice of claim for damages to be given within less than ninety days, as a condition to the right to sue, shall be void, are valid, as applied to a contract for the carriage of goods from the state into another state or territory.[96] State laws, declaring contracts invalid, which require actions against carrier for injuries to shipment in less than the statutory time, were superseded as to interstate shipments by Carmack Amendment of June 29, 1906, which furnishes the exclusive rule on such subject.[97]

§ 3934. Requiring Payment of Damages in Prescribed Time.—A state law providing a penalty on carriers for failure to pay damages on freight within sixty days, is not unconstitutional as in violation of the interstate commerce clause of the constitution.[98] A state law imposing a penalty on a carrier failing to adjust and pay within a specified time a claim for loss of freight while in its possession, is not unconstitutional, as an interference with interstate commerce.[99]

94. Removal of cause to federal court.—State *v.* Louisville, etc., R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150.

95. Equitable remedies.—Rosenbush *v.* Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317.

96. Time for making claim for damages.—Judgment, Galveston, etc., R. Co. *v.* Armstrong (Tex. Civ. App.), 43 S. W. 614, reversed in 46 S. W. 33, 92 Tex. 117.

97. Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397, reversing judgment (Tex. Civ. App.), 128 S. W. 932.

98. Requiring payment of damages in prescribed time.—Porter *v.* Charleston, etc., R. Co., 41 S. E. 108, 63 S. C. 169, 90 Am. St. Rep. 670.

99. De Lorme *v.* Atlantic, etc., R. Co., 79 S. C. 370, 60 S. E. 440.

Revisal 1905, § 2634, subjecting a carrier to a penalty for failure to adjust and pay a claim for loss of or damage to property within the time prescribed, does not impose an unlawful burden of interstate commerce, in violation of the Constitution of the United States art. 1, § 8, conferring on congress the right to regulate interstate commerce. Raleigh Iron Works *v.* Southern R. Co., 148 N. C. 469, 62 S. E. 595.

Penalizing the failure to adjust and pay within a specified time claims for loss or damage, as is done by Act S. C. Feb. 23, 1903 (24 St. at Large, p. 81) § 2, does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state courts only the liability of carriers doing business in the state, for property lost or damaged while in their possession. Atlantic, etc., R. Co. *v.* Mazursky, 216 U. S. 122, 54 L. Ed. 411, 30 S. Ct. 378. Affirming judgments, Charles *v.* Atlantic, etc., R. Co., 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762; McTeer *v.* Southern Exp. Co. (S. C.), 58 S. E. 930; Mazursky *v.* Atlantic, etc., R. Co. (S. C.), 58 S. E. 931; Von Lehe *v.* Atlantic, etc., R. Co., 78 S. C. 168, 59 S. E. 1135.

Revisal 1905, § 2644, which provides a penalty for a carrier's failure to adjust a loss in a shipment of goods from without the state within ninety days after a

§ 3935. Lien on Vessel for Services and Material.—Local statutes subjecting vessels to liens for debts contracted in equipping and fitting them for service are not regarded as amendments of the general maritime law, and, in the absence of legislation by congress establishing a uniform rule, are upheld as applied to vessels engaged in interstate or foreign commerce, and owned in other states, as being in aid of commerce, by enabling such vessels to obtain credit for necessaries when away from their home port.[1] Proceedings for the enforcement of a lien on a vessel for materials used in its construction, conferred by a statute of a state though commenced after the vessel was enrolled, licensed, and engaged in interstate commerce, were not objectionable, as in contravention of the jurisdiction of federal courts in admiralty.[2] State statutes giving liens on ships for necessary repairs or supplies furnished on the credit of the vessel, which are enforceable by process in rem, in a court of admiralty, as arising under maritime contracts, cannot be classed as laws intended to impose burdens upon interstate or foreign commerce, and for that reason held unconstitutional, though applied to foreign ships, but their purpose and effect, like liens given by the general maritime laws, are to facilitate commerce by enabling the ship to obtain the things necessary to the prosecution and completion of her voyage.[3]

Lien for Surveying Logs.—A lien given by state statute on logs cut in another state for surveying and scaling them by the surveyor general while in a log boom does not constitute a burden on interstate commerce, but is a lawful

claim for such loss is filed with it, is not in violation of the constitution of the United States, art. 1, § 8, conferring on congress the right to regulate interstate commerce, since the penalty is in no sense a burden on interstate commerce, but is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state regulation. Morris-Scarboro-Moffitt Co. *v.* Southern Exp. Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A., N. S., 983.

Act 1903 (24 St. at Large, p. 81), providing a penalty of $50 to be paid the consignee by a carrier doing business in the state, for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, is not unconstitutional as an interference with interstate commerce, even in case of an interstate shipment. Charles *v.* Atlantic, etc., R. Co., 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762; Mazursky *v.* Atlantic, etc., R. Co. (S. C.), 58 S. E. 931; Von Lehe *v.* Atlantic, etc., R. Co., 78 S. C. 168, 59 S. E. 1135.

Act Feb. 23, 1903 (24 Stat. at Large, p. 81), imposing a penalty of $50 to be paid the consignee by a carrier doing business within the state for failure to adjust and pay claim for loss of freight while in its possession within a specified time, is not unconstitutional as an attempt to regulate interstate commerce. Winslow Bros. & Co. *v.* Atlantic, etc., R. Co., 79 S. C. 344, 60 S. E. 709.

Act 1903 (24 St. at Large, p. 81), providing a penalty to be paid the consignee by a carrier for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, does not violate the interstate commerce clause of the federal constitution, in case of a shipment from out of the state into it, part of which was delivered by the final carrier to the consignee at destination, so that, in the absence of explanation, it is presumed the loss occurred while the goods were in the possession of such carrier, from whom recovery of the penalty is sought. Colleton Mercantile, etc., Co. *v.* Atlantic, etc., R. Co., 82 S. C. 121, 62 S. E. 6.

Laws 1908, c. 196, prescribing a penalty of $25 to be recovered by a shipper from a railroad that fails to settle, within a prescribed time, his claim for damages to freight, is not void as a regulation of, or interference with, interstate commerce. Mobile, etc., R. Co. *v.* Greenwald (Miss.), 61 So. 426.

1. Lien on vessel for services and material.—The Del Norte, 90 Fed. 506.

The exclusive control over interstate commerce, vested in congress by the federal constitution or laws, is not infringed by the enforcement against a vessel engaged in interstate commerce of a lien given by a state statute for materials furnished for her construction. Judgment, Delaney, etc., Iron Co. *v.* Iroquois Transp. Co., 142 Mich. 84, 105 N. W. 527, 113 Am. St. Rep. 566, affirmed in The Winnebago, 205 U. S. 354, 51 L. Ed. 836, 27 S. Ct. 509.

2. Comp. Laws 1897, § 10,789; Delaney, etc., Iron Co. *v.* Iroquois Transp. Co., 105 N. W. 527, 142 Mich. 84, 113 Am. St. Rep. 566, affirmed in The Winnebago, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836.

3. The Robert Dollar, 115 Fed. 218.

charge imposed by the state for furnishing additional facilities for navigation of a waterway.[4]

§ 3936. Seizure for Taxes.—Where a large quantity of coal from which shipments were being made to parties outside the state was seized by a city marshal for taxes, replevin would not lie on the ground that the seizure was an interference with interstate commerce; it appearing that some shipments were made to points within the state.[5]

§ 3937. Entry of Satisfaction of Mortgage.—A code provision imposing a penalty on a mortgagee whose mortgage has been satisfied for failure to enter satisfaction of record after being requested to do so, does not interfere with interstate commerce in its application to nonresident mortgagees.[6]

4. **Lien for surveying logs.**—Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400, 20 S. Ct. 325.

5. **Seizure for taxes.**—Pioneer Fuel Co. *v.* Molloy, 131 Mich. 465, 91 N. W. 750.

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CHAPTER XXXVI.

Taxation.

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§ 3938. Power to Tax.—The constitution contains no express restriction of the power of the states to tax, other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws. It may, therefore, be regarded as the established doctrine that so long as the laws of the state, prescribing the mode and subject of taxation, do not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the constitution of the United States, they are valid.[1] Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce, yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution.[2] But when a law of a state imposes a tax, under such circumstances and with such effect as to constitute a regulation of commerce, either foreign or interstate, it is void on that account.[3] The supreme court of the United States has held in a great number of cases that a tax levied directly upon interstate business alone, or upon such business where it is carried on in connection with local business, and also a requirement that persons or corporations shall take out a license and pay a tax before they can conduct an interstate or local busi-

1. Taxation.—Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Low *v.* Austin (U. S.), 13 Wall. 29, 20 L. Ed. 517; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23; Nathan *v.* Louisiana (U. S.), 8 How. 73, 12 L. Ed. 993; Ward *v.* Maryland (U. S.), 12 Wall. 418, 20 L. Ed. 449.

"Persons and corporations engaged in interstate business may be subjected to the payment of taxes properly levied by the state upon their property within its borders and also on business wholly conducted within the state, and it is likewise conceded that no state has the power to lay a direct tax or burden upon interstate commerce." Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

Although authority is conferred upon congress to lay and collect taxes, yet this grant does not supersede the power of the state to tax for the support of their own governments, nor is the exercise of that power by the states unless it extends to objects prohibited by the constitution, an exercise of any portion of the power that is granted to the United States. State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Webber *v.* Virginia, 103 U. S. 344, 26 L. Ed. 565; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Low *v.* Austin (U. S.), 13 Wall. 29, 20 L. Ed. 517; Ward *v.* Maryland (U. S.), 12 Wall. 418, 20 L. Ed. 449.

Const. U. S. art. 1, § 8, gives congress power to regulate commerce among the several states, etc., and § 10 forbids any state without the consent of congress to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, and hence interstate commerce can not be taxed by the state. Smith *v.* Farr, 104 Pac. 401, 46 Colo. 364.

Under Const. U. S., art. 1, § 8, giving congress the power to regulate commerce among the several states, etc., interstate commerce can not be taxed by a state. Wilcox *v.* People, 104 Pac. 408, 46 Colo. 382.

2. Commerce affected indirectly.—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Brown *v.* Houston, 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

3. Law constituting regulation of interstate commerce.—Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678; Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38, citing Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Osborne *v.* Mobile (U. S.), 16 Wall. 479, 21 L. Ed. 470; State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370.

A statute of a state enacting that the masters and wardens of a port within it, should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port, is a regulation of commerce within the meaning of the constitution, and also a duty on tonnage, and is unconstitutional and void. Steamship Co. *v.* Portwardens (U. S.), 6 Wall. 31, 18 L. Ed. 749.

A state can not tax interstate commerce. State *v.* Pabst Brewing Co., 128 La. 770, 55 So. 349.

ness, is a burden on commerce between the states, and a regulation which belongs exclusively to congress.[4]

State Can Not Tax in Any Form.—It is well settled that a state cannot lay a tax upon interstate or foreign commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. The reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress.[5]

Tax on Right to Engage in Commerce.—The state may not tax the right to carry on interstate commerce or to conduct the business of the government.[6]

Subject National in Character.—Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of congress.[7]

Where Property Located within State.—Neither the constitution nor laws of the United States prohibit a state from taxing the property of persons and corporations engaged in foreign and interstate commerce where the property is located in such state.[8]

Tax as Police Regulation.—If a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify at the hands of any municipality a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.[9]

Tax Affecting Both Intrastate and Interstate Business. A general license tax, imposed by a state statute on a carrier, affecting its entire business, interstate as well as domestic or internal, without discrimination, is unconstitutional.[10] Interstate commerce can not be taxed at all, even though the same

4. Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664, citing Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958; Coleman *v.* Western Union Tel. Co., 75 Kan. 609, 90 Pac. 299.

5. **State can not tax in any form.**—Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380.

No state can levy a tax on interstate commerce, whether by duties laid on the transportation of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. Postal Telegraph-Cable Co. *v.* Mobile, 179 Fed. 955.

6. **Tax on right to engage in commerce.**—State *v.* Western Union Tel. Co., 43 Mont. 445, 117 Pac. 93.

7. **Subject national in character.**—Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

Transportation of passengers or merchandise through a state, or from one state to another, is of this nature. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

Hence, a statute of a state imposing a tax upon freight, taken up within the state and carried out of it, or taken up without the state and brought within it, is repugnant to that provision of the constitution of the United States, which ordains that "congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

8. **Where property located within state.**—Hammer *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

9. **As police regulation.**—Borough of Norwood *v.* Western Union Tel. Co., 25 Pa. Super. Ct. 406.

10. **Tax on occupation or business.**—Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380; Emert *v.* Missouri, 156 U. S. 296, 320, 39 L. Ed. 430, 15 S. Ct. 367; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380, 13 S. Ct. 485; Asher *v.* Texas, 128 U. S. 129, 32 L. Ed. 368, 9 S. Ct. 1.

A state statute was enacted imposing an annual tax on cars of the Pullman Company running into and beyond the state as well as between points within the state. Held, void as imposing a burden upon interstate commerce. Allen *v.* Pullman's Palace Car Co., 191 U. S. 171, 48 L. Ed. 134, 24 S. Ct. 39.

amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.[11] It is equally well settled that persons or companies carrying on a domestic business in connection with interstate business may be subjected to the payment of a state tax imposed on purely domestic business.[12]

Tax Affecting Intrastate Business Only.—A statute is valid where a proper construction of it confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The statute of Missouri enacted for the purpose of imposing a tax upon express companies doing business within the state, and brought before the court in this case, does not impose a tax upon the receipts arising from interstate business, and is not therefore repugnant to commercial clause of the constitution of the United States.[13]

Interstate Shipment to Intrastate Points.—The receipts from continuous transportation between points in the same state may be taxed in that state, though the route lies partly in another state. Such transportation is not interstate commerce.[14]

§§ 3939-3981. Taxation Amounting to Regulation of Commerce—§ 3939. In General.—In the decisions in which state laws have been held inoperative because in conflict with, or amounting to the exercise of, or the assertion of control over, a power vested exclusively in the United States, the interference with the commercial power was found to be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.[15] A tax which so seriously affects the interchange of commodities between the states as to essentially impede or seriously interfere with it, is a regulation of commerce.[16]

Taxation Distinguished from Regulation of Commerce.—The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such.[17] The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state can not tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not with-

11. Caldwell *v.* North Carolina, 187 U. S. 622, 47 L. Ed. 336, 23 S. Ct. 229.

12. Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

13. **Tax on intrastate business only.**—Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035, 12 S. Ct. 250.

14. **Interstate shipment to intrastate points.**—Commonwealth *v.* Lehigh Valley R. Co. (Pa.), 1 Monag. 45, 17 Atl. 179.

15. **Taxation amounting to regulation of commerce.**—Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263, citing Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881.

16. Hinson *v.* Lott (U. S.), 8 Wall. 148, 19 L. Ed. 387.

17. **Taxation distinguished from regulation of commerce.**—This difficulty was recognized in Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638, wherein the possible differences between the decisions in Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, and Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, were commented upon and explained. Mr. Justice Holmes, speaking for the court, said: "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution." United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 S. Ct. 211.

out sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation that when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by the federal supreme court as best it can.[18] Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.[19]

§§ 3940-3947. Tax on Corporations Engaged in Interstate Commerce—§ 3940. In General.—The rule seems to be that property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state,[20] provided the rights and power of the national government are not interfered with.[21] Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government.[22]

Taxable to Same Extent as Natural Persons.—The states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent.[23]

18. Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638; United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 S. Ct. 211.

19. Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263.

20. **Corporations.**—New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Ward *v.* Maryland (U. S.), 12 Wall. 418, 20 L. Ed. 449; California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150, 8 S. Ct. 1073; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Postal Telegraph-Cable Co. *v.* Charleston, 153 U. S. 692, 38 L. Ed. 871, 14 S. Ct. 1094; Emert *v.* Missouri, 156 U. S. 296, 320, 39 L. Ed. 430, 15 S. Ct. 367; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122; Stockard *v.* Morgan, 185 U. S. 27, 46 L. Ed. 785, 22 S. Ct. 576; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 47 L. Ed. 995, 24 S. Ct. 817; State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037; Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889; Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114.

21. Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087.

22. Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305.

23. **Taxable to same extent as natural persons.**—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

Valuation or Excise Tax.—Such taxation may be laid upon a valuation, or may be an excise, and in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchises or upon the value of them but they may demand a graduated contribution proportioned either to the value of the privileges granted, or to the extent of their exercises or to the results of their exercise.[24]

Corporations Created by State.—The property, the business, and the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government.[25] The state may tax a corporation on its special franchises, granted to it by the state, or by authority from the state wholly within its limits, though the corporation is engaged in interstate commerce, because the tax is not on the business of the corporation.[26]

Corporations Created by United States.—The property of corporations holding their franchises from the government of the United States is not exempt from taxation by the states of its situs.[27]

Under Charter Provision.—The Illinois Central Railroad Charter requiring the company to pay to the state an amount equal to seven per cent of its gross receipts in lieu of taxes, was a mere charter method of fixing an equivalent for a tax that would otherwise ordinarily be levied on the property of the corporation; and hence, notwithstanding it required the payment of such percentage on the receipts of the railroad company's charter lines from interstate commerce, was not invalid as an attempt to regulate or impose a tax on interstate commerce itself.[28]

§ 3941. Tax on Gross Receipts.—A tax levied by a state upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations is a regulation of commerce and beyond the power of the state.[29]

§ 3942. Tax on Franchise or Privilege.—The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States.[30] The proposition that the states can, by way of a tax

24. Valuation or excise tax.—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

25. Corporations created by state.—Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

26. Hudson, etc., R. Co. *v.* State Board, 127 N. Y. S. 918, 143 App. Div. 26.

27. Corporations created by United States.—Railroad Co. *v.* Peniston (U. S.), 18 Wall. 5, 21 L. Ed. 787; Thomson *v.* Pacific Railway (U. S.), 9 Wall. 579, 19 L. Ed. 792; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810.

28. Under charter provision.—State *v.* Illinois Cent. R. Co., 92 N. E. 814, 246 Ill. 188.

29. Tax on gross receipts.—Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

30. Tax upon franchises.—Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Central Pac. R. Co. *v.* People, 162 U. S. 91, 40 L. Ed. 903, 16 S. Ct. 766; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412, 47 L. Ed. 1116, 23 S. Ct. 730; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 47 L. Ed. 995, 24 S. Ct. 817; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

Rev. Codes, § 165, imposing certain graduated charges, based upon the amount of capital stock of the corporation, to be collected by the secretary of state, for the filing of each certified copy or article of incorporation of any foreign corporation, held unconstitutional as imposing a burden on interstate commerce, when ap-

upon business transacted within their limits, or upon the franchise of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision can not thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way.[31] But where a railroad company received important franchises by grant of the United States, such franchises are not legitimate subjects of taxation by the state. They were granted to the company for national purposes and to subserve national ends. The state can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. It can not tax franchises which are the grant of the United States.[32] A franchise tax imposed locally on a railroad doing an interstate business is invalid as a burden on interstate commerce.[33] A license or privilege tax for the conduct of intrastate business of a corporation doing both interstate and intrastate business, based on the corporation's total capital or capital stock, is unconstitutional as violating the commerce clause of the federal constitution.[34]

Fee for Filing Articles of Incorporation.—The refusal of the Secretary of State to accept for filing articles of incorporation of a domestic corporation, organized to guarantee mortgages on real estate in various states, without payment of the filing fee and license tax contemplated by a statute is not violative of the federal constitution as interfering with interstate commerce.[35]

Based on Amount of Capital Stock.—A state franchise tax upon private corporations, based on the amount of capital employed by the corporation in the state, is not affected by the character of the property in which the capital is invested, and is therefore not rendered illegal by the fact that such capital is em-

plied to foreign interstate corporations. Chicago, etc., R. Co. *v.* Swindlehurst (Mont.), 130 Pac. 966.

Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), requiring a foreign corporation to pay an annual franchise tax for use of the state, based on the amount of capital employed therein, is not invalid as interfering with interstate commerce. Southern R. Co. *v.* Greene, 160 Ala. 396, 49 So. 404; Central, etc., R. Co. *v.* Gaston, 160 Ala. 671, 49 So. 412.

Acts 1911, p. 67, imposing an annual franchise tax on all the corporations doing business in the state upon the proportion of their outstanding capital stock represented by property owned and used in business transacted in the state, held as to a railroad engaged in interstate transportation, not invalid as a taxation of interstate commerce. St. Louis, etc., R. Co. *v.* Norwood, 106 Ark. 321, 152 S. W. 110.

31. Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

32. The state board of equalization of California having included in their assessment all the franchises of a railroad company, amongst which were franchises conferred by the United States, of constructing a railroad from the Pacific Ocean across the state as well as across the territories of the United States, and of taking toll thereon; held, that the assessment of these franchises was repugnant to the constitution and laws of the United States and the power given to congress to regulate commerce among the several states. Franchises conferred by congress cannot, without its permission, be taxed by the states. California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150, 8 S. Ct. 1073.

33. King County *v.* Northern Pac. R. Co., 196 Fed. 323.

34. Mulford Co. *v.* Curry, 163 Cal. 276, 125 Pac. 236.

Civ. Code, § 409, and Pol. Code, § 416, subd. 4, in so far as they provide for and impose on corporations doing an interstate business an annual license tax for the right to do business in California, held invalid as imposing a burden on interstate commerce. Mulford Co. *v.* Curry, 125 Pac. 236, 163 Cal. 276.

35. Fee for filing articles of incorporation.—City Properties Co. *v.* Jordan, 126 Pac. 351, 163 Cal. 587.

So much of Civ. Code, § 408, as requires foreign corporations before doing business in the state to file a copy of their articles with the secretary of state, held not in restraint of interstate commerce. Mulford Co. *v.* Curry, 163 Cal. 276, 125 Pac. 236.

ployed in interstate or foreign commerce.[36] Interstate commerce is not unconstitutionally interfered with by the franchise tax imposed upon a domestic railway corporation by a state law, because no deduction is allowed from the capital stock, taken as the basis of the tax, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state.[37]

Right of Way under River.—A railroad company received a patent from the state of a right of way under the Hudson River for the construction of tunnels for operation of a railroad underneath the river. The franchise, being largely used for local traffic within the state, could be taxed by the state, though used partly in interstate commerce.[38]

Tax on Right to Engage in Commerce.—The cases in which the taxing statutes have been held void, were cases in which the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself.[39] For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid.[40]

§ 3943. Tax on Capital Stock.—The tax imposed under Colorado Laws 1907, ch. 211, upon the capital stock of a foreign railway company, the greater part of whose property and business is outside the state, and whose business done within the state is principally interstate commerce, is invalid under the commerce, and due process of law clauses of the federal constitution, even if the temporary forfeiture of the right to do business, declared by the statute in case of failure to pay the tax, can be confined by construction in business wholly within the state.[41]

§ 3944. Tax on Transfer of Corporate Stock.—An unconstitutional interference with interstate commerce is not made by the tax on transfers of corporate stock imposed by a law of New York, as applied to a sale in New York, be-

36. **Based on amount of capital stock.**—New York *v.* Roberts, 19 S. Ct. 58, 171 U. S. 658, 43 L. Ed. 323, reversing judgment United States *v.* Hopkins, 82 Fed. 529.

37. Judgments 69 N. E. 1129, 177 N. Y. 584 and 76 N. E. 1104, affirmed in New York, etc., R. Co. *v.* Miller, 26 S. Ct. 714, 202 U. S. 584, 50 L. Ed. 1155.

38. **Right of way under river.**—People *v.* State Board, 125 N. Y. S. 895, 69 Misc. Rep. 1.

39. **Tax on right to engage in commerce.**—Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 43, 29 L. Ed. 785, 6 S. Ct. 635; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694, 7 S. Ct. 592; Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380.

40. Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876.

41. **Tax on capital stock.**—Atchison, etc., R. Co. *v.* O'Connor, 223 U. S. 280, 32 S. Ct. 216, Ann. Cas. 1913C, 1050.

Payment of the unconstitutional tax imposed under Colo. Laws 1907, ch. 211, upon the capital stock of a foreign railway company whose business is principally interstate commerce, can not be deemed voluntary, so as to defeat an action to recover it back, where the company, failing to pay the tax, would incur the risk of having its contracts disputed and its business injured by reason of the forfeiture clause in such statute, and of finding the tax greatly increased in case it finally had to pay. Atchison, etc., R. Co. *v.* O'Connor, 223 U. S. 280, 32 S. Ct. 216, Ann. Cas. 1913C, 1050.

The secretary of state, who collects and retains the unconstitutional tax imposed by Colo. Sess. Laws 1907, ch. 211, upon the capital stock of a foreign railway company engaged principally in interstate commerce, is liable to a suit to recover back the tax, as paid under duress and protest—especially in view of the provisions of § 6, that, if it shall be judicially determined that any corporation has erroneously paid the tax, the auditor may draw a warrant for its refunding upon the filing of a certified copy of the judgment. Atchison, etc., R. Co. *v.* O'Connor, 223 U. S. 280, 32 S. Ct. 216, Ann. Cas. 1913C, 1050.

tween two nonresidents, of the stock of foreign railway corporations.[42]

§ 3945. Tax on Right of Corporations to Consolidate.—A statute of Ohio imposes a fee on a consolidated corporation for filing in the state articles of consolidation, where several railroads of different states had been consolidated, forming a new corporation, as a condition to receiving privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the state of Ohio and the statutory provisions passed in accordance therewith. The exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits.[43]

§ 3946. Tax on Property Outside of State.—A state can not tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states.[44]

§ 3947. Tax on Property of Foreign Corporation.—It is settled that where a corporation of one state brings into another to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens.[45] The fact that the rolling stock of a carrier is employed in interstate commerce does not exempt it from taxation by the state.[46] If such stock never passed beyond the limits of the state, it could not be doubted that the state could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that the stock, instead of stopping at the state boundary, crosses the boundary in going out and coming back, can not affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific stock which at a given moment were within its borders.[47] The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter if fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.[48] It is quite true, as the situs of

42. Tax on transfer of corporate stock.—Order, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A., N. S., 314, 6 Am. & Eng. Ann. Cas. 515, affirmed in Hatch *v.* Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 S. Ct. 188, 9 Am. & Eng. Ann. Cas. 736.

43. Tax on right of corporations to consolidate.—Ashley *v.* Ryan, 153 U. S. 436, 38 L. Ed. 773, 14 S. Ct. 865.

44. Property outside of state.—Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498.

45. Property of foreign corporation.—American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Union Refrigerator Trans. Co. *v.* Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 S. Ct. 631; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; Adams Exp. Co. *v.* Kentucky, 166 U. S. 171, 41 L. Ed. 960, 17 S. Ct. 527.

46. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Pullman's Palace Car Co. *v.* Hayward, 141 U. S. 36, 35 L. Ed. 621, 11 S. Ct. 883; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037.

47. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Green *v.* Van Buskirk (U. S.), 5 Wall. 307, 18 L. Ed. 599; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Union Refrigerator Trans. Co. *v.* Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 S. Ct. 631.

48. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Marye *v.* Baltimore, etc., R.

a railroad is in another state, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the propery may be brought and used by its owner by the law of the place where it is found.[49] This principle of the power to a state to tax the movable and constantly changing property of foreign corporations has been applied to corporations engaged in furnishing to shippers refrigerator cars for the transportation of perishable freight.[50] Where rolling stock is used in two or more states, the tax might be fixed by an appraisement and valuation of the average amount of the property habitually used in a state.[51] The taxation of a foreign corporation which owns freight cars run by state railroad companies from points within to points without the state is not unconstitutional, as an interference with interstate commerce.[52]

Engaged in Interstate Commerce.—The provision of a state law which requires a foreign corporation, carrying on solely interstate commerce in Missouri, to make out, deliver, and file with the secretary of state a statement as to its property and business within the state and to pay a license tax thereon, is unconstitutional.[53]

Tax on Corporate Stock.—Taxation of shares in foreign corporations owned by citizens under Burns' Ann. St. Ind. 1908, §§ 10,143, 10,233, 10,234, while shares in domestic corporations are only taxable when property of the corporation is not exempt, does not violate commerce clause of the constitution.[54]

Fees for Filing Charter.—The fee imposed on corporations for filing articles, which they must file before they can be deemed legally incorporated or consolidated, is not a tax on interstate commerce, though they be engaged in such business, but on the right to exist as a corporation.[55] A foreign corporation, though engaged in interstate trade, may, before being permitted to do business in the state, be required to comply with such reasonable conditions as are contained in a state statute, requiring the filing of its charter, the payment of charter fees, the making of reports and furnishing any information concerning its business, the appointment of agents to receive service of process, etc.[56]

Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037.

In the case of Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037, the question was whether a railroad company incorporated by the state of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that state, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other states, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that state. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876.

49. Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876.

50. American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Union Refrigerator Trans. Co. *v.* Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 S. Ct. 631.

51. American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Union Refrigerator Trans. Co. *v.* Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 S. Ct. 631; Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876.

52. Fargo *v.* Auditor General, 57 Mich. 598, 24 N. W. 538.

53. Engaged in interstate commerce.—International Text-Book Co. *v.* Gillespie, 229 Mo. 397, 129 S. W. 922.

54. Tax on corporate stock.—Darnell *v.* Indiana, 33 S. Ct. 120, 226 U. S. 390, 57 L. Ed. 267, affirming judgment Darnell *v.* State, 90 N. E. 769, 174 Ind. 143.

55. Fees for filing charter.—Chicago, etc., R. Co. *v.* State, 51 N. E. 924, 153 Ind. 134.

56. State *v.* American Book Co., 69 Pac. 563, 65 Kan. 847, dismissed American Book Co. *v.* Kansas, 24 S. Ct. 394, 193 U. S. 49, 48 L. Ed. 613.

St. 1903, pp. 447, 450, c. 437, §§ 66, 67, 75, requiring every foreign corporation of the classes described in § 58 (page 443) annually to file in the office of the secretary of the commonwealth a certificate of certain facts, and to pay an excise tax assessed on its capital stock by the tax

§ 3948. Tax on Gross Receipts.—The constitutionality of the taxation by a state of the gross earnings of railroad companies derived from interstate commerce, has been upheld.[57] In a case where the corporation was created by that state and had the situs of its business within that state, and where the receipts had become intermingled with the general property of the carrier.[58] However, a subsequent case questions the correctness of the above statement and holds that

commissioner, pursuant to Const. c. 1, § 1, art. 4, and § 58, including every foreign corporation which has a usual place of business in Massachusetts, or which is engaged, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration, or repair of a building, bridge, railroad, railway, or construction of any kind, are constitutional, and enforceable as applicable to a corporation engaged in interstate commerce, which has, at the same time, a place of business in the state for domestic purposes, since, though broad enough to include corporations engaged exclusively in interstate commerce, the legislative intention will not be presumed to include corporations whose usual places of business are established and maintained solely for use in interstate commerce. Attorney General *v.* Electric Storage Battery Co., 74 N. E. 467, 188 Mass. 239.

57. **Gross receipts.**—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888. See Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284, 16 S. Ct. 113.

A statute of a state imposing a tax upon the gross receipts of railroad companies is not repugnant to Const., art. 1, § 8, subd. 3, providing for the regulation of commerce with foreign nations and among the several states, though the gross receipts are made up in part from freights received for the transportation of merchandise from the state to another, or into the state from another. State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

Act June 7, 1879, § 7 (P. L. 116), imposing a tax upon the receipts of railway and transportation companies, is in violation of the constitution of the United States, art. 1, § 8, providing that congress shall have power to regulate commerce between the states, so far as it levies a tax upon receipts derived from commerce between points within and points without the state, and between points without the state but passing through it; and it is immaterial that goods destined for points without the state were temporarily detained in the state after transportation had actually begun. Delaware, etc., Canal Co. *v.* Commonwealth (Pa.), 1 Monag. 36, 17 Atl. 175, 1 L. R. A. 232.

Ohio Act May 31, 1911 (102 Ohio Laws, pp. 224-260), imposing an excise tax based on gross intrastate earnings of railroads and other public utilities, being by express limitation levied on intrastate earnings only, is not unconstitutional, as imposing a burden on interstate commerce. Ohio River, etc., R. Co. *v.* Dittey, 203 Fed. 537.

Fuel used in operating railroad.—Act Okl. May 26, 1908, §§ 2, 3, and 6 as amended by Act March 27, 1909, being Comp. Laws Okl. 1909, §§ 7702, 7703, 7706, imposing a gross revenue tax on mineral production in the state, is not invalid as imposing a burden on interstate commerce as applied to coal mined by a railroad company and used in the operation of interstate trains. Missouri, etc., R. Co. *v.* Meyer, 204 Fed. 140.

58. **Corporation created by state.** — State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

In the case of State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164, an act of the legislature of Pennsylvania which declared that: "In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semiannually upon the first days of July and January, commencing on the first day of July, 1886," was held to be valid. The grounds upon which it was based were that the corporation, being a creation of the legislature of Pennsylvania and holding and enjoying all its franchises under the authority of that state, the tax was upon the franchises which it derived from the state, and was for that reason within the power of the state, and that, in determining the mode in which the state could tax the franchises which it had conferred, it was not limited to a fixed sum upon the value of them, but it could be graduated by and proportioned to either the value of the privileges granted, or the extent or results of their exercise. "Very manifestly," said the court, "it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised." Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

a state can not constitutionally impose upon a steamship company incorporated under its law a tax upon the gross receipts of such company, which are derived from the transportation of persons and property by sea, between different states, and to and from foreign countries, as such tax amounted to a regulation of interstate and foreign commerce.[59] And it has been held that a statute levying a tax upon the gross receipts of a carrier for the carriage of freights and passengers into, out of, or through the state, affects a matter national in its character, requiring uniformity of regulation, and therefore to be invalid, though not in conflict with any regulation prescribed by congress, but here none of the qualities of the preceding cases appeared; the corporation had never been organized or acknowledged as a corporation of the state, and the receipts for carriage had probably never been within the state.[60]

Gross Receipts of Intrastate Business.—A statute authorizing a city to levy on every railroad company doing business or having an office in the city a license tax not to exceed one per cent of the gross receipts of its business, being invalid as against a railroad whose business extends to points out of the state, as a regulation of interstate commerce, a tax levied thereunder is invalid, though it is limited to business of the railroad done within the state.[61]

Where Railroad Partly within State.—A state statute which required every corporation, person, or association operating a railroad within the state to pay an annual tax, to be determined by the amount of its gross transportation receipts, and which further provides that, when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax shall be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, does not conflict with the constitution of the United States, but it is a regulation within the power of the state. The reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied.[62]

59. **Cases denying right of state.**—Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118. See, also, Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284, 16 S. Ct. 113.

"In Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. Later ones are Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127; Western Union Tel. Co. *v.* Pennsylvania, 128 U. S. 39, 32 L. Ed. 345, 9 S. Ct. 6; Western Union Tel. Co. *v.* Alabama State Board, 132 U. S. 472, 33 L. Ed. 409, 10 S. Ct. 161. See, also, Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; McHenry *v.* Alford, 168 U. S. 651, 42 L. Ed. 614, 18 S. Ct. 242; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 47 L. Ed. 995, 24 S. Ct. 817. In Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court." Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638.

A state statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state, is a tax upon commerce between the states. Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

60. Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857. See New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

61. **Gross receipts of intrastate business.**—Southern R. Co. *v.* Asheville, 69 Fed. 359.

62. **Where railroad partly within state.**—Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, cited

Interstate Transportation between Intrastate Points.—The state may impose a tax on the gross receipts on the transportation of goods and passengers by continuous carriage from one point in the state to another point in the same state, although part of the route is over the soil of another state.[63]

Where Carrier Is Domestic Corporation.—Gross receipts of a railroad company from transportation between terminal points, one or both of which are without the state, by route lying partly within or wholly without the state, are not subject to taxation by such state, though the company's franchises were derived from it.[64]

Tax Equal to One Percent of Gross Receipts.—A state can not impose a tax upon railroad companies whose lines lie wholly within the state, equal to one per centum of the gross receipts, where a part of such gross receipts is derived from the carriage of freight and passengers in interstate commerce.[65] It

in New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810.

In this respect the tax was unlike that levied in Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, where the specific gross receipts for transportation were taxed as such, taxed "not only because they are money, or its value, but because they were received for transportation." Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810.

63. Interstate transportation between intrastate points.—Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 205, 36 L. Ed. 672, 12 S. Ct. 806, affirming 1 Monag. 45, 17 Atl. 179; S. C., 129 Pa. 308, 18 Atl. 125.

64. Where carrier is domestic corporation.—Commonwealth *v.* Lehigh Valley R. Co. (Pa.), 1 Monag. 45, 17 Atl. 179.

65. Tax "equal to" stated per cent of gross receipts.—The state can not impose the tax levied by Act Tex. April 17, 1905, p. 336, c. 141, upon railway companies whose lines lie wholly within the state, "equal to 1 per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, or destined to, points without the state. Judgment, State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71, reversed in Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638.

This is an action against certain railroads to recover taxes and penalties. The supreme court of the state held the penalties to be void under the state constitution, but upheld the tax. State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71. The railroads brought the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the states. In the course of the opinion the court said: "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state can not tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638; Stockard *v.* Morgan, 185 U. S. 27, 46 L. Ed. 785, 22 S. Ct. 576; Asbell *v.* Kansas, 209 U. S. 251, 52 L. Ed. 778, 28 S. Ct. 485, 14 Am. & Eng. Ann. Cas. 1101.

"The distinction between a tax 'equal to' 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property,

does not matter that the corporations are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.[66]

Gross Earnings of Preceding Year.—A statute requires every corporation, operating a railroad in the state, to pay an annual excise tax for the privilege of exercising its franchises; the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the year preceding the levy of the tax. The method of determining the amount of the tax is merely a way of ascertaining the value of the privilege, and does not render the tax a tax upon the receipts themselves, and hence, in its application to railroads which enter the state from another state or from Canada, the act does not operate as a regulation or foreign commerce.[67]

Gross Receipts Arising from Freights.—A statute of a state imposing a tax upon the gross receipts of railroad companies is not repugnant to the constitution of the United States, though the gross receipts are made up in part from freights received for transportation of merchandise from the state to another state, or into the state from another. Such a tax is not a regulation of interstate commerce. Nor is it a tax on imports or exports. Nor is it a tax upon interstate transportation. A distinction is made between a tax upon freights carried between states, because of their carriage, and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.[68]

Tax on Basis of Amount of Gross Receipts.—A tax upon gross receipts of a transportation company is not necessarily a tax upon commerce. Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. The states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. Such taxation may be laid upon a valuation or may be an excise; and, in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercises. No mode of effecting this and no forms of expression which have not a meaning beyond this, can be regarded as violating the constitution. In virtue of the right to tax the property of corporations, the state may lay a tax upon the gross receipts of a carrying company, estimating it after those receipts have been collected and have become the property of the company. And, in virtue of the right to tax the franchises of corporations, the state may resort to the gross receipts as a measure of probable value.[69]

Where Imposed in Nature of General Tax.—A tax on the gross receipts of a railroad is not repugnant to the constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one state to another.[70]

taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638.

66. Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638.

67. **Gross earnings of preceding year.**—Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, 163.

68. **Gross receipts arising from freights.**—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

69. **Tax on basis of amount of gross receipts.**—Reading Railroad *v.* Pennsylvania (U. S.), 15 Wall. 284, 21 L. Ed. 164.

70. **Where imposed in nature of general tax.**—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164; Osborne *v.* Mobile (U. S.), 16 Wall. 479, 21 L. Ed. 470.

Gross Revenue Tax in Addition to Property Tax.—As applied to express companies whose receipts are derived largely from commerce among the states and which also receives large sums as income from investments in bonds and land all outside the state, a statute which imposes upon public service corporations operating within the state a "gross revenue tax," "which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporations," is unconstitutional, not only as an attempt to tax interstate commerce, but as an attempt to levy a tax upon property situated without and beyond the jurisdiction of the state.[71]

Gross Revenue Tax in Lieu of All Property Tax.—Including the gross receipts of a nonresident express company, upon the basis of which a tax is imposed by Minn. Rev. Laws 1905, ch. 11, "in lieu of all taxes on its property," the earnings from interstate shipments, where the transportation while in the company's hands was performed wholly within the state, does not unconstitutionally burden interstate commerce, but is an exercise of the state's power to measure a legitimate property tax by receipts which in part come from interstate commerce, which could not in itself be taxed.[72] The earnings of a nonresident express company carrying goods between two points within the state over a route incidentally traversing a portion of another state, so far as they are derived from the carriage within the state, may be included in the gross receipts, upon which the tax imposed by Minn. Rev. Laws, 1905, ch. 11, is based, without unconstitutionally burdening interstate commerce, or denying due process of law.[73] The Illinois Central Railroad Charter requiring the company to pay to the state an amount equal to seven per cent of its gross receipts in lieu of taxes, was a mere charter method of fixing an equivalent for a tax that would otherwise ordinarily be levied on the property of the corporation; and hence, notwithstanding it required the payment of such percentage on the receipts of the railroad company's charter lines from interstate commerce, was not invalid as

71. **Gross revenue tax in addition to property tax.** — A nonresident express company whose receipts are largely derived from interstate commerce and from investments in bonds and land outside the state can not validly be subjected to the "gross revenue tax" exacted by Okla. Laws 1910, ch. 44, from public service corporations, "which shall be in addition to the taxes levied and collected upon ad valorem basis upon the property and assets of such corporation," equal to such proportion of a specified percentage of its gross receipts from every source whatsoever as the portion of its business done within the state bears to the whole of its business. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298, 56 L. Ed. 445, 32 S. Ct. 218, following Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498; Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638.

The "gross revenue tax" exacted from a nonresident express company by Okla. Laws 1910, ch. 44, "which shall be in addition to the taxes levied and collected upon ad valorem basis upon the property and assets of such corporation" and equal to such proportion of a specified percentage of its gross receipts from every source whatsoever as the portion of its business done within the state bears to the whole of its business, can not be construed, for the purpose of saving its constitutionality, as referring only to the receipts from commerce wholly within the state. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298, 56 L. Ed. 445, 32 S. Ct. 218.

72. **Gross revenue tax in lieu of all property tax.**—The tax in the present case is not like those held invalid in the Galveston Case and the Oklahoma Case, being an addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce. Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, but, as in the Maine Case, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of interstate commerce. United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 S. Ct. 211.

73. United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 S. Ct. 211.

an attempt to regulate or impose a tax on interstate commerce itself.[74]

Receipts of Railroad from Interstate Express.—The Tax Law of New York of 1896 provides for a franchise tax to be assessed on the gross earnings of a transportation corporation within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within the state, but shall not include earnings derived from business of an interstate character. Where it appeared that a domestic railway company's assessment under such section included receipts from express business beginning in the state and transferred within the state for delivery in another state, or shipped outside the state for delivery within the state, such business being interstate commerce, and not taxable, the corporation was entitled to a revision of its assessment.[75]

§§ 3949-3950. Tax on Passengers and Freight—§ 3949. Passengers.—It has been held, that a state statute imposing a tax upon a passenger for the privilege of leaving the state, or passing through it by the ordinary mode of passengers travel, is not in conflict with the provision of the United States constitution conferring on congress the power to regulate commerce, in the absence of any legislation by congress affecting the matter.[76] While on the other hand

74. State *v.* Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

75. **Receipts of railroad from interstate express.**—New York, etc., R. Co. *v.* Miller, 88 N. Y. S. 373, 94 App. Div. 587.

Where the entire business of a domestic corporation consists in the transportation of grain and other products from ports outside of the state to ports and places in the state, and of personal property from ports in the state to ports in other states, and its entire gross receipts from its business are derived from such transportation, and not otherwise, its earnings are "earnings derived from business which is of an interstate character" within Laws 1894, p. 1303, c. 562, § 11; Laws 1896, p. 857, c. 908, § 184, which forbid the imposition of any tax on the business of interstate commerce, and are not subject to the franchise tax imposed by Laws 1880, p. 766, c. 542, § 6; Laws 1881, p. 484, c. 361, § 6; Laws 1896, p. 857, c. 908, § 184. Order, 82 N. Y. S. 582, 84 App. Div. 174, affirmed in Connecting Terminal R. Co. *v.* Miller, 70 N. E. 472, 178 N. Y. 194.

76. **Tax on passengers.**—Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744, cited in Case of State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678. See, also, Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 48, 29 L. Ed. 785, 6 S. Ct. 635.

A state can not impose a tax on the movement of persons or property from one state to another. Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678. The cases of Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744, and Case of State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, cited and affirmed.

The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the state one-fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. Held, that this stipulation was not repugnant to the commerce clause of the constitution of the United States. Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678.

In 1865 the state of Nevada levied "a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire," to be paid by the proprietors or corporations so engaged. Held, that such tax was unconstitutional, on the ground that it would interfere with the right of the general government, under the federal constitution, to the free passage of its officers, agents, and troops over every part of the national territory. Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744.

The tax under Act March 27, 1843, No. 81, providing a fund for the Charity Hospital of New Orleans, being imposed exclusively on the passengers, and not on the officers and crew of the vessel, is not a regulation of commerce; nor a usurpation of the power to "regulate with foreign nations and among the several states," exclusively vested in congress (U. S. Const., art. 1, § 8); it is not inconsistent with any law of congress regulating commerce; nor prohibited by Act Cong. April 8, 1812, § 1, that act having no further application since the admission of Louisiana into the Union. State *v.* Fullerton (La.), 7 Rob. 210.

it is held that interstate transportation of passengers is beyond the reach of a state legislature, and state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is prohibited by the constitution of the United States because a burden upon it.[77] A state statute imposing taxes upon passengers on ships arriving in the ports of the state from foreign ports is a regulation of foreign commerce, which is exclusively vested in congress, and is therefore void.[78] And such tax is not relieved from this unconstitutional objection by saying in the title of the statute that it is in aid of a law called an inspection law, which authorizes an inspection of passengers with reference to their being persons liable to become a public charge, criminals, paupers, etc.[79] A tax upon passengers carriers of a specific amount for each passenger carried is held to be a tax on the passengers.[80]

77. Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527; Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543; Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 48, 29 L. Ed. 785, 6 S. Ct. 635. See Case of State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

In Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543, the statute of New York was defended as a police regulation to protect the state against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. So in the case of Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550, where the pretense was the exclusion of lewd women.

Act 1864, imposing on any carrier of passengers across any portion of the state a tax of ten cents for each passenger, except soldiers and sailors of the United States, in so far as it operates upon persons entering into, departing from, or passing through the state, is, in effect, an act regulating commerce between this and other states, and is therefore void, as conflicting with the provisions of the federal constitution conferring upon congress the power to regulate commerce among the several states. Clarke *v.* Philadelphia, etc., R. Co. (Del.), 4 Houst. 158.

78. Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Head-Money Cases, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543, reviewing and criticising Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702.

A state can not require a sum to be paid for each passenger landed. Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754.

A statute which imposes a heavily burdensome condition upon a shipmaster as a prerequisite to landing his passengers, and allows him the alternative of paying a small sum for each one landed, is a regulation of commerce, and therefore void. What may be done by a state to protect itself from the influx of paupers and convicted criminals, in the absence of legislation on the subject by congress, is left undecided. Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543; Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754. See People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 27 L. Ed. 383, 2 S. Ct. 87.

In Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543, where the owners of vessels from a foreign port were required to give a bond, as security, that every passenger whom they landed should not become a burden on the state, or pay for every such passenger a fixed sum, it was held to be in effect a tax of that sum on the passenger, however disguised by the alternative of a bond which would never be given.

In the case of Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543, a similar statute of Louisiana was held void for the same reason. And in the case of Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550, a statute of California on the same subject was also held void, because it "invades the right of congress to regulate commerce with foreign nations." Head-Money Cases, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247.

79. Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543; Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550; People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 27 L. Ed. 383, 2 S. Ct. 87.

80. Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744, and Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Case of State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 48, 29 L. Ed. 785, 6 S. Ct. 635.

Tax on Passengers but Not on Vehicles.—The act of the general assembly of Ohio of March, 1834, assessing tolls upon passengers carried by mail coaches in Ohio, is constitutional, since not a tax upon the coach itself.[81]

Condition in Charter of Railroad.—The effect of a condition in the charter of a railway company that the company shall pay over to the state a certain percentage of all moneys received for the transportation of passengers, is not to impose a capitation tax, or a tax upon the passengers' right of transit through the state. It operates only as a tax imposed upon the company, with its consent, and therefore does not violate any provision of the constitution of the United States.[82] A clause in the charter of a railroad company, providing that all tonnage of whatsoever kind or description, except the ordinary baggage of passengers, carried or conveyed on said railroad, in each and every year, shall be subject to a toll or duty, for the use of the commonwealth, of three mills per ton per mile, is simply a mode of taxing the company according to the magnitude of its business, and is not intended as a tax on commerce. Such a tax is not in violation of the provisions of the constitution of the United States that "congress shall have exclusive power to regulate commerce with foreign nations, and among the states," and prohibiting the states, without the consent of congress, from laying duties on imports and exports.[83]

Transported by Foreign Corporations.—The Act of New Jersey of March 28, 1862, relating to taxes, provided that foreign carriers regularly doing business in this state should pay a certain transit duty on every passenger and ton of goods transported over the territory of the state, and not exclusively within its limits. This provision was in conflict with the clause of the constitution declaring that congress shall have power to regulate commerce among the several states.[84]

Tax on Alien Passengers.—State statutes imposing taxes upon alien passengers are invalid.[85] Act April 26, 1862, being an act to discourage immigration of the Chinese into California, is not within the power of the state to exclude paupers and other obnoxious persons, it not appearing that the Chinese are

81. Tax on passengers but not on vehicles.—State *v.* Neil, 7 O. 132, 28 Am. Dec. 623, reversed in 3 How. 720, 11 L. Ed. 800.

82. Condition in charter provision.—State *v.* Baltimore, etc., R. Co., 34 Md. 344.

83. Pennsylvania R. Co. *v.* Commonwealth (Pa.), 3 Grant Cas. 128.

84. Transported by foreign corporations.—Erie R. Co. *v.* State, 31 N. J. L. 531, 86 Am. Dec. 226.

Section 10 of the Tax Act of March 28, 1862, taxing foreign corporations doing business in New Jersey by making them pay a duty upon every passenger and ton of freight brought into or carried out of the state, is not in violation of the provisions of the constitution of the United States giving congress the power to regulate commerce and forbidding states to tax imports or exports. State *v.* Delaware, etc., R. Co., 30 N. J. L. 473.

85. Tax on alien passengers.—Smith *v.* Turner (U. S.), 7 How. 283, 12 L. Ed. 702.

A state tax on immigrants is void. People *v.* Downer, 7 Cal. 169; Mitchell *v.* Steelman, 8 Cal. 363.

Statutes imposing taxation upon alien passengers arriving in ports of the United States are void. Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702.

The statute of New York of May 31, 1881, imposing a tax on every passenger from a foreign country landing in the port of New York who is not a citizen of the United States, and holding the vessel which brings him liable for the tax, is a regulation of commerce. The tax is not relieved from this constitutional objection by calling in an inspection law. People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 27 L. Ed. 383, 2 S. Ct. 87, affirming 10 Fed. 357.

Act 1881, providing for inspection of persons and effects of immigrants arriving by vessel at the port of New York from any foreign country, is not, within the constitution of the United States, art. 1, § 10, clause 2, an inspection law, for which the state may lay duties on imports or exports; and therefore Laws 1881, c. 432, § 590, entitled "An act to raise money for the execution of the inspection laws of the state of New York," which levies a duty on every alien coming from a foreign port to the port of New York, is a regulation of interstate commerce, and void. People *v.* Edye (N. Y.), 11 Daly 132.

such.[86] But the imposition of a tax upon immigrant agents, is not a regulation of interstate commerce.[87]

Power of Congress to Tax Alien Passengers.—The Act Cong. Aug. 3, 1882, entitled "An act to regulate immigration," imposes on the owners of vessels who shall bring passengers from a foreign port into a port of the United States a duty of fifty cents for every such passenger not a citizen of the United States, and is not a tax subject to the limitations imposed by the constitution on the general taxing power of congress.[88] The act of congress authorizing the levy of a tax on passengers is not in violation of the treaties in existence before the act was passed between the United States and the various foreign countries, of which the owners of the vessels bringing the passengers were citizens or subjects, which provided for freedom of commerce or navigation, since it applies to citizens of the United States and their vessels as well.[89]

Passengers on Ships.—A state law, which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a state officer on account of each passenger brought from a foreign country into the state, is also void.[90]

§ 3950. Freight.—A statute of a state imposing a tax upon freight taken up within a state and carried out of it, or taken up without the state and brought into it, is repugnant to the constitution, providing that congress shall have power to regulate commerce with foreign nations and among the several states.[91] Where a tax demanded by a state statute is imposed, not upon the company, but upon the freight carried and because carried, so far as it affects commodities transported through the state, or from points without the state to points within it, or from points within the state to points without it, the act is a regulation of interstate commerce.[92] If the subjects of taxation can be separated so that that

86. The act of California.—Lin Sing *v.* Washburn, 20 Cal. 534.

Section 2955 of the political code of California, so far as it requires the payment of seventy cents for each passenger inspected to ascertain if he is afflicted with leprosy, coming into the United States by sea, and imposing a fine for nonpayment upon the owners and consignees of the vessel bringing the passengers, is unconstitutional and void. Bunker *v.* Pacific Mail Steamship Co., 16 Fed. 344.

87. Tax on immigrant agent.—Williams *v.* Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685, affirmed in 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

A burden on interstate commerce is not imposed by Laws Ga. 1898, p. 21, par. 10, § 4, imposing a license tax on emigrant agents engaged in the business of hiring persons to labor outside the state. Judgment, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685, affirmed in Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

88. Power of congress.—Eyde *v.* Robertson, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247.

Act Cong. Aug. 3, 1882 "to regulate immigration," which imposes on the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States a duty of fifty cents for every such passenger not a citizen of this country, to constitute a fund "to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress," etc., is a valid exercise of the power to regulate commerce with foreign nations. Edye *v.* Robertson, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247.

89. Edye *v.* Robertson, 18 Fed. 135, 21 Blatchf. 460.

90. Tax on each passenger carried.—Gilman *v.* Philadelphia (U. S.), 3 Wall. 713, 18 L. Ed. 96; Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702.

91. Freight.—Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, reversing Commonwealth *v.* Erie R. Co., 62 Pa. 286, 1 Am. Rep. 399.

A cargo in interstate commerce is not subject to taxation by a state. Ex parte Eaglesfield, 180 Fed. 558.

92. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; cited in Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Osborne *v.* Mobile (U. S.), 16 Wall. 479, 21 L. Ed. 470; Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702.

A statute of Pennsylvania taxing the

which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising from commerce solely within its own territory.[93] But it has been held that a state law requiring transportation companies having lines within the state to pay a tax upon freights is not void for infringing the power to regulate commerce between the states conferred by the United States constitution upon congress.[94]

Tax on Freight and Tax on Receipts Distinguished.—A tax by a state upon freights carried between states differs from a tax upon the receipts from such transportation, since the former is a tax because of the carriage, and the latter is upon the property of the company.[95]

Tax on Goods before Entering Commerce.—Act April 8, 1861 (P. L. 258), punishing the buying without a license of certain articles of produce in Berks and Franklin counties, "with intent to send the same for sale or barter to any other market out of said counties," is not in violation of the interstate commerce clauses of the constitution; the license fee, at most, being only a tax on the articles before they begin to move as an article of trade from one state to another. Even if the act were obnoxious to the interstate commerce clauses, in the case of a purchase of goods to be sold in another state it would still be valid as to business wholly within the state.[96]

After Property Has Ceased to Be Interstate Commerce.—After property has left the channels of commerce and obtained a situs in the state, it is subject to the taxing power of the state; and the interstate commerce clause of the federal constitution can be invoked only to protect such property from unjust discrimination.[97]

Property Delayed in Transit for Purpose of Separation.—The tax on property belonging to the citizens of another state in its transit to markets in other states, which is delayed within this state merely for the purpose of separation and assortment, is a tax on commerce.[98] Complainant shipped coal from Pennsylvania to its own order to a dock in New Jersey, where it was transferred

transportation companies on freight hauled through the state was held to effect a matter national in its character, requiring uniformity of regulation, and to be therefore invalid, though not in conflict with any regulation prescribed by congress. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

In the Case of State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, the judgment was rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the state. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

93. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127.

94. Commonwealth *v.* Erie R. Co., 62 Pa. 286, 1 Am. Rep. 399, reversed in Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

The Tonnage Tax Law, Act April 25, 1864, laying a charge on certain classes of common carriers for freight carried over their lines, levied on all and rated equitably according to the character of the freight and expense of moving it, is an exercise of the rights of taxation and eminent domain, as an incident to which a state may require companies operating public works and exercising franchises under her grant to contribute to her revenues, and is not invalid, as an attempt to regulate commerce. Commonwealth *v.* Erie R. Co., 62 Pa. 286, 1 Am. Rep. 399, reversed in Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146.

95. Tax on freight and tax on receipts distinguished.—State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

96. Tax on goods before entering commerce.—Rothermel *v.* Meyerle, 136 Pa. 250, 20 Atl. 583, 9 L. R. A. 366.

97. After property has ceased to be interstate commerce.—Darnell *v.* State, 174 Ind. 143, 90 N. E. 769.

Where goods have been brought within the state, and have entered into the body of the merchandise therein situate, they lose their character as articles of interstate commerce, and become subject to taxation within the state. Phillips *v.* Raynes, 120 N. Y. S. 1053, 136 App. Div. 417.

98. Property delayed in transit for purpose of separation.—Detmold *v.* Engle, 34 N. J. L. 425.

from the cars either into bottoms for continued transportation to consignees then determined upon, or, when no bottoms were available, the coal was dumped onto a dock, from which it was later transferred to bottoms as occasion required. The coal so temporarily stored at the dock ceased to be "interstate commerce," notwithstanding the intention to transship, and was therefore subject to state taxation, under the rule that, to claim exemption from taxation under the commerce clause of the federal Constitution, there must be a continuous movement of the merchandise in interstate commerce, pursuant to an existing contract of sale or consignment.[99]

Tax on Weight of Goods.—A state statute requiring transportation companies doing business in the state, to pay a fixed sum as a tax on each ton of freight carried, without regard to the distance moved or charge made, so far as it applies to freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or in other words all freight other than that taken up and delivered within the state, is unconstitutional and void as a regulation of interstate and foreign commerce,[1] though valid as to all freight, the carriage of which begins and ends within the limits of the state.[2]

§ 3951. Tax on Privilege and Occupation.—Tax on Privilege of Engaging in Interstate Commerce.—A city situated on a branch line, and not the main line, of a foreign railway corporation engaged in business involving interstate commerce, can not impose on the company a license tax on the privilege of engaging in the business of a common carrier within its limits.[3] A state law imposing a privilege tax on railroad companies and railroad agents, other than officers of railroads terminating in the taxing district, is not an attempt to regu-

99. Susquehanna Coal Co. *v.* South Amboy, 184 Fed. 941.

Oil shipped from Pennsylvania and Ohio, and destined ultimately for points in Arkansas, Louisiana, and Mississippi, is not property in interstate commerce, so as to be exempt from state tax or inspection laws while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels, and other receptacles, and from which it is forwarded to its final destination. Judgment 117 Tenn. 82, 95 S. W. 824, affirmed in General Oil Co. *v.* Crain, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475.

1. **Tax on weight of goods.**—Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146. See, also, Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; State Tax on Railway Gross Receipts (U. S.), 15 Wall. 284, 21 L. Ed. 164.

In the Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, the court but applied the rule, announced in Brown *v.* Maryland (U. S.), 12 Wheat. 419, 6 L. Ed. 678, that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it unto the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015, and Webber *v.* Virginia, 103 U. S. 344, 26 L. Ed. 565; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067.

In the Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, the tax was not imposed for the purpose of regulating interstate commerce, but in order to raise a revenue and would have been a legitimate exercise of an admitted power of the state if it had not been exerted so as to operate as a regulation of interstate commerce. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 S. Ct. 689, 1062.

2. Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146, cited on this point in Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229, 8 S. Ct. 1127.

3. **Tax on privilege of engaging in interstate commerce.**—San Bernardino *v.* Southern Pac. Co., 107 Cal. 524, 40 Pac. 796, 29 L. R. A. 327.

late commerce in a manner in contravention to the federal constitution.[4]

Tax on Privilege of Navigation.—An ordinance establishing a rate or license, as the price of the privilege of navigation certain navigable waters in the coastwise trade, is invalid as the sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ the particular vessels in the coasting trade; and the state thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the party is entitled under, and which he derives from, the constitution and laws of the United States.[5] The ordinance of the city of New Orleans establishing a rate of licenses for professions and other businesses, and assessing and collecting certain sums from persons owning and running tow boats to and from the Gulf of Mexico, and from persons owning and running job boats within the corporate limits, is a regulation of commerce among the states, and therefore contrary to art. 1, § 8, clause 3, of the constitution of the United States, and void.[6] The Chicago River being a navigable stream, and its waters connecting with the harbor of Chicago, and the vessels navigating the river and harbor having access by them to Lake Michigan and the states bordering on the lake and connecting lakes and rivers, an ordinance of the city of Chicago imposing a license tax upon tug boats enrolled and licensed in the coasting trade under the laws of the United States, for the privilege of navigating the Chicago River and its branches, and which were at the time a tax was exacted, engaged in the coasting and foreign trade, and in towing vessels engaged in interstate commerce, from Lake Michigan to the Chicago River and its branches, and in towing vessels similarly engaged from the river into the lake, is invalid and cannot be sustained because of expenditures by the city in deepening and improving the channel of the river.[7]

Tax on Privilege of Maintaining Office.—It has been ruled that a tax imposed by a state on a corporation engaged in the business of interstate commerce, for the privilege of keeping an office in the state, was a tax on commerce among the states.[8]

Tax for Privilege of Using Streets of City.—A law of a state requiring owners of vehicles using the streets of a city to pay an annual license fee, and providing that the fees be placed to the credit of the street-repairing fund of the public treasury of said city, is not in violation of the interstate commerce clause of the federal constitution, when enforced against owners who are nonresidents of the state, and not engaged in business in the state, for vehicles used by them upon such streets in interstate transportation, and in prosecution of interstate commerce. The license fees must be regarded as compensation for the advantages and improved facilities afforded by the city for such transportation.[9]

Tax on Soliciting Agent.—An agency of a line of an interstate railroad, established in a state, for the purpose of inducing passengers to take that line at

4. Lightburne *v.* Taxing Dist., 72 Tenn. (4 Lea) 219.

5. **Tax on privilege of navigation.**—Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 S. Ct. 313; Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306. See State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23.

6. The case falls directly within the rule laid down in Sinnot *v.* Davenport (U. S.), 22 How. 227, 16 L. Ed. 243, and Foster *v.* Davenport (U. S.), 22 How. 244, 16 L. Ed. 248, which cases are followed and approved. Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38.

7. Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306.

In Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23, the federal supreme court held that vessels enrolled and liensed pursuant to the laws of the United States, had conferred upon them as full and complete authority to carry on this trade as it was in the power of congress to confer. See, also, Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306.

8. **Tax on privilege of maintaining office.**—Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958, cited in Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

9. **Vehicles using streets of city.**—Bogart *v.* State, 10 O. Dec. 365, 20 Wkly. L. Bull. 458.

a certain point, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license tax imposed upon the agent for the privilege of doing business is a tax upon interstate commerce, and is unconstitutional. The business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road and hence of interstate commerce.[10]

Tax on Locomotive Engineer.—An act of the state legislature imposing a license upon any locomotive engineer operating or running any engine or train of cars on any railroad in that state was resisted, by an engineer of the Mobile and Ohio Railroad Company, who ran an engine drawing passenger coaches on that road from Mobile in that state to Corinth in Mississippi, on the ground that the statute of the state was an attempt to regulate interstate commerce, and was, therefore, repugnant to the commercial clause of the constitution of the United States. It was held, that the statute was not in its nature a regulation of commerce, as far as the statute affected commercial transactions among the state, its effect was so indirect, incidental and remote as not to burden or impede such commerce, and that it was not, therefore, in conflict with the constitution of the United States or any law of congress.[11]

Tax on Agent of Express Company.—The statute of a state requiring from the agent of every express company not incorporated by the laws of such state, a license from the auditor of public accounts, and also requiring a statement to be made and filed in the auditor's office showing that the company is possessed of an equal capital of a certain sum, either in cash or safe investments, exclusive of stock notes, before he can carry on any business for said company in the state embraces interstate business as well as business confined wholly within the state, and it is a prohibition against the carrying on of such business without compliance with the state law. Such statute, in so far as it requires such license to be taken out by a foreign corporation engaged in interstate commerce, is a regulation of such commerce, and therefore repugnant to the commercial clause of the United States constitution and such statute can not be sustained as a regulation made in the fair exercise of the police power of the state.[12]

10. Tax upon agent of carrier.—Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881. See, also, Williams *v.* Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128.

"To the same effect are Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; Brennan *v.* Titusville, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829, and Stockard *v.* Morgan, 185 U. S. 27, 46 L. Ed. 785, 22 S. Ct. 576." Norfolk, etc., R. Co. *v.* Sims, 191 U. S. 441, 48 L. Ed. 254, 24 S. Ct. 151.

Order No. 1589 of the board of supervisors of the city and county of San Francisco, which imposes a license tax of $25 per quarter on every railroad agency, is a regulation of interstate commerce, in so far as it applies to an agent who solicits passenger traffic in San Francisco over a railroad operated between Chicago and New York, but who sells no tickets and neither receives nor pays out any money or other valuable consideration on account thereof. The agent's business, being carried on to assist, or with the purpose to assist, the traffic of his road, is within the protection of the commerce clause of the federal constitution (Const., art. 1, § 8, cl. 3), though it may not be essential to such traffic. McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881, distinguishing Pembina, etc., Milling Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 737.

11. Tax on locomotive engineer.—Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564.

12. Tax on agent of express company.—Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851, cited in Brennan *v.* Titusville, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829.

A license tax upon express companies has been sustained, in view of a decision of the supreme court of the state, that the license affected only business of the company within the state. Osborne *v.* Florida, 164 U. S. 650, 41 L. Ed. 586, 17 S. Ct. 214; Leffingwell *v.* Warren (U. S.), 2 Black 599, 17 L. Ed. 261; People *v.* Weaver, 100 U. S. 539, 541, 25 L. Ed. 705; Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472, 17 S. Ct. 110; Allen *v.* Pullman's Palace Car Co., 191 U. S. 171, 48 L. Ed. 134, 24 S. Ct. 39.

The court in Osborne *v.* Florida, 164

§ 3952. Tax on Tolls.—A state can validly impose taxes on tolls received by one company from another for the use of the former's railroad and track within the state, where the company paying the tolls is engaged in the transportation of merchandise from points within the state to points beyond and such tax is not in conflict with the commerce clause of the constitution of the United States.[13]

§§ 3953-3979. Tax on Means and Instruments of Commerce—§ 3953. In General.—The state has an unquestioned right to place a property tax on the instrumentalities engaged in commerce.[14] The exemption of

U. S. 650, 41 L. Ed. 586, 17 S. Ct. 214, said: "The case of Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851, is not in the slightest degree opposed to this view. The act which was held to be in violation of the federal constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that state without first obtaining a license from the state. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question."

The case of Osborne *v.* Mobile (U. S.), 16 Wall. 479, 21 L. Ed. 470, brought up for consideration an ordinance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the state, to pay an annual license of $500; if the business was confined within the limits of the state, the license fee was only $100; if confined within the city, it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. The federal supreme court held that the ordinance was not unconstitutional. This was December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon congress to regulate commerce among the several states. Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380.

When the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would not furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. "It was stated by Mr. Justice Bradley, in the course of his opinion in Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851, that: 'Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection,' viz, an objection that the tax or license was a regulation of or that it improperly affected interstate commerce." Osborne *v.* Florida, 164 U. S. 650, 41 L. Ed. 586, 17 S. Ct. 214.

13. Tax on tolls.—New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

Definition of "tolls."—See New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

In the case of New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896, "the state of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that state, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a reference to the amount of the tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company, and thus, in effect, become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burthen on interstate commerce." Thomas *v.* Gay, 169 U. S. 264, 42 L. Ed. 740, 18 S. Ct. 340.

14. Taxation of property engaged in commerce.—Maryc *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23; Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087; Fairbank *v.* United States, 181 U. S. 283, 45 L. Ed. 862, 21 S. Ct. 648.

The state has the right to tax property, although used in interstate commerce. St. Louis, etc., R. Co. *v.* Norwood, 106 Ark. 321, 152 S. W. 110.

The state may tax property within its

interstate and foreign commerce from state regulation does not prevent a state from taxing the property of those engaged in such commerce located within its limits,[15] although belonging to persons domiciled elsewhere.[16] It is well settled that a state has power to tax all property having a situs within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state.[17]

§§ 3954-3959. Tax on Railroads—§ 3954. In General.—A state law for the levy and collection of taxes upon railroad property is unconstitutional, in so far as it attempts to levy a tax upon the earnings of railroad companies derived from interstate transportation, being to that extent an interference with interstate commerce.[18]

Railroad in Part in State.—A state law which provides that when only part of a railroad lies in the state it shall pay taxes on such proportion of the valuation of its capital stock, funded and floating debt, and bonds as the length of its road lying in the state bears to the entire length of the road, is not unconstitutional as laying a tax on interstate commerce.[19]

Railroad Wholly within State.—Where a railroad for whose use toll is paid by another road lies wholly within the state, the tax on such tolls does not constitute a tax on interstate commerce, by reason merely of the fact that the

borders, though such property may be employed by its owners in interstate commerce. State *v.* United States Exp. Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A., N. S., 1127.

15. Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380; Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Postal Telegraph-Cable Co. *v.* Charleston, 153 U. S. 692, 38 L. Ed. 871, 14 S. Ct. 1094; Emert *v.* Missouri, 156 U. S. 296, 39 L. Ed. 430, 15 S. Ct. 367; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Maryе *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 S. Ct. 1037; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896; Fairbank *v.* United States, 181 U. S. 283, 45 L. Ed. 862, 21 S. Ct. 648; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412, 47 L. Ed. 1116, 23 S. Ct. 730. See, also, Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 47 L. Ed. 995, 24 S. Ct. 817.

16. Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498.

17. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Ficklen *v.* Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 21 S. Ct. 810.

In Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 S. Ct. 686, it is said: "That the service in which these vessels were engaged formed one link in the line of continuous interstate commerce may affect the state's power of regulation but not its power of taxation. True, they were not engaged in an independent service, as the cabs in Pennsylvania R. Co. *v.* Knight, 192 U. S. 21, 48 L. Ed. 325, 24 S. Ct. 202, but, being wholly within the state, that was their actual situs. And, as appears from the authorities referred to, the fact that they were engaged in interstate commerce does not impair the state's authority to impose taxes upon them as property."

18. Tax on railroads.—Northern Pac. R. Co. *v.* Raymond, 5 Dak. 356, 40 N. W. 538, 1 L. R. A. 732.

19. Proportionate to length of road.—State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765.

Act 1883 (Sess. Laws, p. 211, c. 99) providing that in lieu of any and all other taxes upon the property of any railroad company, etc., there shall be paid a certain percentage "of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory," refers only to the earnings arising from traffic within the state, and is not unconstitutional, as imposing a tax on the earnings derived from interstate commerce. Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310, 51 N. W. 386; S. C., 2 N. Dak. 395, 51 N. W. 786; Northern Pac. R. Co. *v.* Brewer, 2 N. Dak. 396, 51 N. W. 787; Northern Pac. R. Co. *v.* Strong, 2 N. Dak. 395, 51 N. W. 787; Northern Pac. R. Co. *v.* Tressler, 2 N. Dak. 397, 51 N. W. 787.

lessee road is engaged in interstate transportation, and it is for this use that tolls are paid.[20]

Railroad Entirely Outside of State.—The fact that a road represented by an agent is wholly outside the state of California does not justify imposing a tax on its traffic. The limitation on the power of a state to tax interstate commerce extends to all such commerce, though it may not actually pass through its territory.[21] A railroad company, whose only business within the state is discharging freight and passengers brought over its line from without the state, and receiving freight and passengers to be sent out of the state over its line, and incidentally maintaining terminal facilities, employing clerks, and keeping a bank account, can not be taxed by the state on its business, this being interstate commerce.[22]

Railroad Owned or Leased by Foreign Corporation.—Where a foreign corporation owns a railroad lying partly within and partly without a state, the state may tax such portion of the tolls received for the use of the road as was received for the use of the portion within the state.[23] A law of New Jersey for taxing railroads provides that, in case of a railroad of this state being under lease to a foreign corporation, any tangible personal property of such foreign company, if used or kept but a part of the time in this state, shall be assessed such proportionate part of its value as the time it is used or kept in this state during the year preceding the 1st day of January designated in the act bears to the whole year; and it appearing that certain engines and cars that were used on its leased lines in this state by the Philadelphia & Reading Railroad Company in the course of interstate commerce, such company having in use a full local equipment of such leased lines, which was duly taxed in this state, held, that the tax upon such property employed in interstate commerce was illegal, being in contravention of that clause of the constitution of the United States that gives to congress the exclusive regulation of commerce between the several states.[24]

Where Different Tax Imposed on Individuals.—A state statute does not violate the federal constitution, although it prescribes a different rule of taxation for railroad companies from that for individuals.[25]

§ 3955. Tax on Franchise, Privilege and Occupation.—A state law providing that every transportation company shall pay a tax on its corporate franchise or business, at a certain rate on its gross earnings, for business transacted in this state, does not, in the case of a railroad company extending into another state, impose a tax on interstate commerce, but the tax is on the franchise of the corporation, the amount thereof being measured by the receipts of its business.[26]

20. **Railroad wholly within state.**—Commonwealth *v.* New York, etc., R. Co., 145 Pa. 38, 22 Atl. 212.

21. **Railroad entirely outside of state.**—McCall *v.* California, 136 U. S. 104, 34 L. Ed. 392, 10 S. Ct. 881.

22. Pennsylvania R. Co. *v.* Wemple, 65 Hun 252, 20 N. Y. S. 287.

A railroad company, whose only business within the state is discharging freight and passengers brought over its line from without the state, receiving freight and passengers to be sent out over its line, and maintaining terminal facilities, such as wharves and piers, and buildings in connection therewith, and the employment of agents, clerks, and laborers, is not subject to a tax on its "corporate franchise and business," under Laws 1880, c. 542, and acts amendatory thereof, such business being interstate commerce. Pennsylvania R. Co. *v.* Wemple, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694, affirming 65 Hun 252, 20 N. Y. S. 287.

23. **Railroad owned by foreign corporation.**—New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

24. **Property leased to foreign corporation.**—Central R. Co. *v.* State Board, 49 N. J. L. 1, 7 Atl. 306.

25. **Where different tax imposed on individuals.**—State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

26. **Tax on corporate franchise.**—Dunkirk, etc., R. Co. *v.* Campbell, 74 Hun 210, 26 N. Y. S. 832.

Tax on Franchise Conferred by United States.—The state board of equalization of California included in their assessment all the franchises of a railroad company, among which were franchises conferred by the United States, of constructing a railroad from the Pacific Ocean across the state as well as across the territories of the United States, and of taking toll thereon. Such assessment is repugnant to the constitution and laws of the United States, and the power given to congress to regulate interstate commerce.[27]

Tax Required as Prerequisite to Maintaining Office.—A tax assessed against a railroad company which is a link in a through line of road, and carries freight and passengers in and out of the state, by the state through which the through line passes, as a condition precedent to its keeping an office in such state for the use of its officers, agents, and employees, is a tax on the means by which the company is enabled to carry on its business of interstate commerce, and is therefore in violation of the constitution of the United States, giving the power to regulate interstate commerce to congress.[28]

Tax for Operating within Limits of City.—A municipal ordinance imposing a tax of a specified amount on every railroad company operating within the corporate limits, when imposed under legislative authority, is valid. Such tax does not interfere with interstate commerce as to a railroad extending into another state.[29] The imposition by a city, of a license tax, on railroad companies whose lines extend through it, and which have places of business therein, is not an interference with interstate commerce.[30] A city ordinance imposing a privilege tax on a railroad company running cars through the city, for the business of transporting freight or passengers between the city and other points in the state, does not interfere with interstate commerce.[31]

Occupation Tax.—An ordinance imposing an occupation tax on railroads having a depot within the city, and excepting from the levy all interstate traffic commerce of such corporations, is not invalid, as imposing a burden on interstate commerce.[32]

§ 3956. Tax on Capital Stock.—A state law which provides that when only part of a railroad lies in the state it shall pay taxes on such proportion of the valuation of its capital stock, funded and floating debt, and bonds as the length of its road lying in the state bears to the entire length of the road, is not unconstitutional as laying a tax on interstate commerce.[33]

§ 3957. Tax on Rolling Stock.—A tax upon the ordinary and lawful means of transportation is really a tax upon the thing carried, and a state law imposing a tax upon locomotives, passenger and freight cars, etc., being not merely a police regulation, but an expedient for raising revenue, involves a tax upon the passengers and freight transported, and is unconstitutional, as interfering with commerce between the states.[34] But it has been held that the power conferred upon congress to regulate commerce among the several states, does not inhibit the taxation by a state of railway cars found within its borders, though in the transaction of business they pass into adjoining states and territories.[35] It is no

27. Tax on franchise conferred by United States.—California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150, 8 S. Ct. 1073.

28. Tax required as prerequisite to maintaining office.—Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 S. Ct. 958, reversing Norfolk, etc., R. Co. *v.* Commonwealth, 114 Pa. 256, 6 Atl. 45.

29. Tax for operating within limits of city.—Piedmont R. Co. *v.* Reidsville, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284.

30. Anniston *v.* Southern R. Co., 20 So. 915, 112 Ala. 557; Alabama, etc., R. Co. *v.* Bessemer, 21 So. 64, 113 Ala. 668.

31. Nashville, etc., R. Co. *v.* Alabama City, 32 So. 731, 134 Ala. 414.

32. Occupation tax.—York *v.* Chicago, etc., R. Co., 76 N. W. 1065, 56 Neb. 572.

33. Tax on capital stock.—State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765.

34. Tax on cars, etc.—Minot *v.* Philadelphia, etc., R. Co., Fed. Cas. No. 9,645, 2 Abb. U. S. 323, 7 Phila. 555, affirmed in 18 Wall. 206, 21 L. Ed. 888.

35. Denver, etc., R. Co. *v.* Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252.

objection to the imposition of a state tax upon railroad rolling stock used partly within the state that the same is engaged as a vehicle of interstate commerce, or that its legal situs is in another state or territory, where taxes on it have been paid.[36]

Tax on Rolling Stock in Different Counties.—The provision of Act Ind. March 6, 1891, in regard to taxation of railroad property, that rolling stock shall be listed and taxed in the several counties in the proportion that the main track used or operated in such county bears to the length of the main track used or operated by the company, in connection with the requirement of a statement of the amount of capital stock and indebtedness, is not invalid as requiring assessment and valuation of property outside the state, as the intent of the act reach simply property of the railroad company within the state is obvious from its other provisions and its general scope, and it does not require the valuation of such property to be determined absolutely on a mileage basis.[37]

Leased Cars.—A state statute directing the officers of each railroad company operating in the state to report to the state board of equalization the number of cars of all kinds in use upon its road, and authorizing the board to assess all property used by one corporation, and belonging to another, to either the corporation using it or the one owning it, is not, when applied to the case of a transportation company loaning cars to a railroad company for special purposes, an attempt to regulate interstate commerce.[38] A tax on railway cars, owned by a Kentucky corporation having no place of business in the state of Utah but leased to shippers, and passing through and doing business in Utah, is not a regulation of interstate commerce.[39]

Cars Owned by Corporation Which Is Not Railroad Company.—Cars of a foreign corporation, not a railroad corporation, having its principal office in another state, which are merely in transit in Illinois for the purposes of bringing merchandise from another state into or through Illinois, are instruments of interstate commerce, and not subject to taxation there.[40]

§ 3958. Tax on Gross Earnings.—The corporation tax law of Vermont, imposing a tax upon the entire gross earnings of all railways operated in the state, and providing that, if a railway be situated partly within and partly without the state, the tax shall be proportionate to the mileage of trains run within the state, is unconstitutional, as an interference with interstate commerce.[41]

§ 3959. Payment of Bonus to State.—A condition, in a charter granted by a state to a railroad company, that the company shall pay a bonus to the state from time to time, is not invalid as amounting to a tax upon the transportation of passengers, or as infringing the exclusive power of congress to regulate commerce among the states.[42]

§ 3960. Tax on Street Railroads.—The annual franchise tax which a state statute requires the state board of assessors to levy upon such proportion of the annual gross receipts of street railroad corporation as the length of its line in this state upon any street, highway, road, lane, or other public place, bears to

36. Reinhart *v.* McDonald, 76 Fed. 403.

37. **Tax on rolling stock in different counties.**—Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114; Indianapolis, etc., R. Co. *v.* Backus, 154 U. S. 438, 38 L. Ed. 1040, 14 S. Ct. 1114, affirming Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432.

38. **Leased cars.**—Hall *v.* American Refrigerator Trans. Co., 24 Colo. 291, 51 Pac. 421, 65 Am. St. Rep. 223.

39. Union Refrigerator Trans. Co. *v.* Lynch, 55 Pac. 639, 18 Utah 378, 48 L. R. A. 790, affirmed in 20 S. Ct. 631, 177 U. S. 149, 44 L. Ed. 708.

40. **Cars owned by corporation which is not railroad company.**—In re Union Tank Line Co., 204 Ill. 347, 68 N. E. 504, 98 Am. St. Rep. 221.

41. **Tax on gross earnings.**—Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 721, 10 L. R. A. 562, following Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

42. **Payment of bonus to state.**—Baltimore, etc., R. Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678.

the length of its whole line, is not levied on the gross receipts of the corporation, nor on the business of the corporation, but is merely an excise tax on the franchises of the corporation, viz, the franchise to exist and the franchise to occupy the streets, which is measured in part by the gross receipts, and therefore such franchise tax is not a regulation of interstate commerce, and the act under which it is levied is not in conflict with the clause of the constitution of the United States giving to congress power to regulate commerce among the several states.[43] Since no one may use the streets of a city for railroad purposes, except by virtue of a franchise from the state, a franchise so granted is property, and can not be revoked, except for cause, unless the right of revocation is reserved in the grant, and is subject to taxation as other property, notwithstanding the owner is engaged in interstate commerce.[44]

§ 3961. Tax on Express Companies.—An express company engaged in transportation from one state to another is engaged in interstate commerce, and no territory or state can impose upon it any conditions, by way of license, or otherwise, to engage in this commerce by passing through its limits; but such company will have no right to do a mere local business within a state or territory without complying with the territorial or state law.[45]

A tax upon the property within the state of an express company engaged in interstate commerce, based upon its gross earnings within the state on interstate shipments,[46] or the taxable value of which is determined with reference to the whole capital of the company,[47] is not an unconstitutional interference with interstate commerce.

As Prerequisite to Engaging in Business.—A person engaged in conducting an interstate express can not be required by the state or municipal authorities to take out a local license as a prerequisite to conducting his interstate business within the state or municipality.[48] An ordinance of a city, requiring an express company doing a local and interstate business to pay a license fee, and declaring it unlawful for such company to transact any business in such city until such fee is paid, is unconstitutional, as an unlawful exaction on interstate commerce.[49]

An ordinance imposing a license tax on every express company having an office in a certain city and state, and there receiving goods and forwarding them to points in that state, or receiving goods in that state, or receiving goods in that state and delivering them in that city, is repugnant to the interstate commerce law, and void.[50] But the ordinance of the city of Mobile requiring payment for a license by an express company, to transact in that city a business extending beyond the limits of the state, is not repugnant to the provision of the United States constitution vesting in congress the power to regulate commerce among

43. Tax on street railroads.—Phillipsburg Horse Car R. Co. *v.* State Board, 82 N. J. L. 49, 81 Atl. 1121.

44. Hudson, etc., R. Co. *v.* State Board, 96 N. E. 435, 203 N. Y. 119, reversing orders 126 N. Y. S. 1063 and 127 N. Y. S. 918, 143 App. Div. 26.

45. Express companies.—Wells, Fargo & Co. *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441.

Act Tenn. March 29, 1887, imposing a license tax upon express companies, is unconstitutional, as invading the exclusive power of congress to regulate interstate commerce, as against an express company engaged in interstate transportation. United States Exp. Co. *v.* Allen, 39 Fed. 712.

Act Tenn. April 8, 1889, providing that a license tax shall be paid by express companies for transporting one or more packages between points within the state, the amount of such tax being regulated by the length of the company's lines, is, in effect, a tax on interstate business, and is unconstitutional. United States Exp. Co. *v.* Allen, 39 Fed. 712.

46. State *v.* United States Exp. Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A., N. S., 1127.

47. Sanford *v.* Poe, 17 S. Ct. 305, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641.

48. As prerequisite to engaging in business.—Barrett *v.* New York, 189 Fed. 268.

49. Southern Exp. Co. *v.* Ensley, 116 Fed. 756.

50. City license.—Webster *v.* Bell, 15 C. C. A. 360, 68 Fed. 183.

the several states.[51] Neither is it a tax "to regulate commerce," which is prohibited to the states. To regulate commerce is to prescribe a rule in which it is to be governed. The express company can conduct its business as it pleases, and charge what rate of fees for transportation it pleases. Express companies are common carriers, and this ordinance does not interfere with their duties as such in the slightest. It is simply a tax for a license to do business in Mobile.[52]

Tax on Business and Occupation.—An occupation tax imposed on express companies under an ordinance expressly providing that it shall only apply to domestic business and not to interstate, is not a regulation of interstate commerce.[53] It is not an objection to an occupation tax on an express company on business done in the state that much the larger part of its business is interstate.[54] An express company transacting interstate and intrastate business is not liable for an occupation tax, imposing such a tax on "any carrier" transmitting goods "from one place to another," since the statute, not making any discrimination between local and interstate business, contravenes the federal constitution, giving congress sole power to regulate interstate commerce.[55] An occupation tax may be imposed on an express company on intrastate business, though in carrying packages from one point to another within the state it passes for a short distance through another state.[56]

51. The ordinance of the city of Mobile passed March 2, 1866, providing that every express or railroad company doing business within the city, and whose business extends beyond the state, must pay a license fee, under penalty, etc., does not conflict with the constitution of the United States. Osborne *v.* Mobile, 44 Ala. 493.

The city ordinance of Mobile of 1866 requiring any express company whose business extends out of the state to pay an annual license of $500, "if within the limits of the state, $100," and "if within the limits of the city of Mobile, $50," is constitutional and valid. Southern Exp. Co. *v.* Mobile, 49 Ala. 404.

52. Osborne *v.* Mobile, 44 Ala. 493.

53. Occupation tax.—Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

The act of Michigan approved March 27, 1867, regulating express companies and requiring the payment of a specific state tax of one per cent on the gross amount of current business in this state, is not in conflict with the federal constitution, giving to congress the power to regulate commerce among the several states. Walcott *v.* People, 17 Mich. 68.

The act of the Kentucky legislature providing that express companies within the state shall pay a license tax of $500 to $1,000 per annum, according as the lines over which they operate are less or more than 100 miles in length, is void, as a regulation of interstate commerce, within the inhibition of the constitution of the United States in that it seeks to lay a burden upon the business of such companies, rather than upon their property. Commonwealth *v.* Smith, 92 Ky. 38, 13 Ky. L. Rep. 362, 17 S. W. 187, 36 Am. St. Rep. 578.

54. Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

"The result of the authorities is that a rate on a continuous carriage from point to point within the state is to be regarded as a unit, and when it is applied to a shipment which passes through more than one state it takes on an interstate character and is beyond the regulation of the state; but a different rule obtains in the matter of taxation. The state may properly tax the property located within its borders of a corporation doing an interstate business, and may also tax that part of the business of such corporation doing an interstate business, and may also tax that part of the business of such corporation which is done within the state. The extent of the state business is of little consequence. The domestic business may be inconsiderable, and, if a small but definite part of the business is domestic, the company transacting it can not escape paying the state tax on that part. State *v.* Telegraph Co., 75 Kan. 609, 90 Pac. 299; Kehrer *v.* Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 S. Ct. 403. The appellant argues that as the tangible property of the express company is subject to taxation it is unjust to impose the additional tax on its business; but all know that express companies have but little tangible property subject to taxation, and the practical methods by which such companies can be afforded an opportunity to contribute their just share of the public burdens and pay for the protection which the public gives is through excise taxes or license taxes on their business. Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035, 12 S. Ct. 250." Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

55. State *v.* Northern Pac. Exp. Co., 71 Pac. 404, 27 Mont. 419, 94 Am. St. Rep. 824.

56. Leavenworth *v.* Ewing, 80 Kan. 58, 101 Pac. 664.

Tax on Gross Receipts.—A state has no power to impose a tax upon the receipts of a foreign express company for the transportation of merchandise received out of the state and delivered out of the state, and simply carried through the state, as the law imposing such a tax is an interference on the part of the state with the power of congress to regulate interstate commerce.[57] Act Missouri May 16, 1889, which imposes on companies carrying goods "by express, on contract with any railroad or steamboat company," a tax on their "receipts for business done within this state," is not an interference with interstate commerce.[58] The provision of the United States constitution that congress alone shall have power to regulate commerce with foreign nations and among the several states is not violated by a tax levied by the state upon the gross receipts of an express company whose business consists in receiving goods to be transported to points outside the state, to which its line does not extend.[59]

Tax on Intangible Property.—A state statute imposing an alleged franchise tax on corporations which, in effect, is not a franchise tax, but a tax on the intangible property of the corporation not otherwise taxed, is not unconstitutional in its application to an interstate express company as an unwarrantable interference with interstate commerce.[60] A state law, taxing the intangible property of express companies in proportion to mileage in the state, as compared with total mileage, is not an interference with interstate commerce.[61]

Tax on Express Wagons.—New York city ordinances, regulating express wagons using the streets of the city, requiring that they be licensed and marked with the word "express" and with their official numbers, that they be regularly inspected and pay a license fee of five dollars for each wagon, that the drivers shall also be licensed and pay a license fee of fifty cents, were reasonable and ap-

57. **Tax on gross receipts.**—Indiana *v.* American Exp. Co., 7 Biss. 227, Fed. Cas. No. 7,021.

The earnings of nonresident express company carrying goods between two points within the state over route incidentally traversing portion of another state, derived from carriage within the state, held within the gross receipts upon which tax under Rev. Laws Minn. 1905, §§ 794-1038, is based, without burdening interstate commerce. United States Exp. Co. *v.* Minnesota, 32 S. Ct. 211, 223 U. S. 335, 56 L. Ed. 459, affirming judgment State *v.* United States Exp. Co., 131 N. W. 489, 114 Minn. 346, 37 L. R. A., N. S., 1127.

Including in gross receipts of nonresident express company under Rev. Laws Minn. 1905, §§ 794-1038, earnings from interstate shipments, where transportation was performed wholly within the state, held not an unconstitutional burden on interstate commerce. United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 S. Ct. 211, affirming judgment, State *v.* United States Exp. Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A., N. S., 1127.

A nonresident express company, whose receipts are largely derived from interstate commerce and investments in bonds and lands outside the state, held not subject to the gross revenue tax exacted by Laws Okl. 1910, c. 44. Meyer *v.* Wells, Fargo & Co., 32 S. Ct. 218, 223 U. S. 298, 56 L. Ed. 445.

58. Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035, 12 S. Ct. 250.

Act Missouri May 16, 1889, which imposes on companies carrying goods, "by express, on contract with any railroad or steamboat company," a tax on their "receipts for business done within this state," is not an interference with interstate commerce. Pacific Exp. Co. *v.* Seibert, 44 Fed. 310.

59. American Union Exp. Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382.

The act of December, 1866, imposing a tax on the gross receipts of express companies, is not in contravention of the constitution of the state or of the United States, as regulating the "commerce among the states," or imposing a duty on "imports and exports." Southern Exp. Co. *v.* Hood (S. C.), 15 Rich. L. 66, 94 Am. Dec. 141.

Laws 1891, c. 14, §§ 65, 66, providing for the taxation of the property of express companies, are not unconstitutional because they enable the board of assessment and equalization, in valuing their property, to take into consideration their gross earnings from contracts made with railroad companies extending to points without the state. American Exp. Co. *v.* State Board, 3 S. Dak. 338, 53 N. W. 192.

60. **Tax on intangible property.**—Coulter *v.* Weir, 62 C. C. A. 429, 127 Fed. 897.

61. **Tax on mileage basis.**—Weir *v.* Norman, 166 U. S. 171, 41 L. Ed. 960, 17 S. Ct. 527.

plicable to delivery wagons of express companies engaged in interstate commerce.[62]

Company Engaged in Both Interstate and Intrastate Commerce.—The Mississippi act imposing a tax on express companies doing business in the state is void as to all interstate transportation, but valid as to all business to be exclusively performed within the state. A levy of a tax on a company being both a local and interstate business will be enjoined until a separation between the two kinds of business can be made.[63] An express company is not relieved from a license tax imposed with reference to intrastate business because also engaged in interstate business.[64]

Company Engaged Solely in Intrastate Commerce.—A license or privilege tax imposed by a state on the business of an express company engaged solely in interstate commerce, where there is no intention by this means to obstruct or prohibit the business, is not invalid.[65] A statute which in effect imposes a license tax on express companies doing any local business, but none on those doing interstate business only, is not void as regulating interstate commerce.[66]

Where Route Extends Short Distance Out of State.—Annual privilege tax levied by city on business of express company, excluding interstate business, is not invalid because transportation is over a route for a short distance passing out of the state.[67]

§ 3962. Tax on Sleeping Cars.—A state statute imposing what was called a privilege tax upon every sleeping car or coach, run or used upon a railroad in that state, not owned by the railroad company so running or using it, is held to affect a matter national in its character, requiring uniformity of regulation, and therefore to be invalid, though not in conflict with any regulation prescribed by congress.[68]

62. **Tax on express wagons.**—Barrett *v.* New York, 189 Fed. 268.

63. **Engaged in both interstate and intrastate commerce.**—United States Exp. Co. *v.* Hemmingway, 39 Fed. 60.

Act Mississippi, imposing a tax on express companies doing business in the state, is void as to all interstate transportation, being in violation of the constitution, art. 1, § 8, par. 3, exclusively confiding regulation of interstate commerce to congress, but valid as to all business to be exclusively performed within the state. United States Exp. Co. *v.* Hemmingway, 39 Fed. 60.

64. Hardee *v.* Brown, 56 Fla. 377, 47 So. 834.

65. **Engaged solely in intrastate commerce.**—Memphis, etc., R. Co. *v.* Nolan, 14 Fed. 532; S. C., 27 Alb. L. J. 217, 4 Ky. L. Rep. 840.

66. Osborne *v.* Florida, 17 S. Ct. 214, 164 U. S. 650, 41 L. Ed. 586; United States Exp. Co. *v.* Hemmingway, 39 Fed. 60.

67. **Where route extends short distance out of state.**—Ewing *v.* Leavenworth, 33 S. Ct. 157, 226 U. S. 464, 57 L. Ed. 303, affirming judgment, 101 Pac. 664, 80 Kan. 58.

68. **Tax on sleeping cars.**—Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635, confirmed and applied in Tennessee *v.* Pullman Southern Car Co., 117 U. S. 51, 29 L. Ed. 791, 6 S. Ct. 643.

Where a state statute imposes a tax of $500 per cent on sleeping car companies doing both interstate and intrastate business, and makes no distinction between the two, such statute is an infringement upon interstate commerce and is therefore unconstitutional and void. Allen *v.* Pullman's Palace Car Co., 191 U. S. 171, 48 L. Ed. 134, 24 S. Ct. 39. See, also, Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4.

Act Tennessee March 16, 1877, § 6 (Laws 1877, c. 16, p. 26), imposing a privilege tax upon sleeping cars owned by a foreign corporation, and leased to a Tennessee railroad corporation, which received the transit fare, while the fee for sleeping accommodation was paid to the owner, and used for the transportation of passengers into or out of or across the state, is void, as an interference with interstate commerce. Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 S. Ct. 635; Tennessee *v.* Pullman Southern Car Co., 117 U. S. 51, 29 L. Ed. 791, 6 S. Ct. 643.

The legislature of Tennessee has no power to impose upon the Pullman Southern Car Company a privilege tax of $75 per annum for running or using sleeping cars in the transportation of interstate passengers, notwithstanding such cars may enter or cross the territory of that

Engaged in Both Interstate and Intrastate Commerce.—Taxes exacted from a sleeping car company engaged in both interstate and intrastate traffic, under a state statute imposing an annual tax upon sleeping car companies doing business in the state, which makes no distinction between cars used in interstate traffic or in traffic wholly within the borders of the state, are void as an attempt by the state to impose a burden upon interstate commerce.[69]

Engaged in Intrastate Commerce Only.—The privilege tax imposed on sleeping and palace car companies carrying passengers from one point to another within the state, can not be deemed an unconstitutional regulation of commerce, because of the declaration in the constitution of the state, that sleeping car companies are common carriers and subject to liability as such, where such provision is regarded by the state courts as imposing no obligation on the company to transport local passengers.[70]

Where Local Passengers Carried.—An annual tax imposed by a state statute upon sleeping car companies which carry one or more local passengers on cars operating within the state is not void as a burden on interstate commerce, where the company is free to decline all local business if it sees fit.[71]

Tax on Capital Stock.—Since a state has the right to tax personal property within its jurisdiction, even though it is employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, is valid and constitutional, though such cars run into, through, and out of the state.[72]

Tax on Gross Receipts.—The Indiana statute which provides that every sleeping car company doing business in the state shall report to the auditor the gross amount of all its receipts for fares earned in business done in the state for the preceding year, and shall pay into the state treasury two dollars on every one hundred dollars of such receipts, is invalid.[73]

Tax on Value of Average Number of Cars Placed in Railroad Yard.—Under a statute of Kentucky authorizing a city to make an annual assessment of all personal property within the corporate limits subject to taxation for state purposes, and providing that all personal estate within the state shall be subject to taxation, unless exempted, a city may impose a tax on sleeping cars of a foreign corporation engaged in interstate commerce to the extent of the value of the

state. Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276.

Act 1877, c. 16, § 6, declaring the running of sleeping cars not owned by the railroad upon which they are used to be a privilege, and imposing a tax thereon, is constitutional; and this, although the owner is a foreign corporation, and the cars are used for the accommodation of passengers traveling through the state. Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587.

69. Engaged in both interstate and intrastate commerce.—Allen *v.* Pullman's Palace Car Co., 24 S. Ct. 39, 191 U. S. 171, 48 L. Ed. 134.

70. Engaged in intrastate commerce only.—Judgment, Pullman Palace Car Co. *v.* Adams, 30 So. 757, 78 Miss. 814, 84 Am. St. Rep. 647, affirmed in 23 S. Ct. 494, 189 U. S. 420, 47 L. Ed. 877.

71. Where local passengers carried.—Allen *v.* Pullman's Palace Car Co., 24 S. Ct. 39, 191 U. S. 171, 48 L. Ed. 134.

72. Tax on capital stock.—Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Pullman's Palace Car Co. *v.* Hayward, 141 U. S. 36, 35 L. Ed. 621, 11 S. Ct. 883, affirming Pullman's Palace Car Co. *v.* Commonwealth, No. 2, 107 Pa. 156.

Act June 7, 1879, imposing a tax on the gross receipts of foreign corporations, held not an unconstitutional interference with the congressional jurisdiction over interstate commerce, though the receipts were partly derived from passengers traveling in cars of such corporations passing into, through, and out of the state. Pullman's Palace Car Co. *v.* Commonwealth, No. 1, 107 Pa. 148.

73. Tax on gross receipts.—State *v.* Woodruff, etc., Coach Co., 114 Ind. 155, 15 N. E. 814.

Section 87 of the act of the legislature of Indiana of March 29, 1881, entitled "An act concerning taxation," imposing a certain proportionate tax according to distance traveled in Indiana on the gross receipts of foreign sleeping car companies conveying passengers to, from, and through Indiana, is unconstitutional, as being in conflict with article 1, § 8, of the constitution of the United States. Indiana *v.* Pullman Palace Car Co., 11 Biss. 561, 16 Fed. 193.

average number of cars daily placed in railroad yards in the city for the purpose of preparing them for train service.[74]

Charter Fee.—A foreign sleeping car company can not be restrained from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock, imposed by a state statute for the benefit of its permanent school fund, as a condition of doing such business, since such requirement amounts to a burden or tax on the company's interstate business and on its property located and used outside the state.[75]

§ 3963. Tax on Refrigerator Cars.—A state may constitutionally tax refrigerator cars used on railroads of the state, and required in their business, though owned by a corporation of another state, which furnishes them for the transporation of perishable products, as required by a shipper or railroad company for a particular shipment or trip—being paid by the railroad company on a mileage basis—and though such cars are used within the state entirely in carrying on interstate commerce; and such tax may properly be fixed upon the value of the average number of cars employed within the state.[76] The state may tax the average number of refrigerator cars used by railroads within the state, but owned by a foreign corporation which has no office or place of business within the state, and employed as vehicles of transportation in the interchange of interstate commerce.[77]

§§ 3964-3972. Tax on Ships—§ 3964. In General.—The levying of a tax upon vessels or other watercraft or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the constitution of the United States.[78] A state law which includes steamboats in the property made taxable is not necessarily in violation of the provision of the United States relative to the regulation of commerce.[79] Where a city is authorized by law to assess, levy, and collect an annual tax for the use of the city on personal property, not to exceed a certain per cent of the assessed valuation thereof, an annual tax on steamboats having that city as their home port, and based on their valuation, is not in violation of the constitution of the United States, declaring that congress shall have power to regulate commerce with foreign nations and among the several states.[80]

To Defray Expense of Quarantine.—The expense of quarantine regulations can not be raised by a tax on foreign-owned ships engaged in interstate or international commerce.[81]

To Defray Hospital Expenses.—State statutes requiring from the masters of vessels engaged in the foreign and coasting trade the payment of a sum of money for hospital purposes, for each of the officers and crew of such vessel, are

74. **Tax on value of average number of cars placed in railroad yard.**—Covington *v.* Pullman Co., 121 Ky. 218, 89 S. W. 116, 28 Ky. L. Rep. 199.

75. **Charter fee.**—Judgment, Coleman *v.* Pullman Co., 75 Kan. 664, 90 Pac. 319, reversed in 216 U. S. 56, 30 S. Ct. 232.

76. **Tax on refrigerator cars.**—Hall *v.* American Refrigerator Trans. Co., 51 Pac. 421, 24 Colo. 291, 65 Am. St. Rep. 223; S. C., 19 S. Ct. 599, 174 U. S. 70, 43 L. Ed. 899.

77. Judgment, 55 Pac. 639, 18 Utah 378, 48 L. R. A. 790, affirmed in Union Refrigerator Trans. Co. *v.* Lynch, 20 S. Ct. 631, 177 U. S. 149, 44 L. Ed. 708.

78. **Tax on ships.**—Transportation Co. *v.* Wheeling, 99 U. S. 273, 25 L. Ed. 412; Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303; Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257; Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38; State Tonnage Tax Cases (U. S.), 12 Wall. 204, 20 L. Ed. 370; Nathan *v.* Louisiana (U. S.), 8 How. 73, 12 L. Ed. 993; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Gibbons *v.* Ogden (U. S.), 9 Wheat. 1, 6 L. Ed. 23; Passenger Cases (U. S.), 7 How. 283, 12 L. Ed. 702; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463.

79. Perry *v.* Torrence, 8 O. 521, 32 Am. Dec. 725.

80. Wheeling, etc., Transp. Co. *v.* Wheeling, 9 W. Va. 170, 27 Am. Rep. 552.

81. **To defray expense of quarantine.**—Peete *v.* Morgan (U. S.), 19 Wall. 581, 22 L. Ed. 201.

unconstitutional and void, but enactments requiring payment from shipmasters on account of passengers are constitutional and valid.[82]

Company Incorporated in State.—The power of congress to regulate commerce either with foreign countries or between the states is not interfered with by the assessment of a steamship company incorporated in New York for the transportation of passengers and freight between New York and a foreign country.[83]

Wharf Leased in State.—A foreign corporation, whose vessels, while en route between the ports of two different states, stop at a port of a third state, is not liable for a license tax at that port because it there leases a wharf or landing; has plant and machinery for the taking in and discharge of freight and passengers; engages stevedores and longshoremen, who are in its sole employment; has there an agent and subordinate clerks, an office, with furniture, books, and appliances; and keeps a bank account and occasionally purchases supplies there, since all such operations are an essential and integral part of its interstate commerce business.[84]

§ 3965. Tax on Gross Receipts.—The imposition of a tax, under the acts of Pennsylvania, of March 20, 1877, and June 7, 1879, upon a steamship company incorporated under the laws of Pennsylvania, upon the gross receipts of such company, derived from the transportation of persons and property by sea between different states, and to and from foreign countries, is an invalid regulation of interstate and foreign commerce.[85] The city of Mobile, under its charter authority to tax real and personal property within the city, may lawfully assess a steamboat plying on the Alabama River, though it is registered and enrolled as a coasting vessel under the laws of the United States, and the owner of the boat is a citizen of another state, if resident in Mobile during the business season. That the boat may be assessed and taxes paid in the state of which the owner is a citizen is immaterial.[86]

§ 3966. Tax on Interest of Citizen in Vessel.—The state has a right to tax a citizen and resident in the state for his interest in vessels which navigate the seas, and are regularly registered and licensed as American vessels under the laws of congress.[87] A municipal tax on a vessel engaged in foreign commerce, and owned by a citizen of the municipality levying the tax, is not in conflict with the United States constitution, which gives to congress the right to regulate commerce with foreign states.[88]

§ 3967. Tax on Persons Residing on Ships.—A statute requiring payment of a license tax by a person residing on a boat, though it applies to the Ohio and Mississippi Rivers, is not an interference with interstate commerce.[89]

82. **To defray hospital expenses.**—People *v.* Brooks (N. Y.), 4 Denio 469.

83. **Company incorporated in state.**—People *v.* Commissioners of Taxes and Assessments (N. Y.), 48 Barb. 157.

84. **Where wharf leased.**—Clyde Steamship Co. *v.* Charleston, 76 Fed. 46.

85. **Tax on gross receipts.**—Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118.

86. Battle *v.* Mobile, 9 Ala. 234, 44 Am. Dec. 438.

The city of Mobile, under its charter authority to tax real and personal property within the city, may lawfully assess a steamboat plying on the Alabama River, if owned by citizens of the state resident in Mobile, though it is registered and enrolled as a coasting vessel under the laws of the United States. Battle *v.* Mobile, 9 Ala. 234, 44 Am. Dec. 438.

A state tax on the gross receipts of a state corporation engaged in transporting freight and passengers between this and foreign countries held not within the constitutional inhibition as to the regulation of foreign commerce. Philadelphia, etc., Steamship Co. *v.* Commonwealth, 104 Pa. 109.

87. **Tax on interest of citizen in vessel.**—Howard *v.* State (Md.), 3 Gill 14.

It is not a regulation of commerce for the state to tax the interests of a citizen of Maryland in vessels engaged in foreign commerce, registered at the proper federal office in the state. Gunther *v.* Baltimore, 55 Md. 457.

88. Gunther *v.* Baltimore, 55 Md. 457.

89. **Tax on persons residing on ships.**—Robertson *v.* Commonwealth, 101 Ky. 285, 40 S. W. 920, 19 Ky. L. Rep. 442.

§ 3968. Tax on Agents, Pilots, etc.—Tax on Agents.—The Act of Tennessee of 1879, providing means for the local government of the "taxing district," which provides that steamboat agents other than the proper officers of railroads terminating at the taxing districts, shall pay a privilege tax is not a regulation of commerce between the states, and is not therefore in violation of the constitution of the United States.[90]

Tax on Pilots.—The act of Indiana "regulating the licensing of pilots at the falls of the Ohio river" provides that the governor shall appoint the pilots, who shall execute bonds, etc., conditioned, etc., and that any owner or navigator of a boat ascending or descending the river may navigate said falls at his own risk. The law is valid, at least so far as commercial intercourse may be carried on between the parts of the state named in said act by citizens of the state, and therefore does not conflict with the provision in the United States constitution providing that congress shall have power to regulate commerce with foreign nations and among the several states, etc.[91]

Tax on Steamboat Engineer.—The New York city charter, makes it a misdemeanor for one to act as an engineer for the purpose of operating a steam boiler, save for private dwellings for heating purposes or for locomotives, without a certificate of qualification. Though applicable to one acting as engineer of a boiler situated on a scow on the East river, and used for blasting purposes, the statute did not impose a burden on commerce.[92]

§ 3969. Registered under Laws of United States.—Vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of congress, may be taxed by state authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other property in the state, without unfavorable discrimination on account of its employment.[93] Steamboats which ply between different ports on a navigable river may, under a state statute, be taxed as personal property by the city where the company owning them has its principal office, and which is there home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon demandable under those laws have been duly paid.[94] Vessels, which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled, under an act of congress, at a port outside the limits of the state.[95] The object of the registry acts does not require and there is no suggestion in the statutes that vessels registered or enrolled are exempt from the ordinary rules respecting taxation of personal property. It is true by § 4141 there is created what may be called the home port of the vessel, an artificial situs, which may control the place of taxation in the absence of an actual situs elsewhere.[96]

Ships or vessels touching foreign ports.—But ships or vessels engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one state,

90. Tax on agents.—Lightburne *v.* Taxing Dist., 72 Tenn. (4 Lea) 219.

91. Pilots.—Barnaby *v.* State, 21 Ind. 450.

92. Tax on steamboat engineer.—People *v.* Prillen, 76 N. Y. S. 821, 73 App. Div. 207, reversed in 173 N. Y. 67, 65 N. E. 947.

93. Registered under laws of United States.—Transportation Co. *v.* Wheeling, 99 U. S. 273, 25 L. Ed. 412.

94. Transportation Co. *v.* Wheeling, 99 U. S. 273, 25 L. Ed. 412.

95. Judgment, Old Dominion Steamship Co. *v.* Commonwealth, 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855, affirmed in Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 S. Ct. 686.

96. Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 S. Ct. 686. See Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254.

are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight.[97]

The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another state, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles.[98]

Steamboats plying between different ports on a navigable river may, under a state statute, be taxed as personal property by the city where the company owning them has its principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon, demandable under those laws, have been duly paid.[99]

§ 3970. Registered in Another State.—No state but that in which a vessel has her home port has dominion over her for the purpose of taxation.[1] The state of California has no power to tax vessels owned and registered in New York, but which are temporarily within its jurisdiction for the purpose of discharging and receiving passengers and freight.[2]

§ 3971. Tax on Particular Ships.—Tax on Towboats.—The New Orleans city ordinance imposing a license tax on every agency, person, or corporation owning or running towboats to and from the Gulf of Mexico violates the constitution of the United States, giving congress power to regulate commerce between the states.[3] Steam tugs engaged in the business of towing vessels from

97. Ships or vessels touching foreign ports.—Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254; St. Louis *v.* Ferry Co. (U. S.), 11 Wall. 423, 20 L. Ed. 192; Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463; Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 S. Ct. 686.

A company, incorporated by New York (all the stockholders being residents of that state) owned vessels which were employed in the transportation of passengers, etc., between New York and San Francisco and different ports in the territory of Oregon. The vessels were ocean steamships duly registered in New York and remained in California no longer than was necessary to land their passengers and freight, and prepare for the next voyage. It was held that these vessels were not liable to assessment and taxation under the laws of California and under the authorities of San Francisco. Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254.

When a vessel is regularly registered in the port to which she belongs, that is to say, "in the port nearest to which her owner, husband, or acting and managing owner usually resides," the fact that she may be temporarily in a port of a state, other than that where her home port is, and engaged in lawful commerce—one of a daily line of steamers—between that port and a port of a yet third state, does not cause her to become incorporated into the personal property of the state where she is temporarily, and no state but that in which her home port is has dominion over her for the purpose of taxation. The fact that the vessel was enrolled by her master as a coaster at Mobile, Alabama, and that her license as a coaster was renewed from year to year, does not affect her registry in New York or her ownership there. It accordingly does not change the rule. Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303.

98. Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254; Peyroux *v.* Howard (U. S.), 7 Pet. 324, 8 L. Ed. 700; The General Smith (U. S.), 4 Wheat. 438, 4 L. Ed. 609.

99. Transportation Co. *v.* Wheeling, 99 U. S. 273, 25 L. Ed. 412.

1. Ship registered in another state.—Morgan *v.* Parham (U. S.), 16 Wall. 471, 21 L. Ed. 303.

2. Hays *v.* Pacific Mail Steamship Co. (U. S.), 17 How. 596, 15 L. Ed. 254.

3. Tax on towboats.—Moran *v.* New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 S. Ct. 38.

The ordinance of the city of New Orleans imposing a license tax upon the owners of towboats running on the Mississippi River to and from the Gulf of Mexico is not a regulation of commerce, and it is not, therefore, in conflict with

the Chicago River into the harbor and lake, and in bringing vessels from the lake into the river, are engaged in interstate and foreign commerce; and if they possess a license to engage in the coasting and foreign trade, under an act of congress, they can not be compelled to pay any further license fee to the city of Chicago, and a city ordinance requiring the same is void.[4] The exaction of such a license fee can not be supported upon the ground that the city of Chicago had from time to time expended money in deepening the Chicago River for navigation purposes, when the ordinance does not profess to require the license fee on any such ground, and no suggestion is made that any special benefit has arisen, or can arise, to such tugs, by such deepening of the river.[5] Vessels licensed for coasting trade, as provided by the Revised Statutes of the United States and engaged in transporting freight upon the Mississippi river from Illinois to Missouri, and unloading the same into vessels moored at the improved wharf of the city of St. Louis, can not be compelled to pay a license fee exacted by an ordinance of the city of St. Louis which does not exact such fee as compensation for the use of the city's wharf, but for the privilege "of towing boats or other water crafts into or out of the harbor of the city, or from one place to another within said harbor," such ordinance being void as an interference with interstate commerce.[6]

Tax on Dredges.—Dredges, having no propelling power, and not designated for use in the carrying trade, nor entitled to enrollment and registry, though employed to do work intended to aid navigation and commerce, and although they are vessels subject to maritime liens, are not instruments of interstate or foreign commerce, and may be subjected to taxation in a state other than that of the residence of their owners, when kept and employed in such state without an intention to remove them therefrom at any definite time; and such vessels are taxable under a law of the state of Washington, providing that "all boats and small craft not required to be registered must be assessed in the county where the same are kept."[7]

Tax on Oyster Boats.—An act of the state of Maryland prohibiting any person from using a vessel for buying, carrying, or selling oysters over the navigable waters of Chesapeake Bay, unless licensed from the state, after a previous twelve months residence in the state, and the payment of a tonnage tax, is unconstitutional, so far as it interferes with the right to carry on such business in licensed and enrolled vessels of the United States, and because it requires a payment of tonnage tax without the consent of congress.[8]

the constitution of the United States. New Orleans *v.* Eclipse Tow-Boat Co., 33 La. Ann. 647, 39 Am. Rep. 279.

Act No. 150 of 1890, § 8, par. 19, imposing a license tax on every person engaged in the business of operating towboats on the Mississippi River and its tributaries, to be graduated according to the gross annual receipts, is void because it is a regulation of interstate commerce. Frere *v.* Von Schoeler, 47 La. Ann. 324, 16 So. 808, 27 L. R. A. 414.

4. Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306.

5. Harman *v.* Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 S. Ct. 306, reversing 140 Ill. 374, 29 N. E. 732.

The navigation of the Chicago River having been improved by the city of Chicago at its own expense, an ordinance prohibiting the use of tugboats engaged in interstate commerce, except under license from the city, is valid, as being the imposition of a toll for the use of the river in its improved condition. Harmon *v.* Chicago, 140 Ill. 374, 29 N. E. 732, reversing 26 N. E. 697.

Tugboats licensed by the United States for the coasting trade, and employed in towing vessels engaged in interstate commerce in and out of the Chicago River, are engaged in interstate commerce, though their operations are in fact confined largely to the corporate limits of the city of Chicago. But a city ordinance prohibiting the use of such tugboats, except under license from the city, is unconstitutional, as being a toll for the use of the river in its condition as improved by the city at its own expense. Harmon *v.* Chicago, 140 Ill. 374, 29 N. E. 732, reversing 26 N. E. 697.

6. St. Louis *v.* Consolidated Coal Co., 158 Mo. 342, 59 S. W. 103, 51 L. R. A. 850, 81 Am. St. Rep. 310.

7. **Dredges.**—McRae *v.* Bowers Dredging Co., 90 Fed. 360.

8. **Oyster boats.**—Booth *v.* Lloyd, 33 Fed. 593; Ex parte Insley, 33 Fed. 680.

An act to enforce, in Maurice River Cove and Delaware Bay, an act for the preserva-

Boat Used for Exhibition Purposes.—A tax imposed by a town, under authority of the state, on a public exhibition given on board a steamboat, the owner whereof has obtained a coasting license from the federal government, is a mere police regulation, necessary to the order of cities and town, and not a regulation of commerce.[9]

§ 3972. Wharfage Fees.—The imposing of wharfage fees by a city on a river which is the boundary between the states is not an interference with interstate commerce.[10] A statute fixing reasonable rates of compensation to be paid to a wharfinger for the use of his wharf by a vessel moored thereto does not create a tax upon tonnage or an impediment to commerce.[11] The exaction of wharfage is not the laying of a duty of tonnage, and, where an ordinance requires steamboats and other water craft to pay for the use of the wharfs, and no demand is made for entering, loading, or lying in the harbor or port, such charges will not be considered as a duty of tonnage but as wharfage.[12] A city has no power to compel a boat to avail itself of its wharves by landing there instead of landing at the natural bank of the river, or to require the payment of wharfage dues from any vessel not landing at the wharf, as an exaction of such dues for the mere privilege of landing at the banks of a natural stream, although within the harbor limits of the city, is a duty of tonnage within the prohibition contained in the United States Constitution, art. 1, § 10.[13]

§ 3973. Tax on Ferries.—The granting of ferry licenses on boundary rivers is within the police powers of a state, provided it be not so exercised as to interfere with general commercial transportation, as distinguished from ferriage.[14] A tax on the privilege of operating a ferry, where the ferry company is

tion of clams and oysters, requiring a license from all boats engaged in planting or taking oysters there, is not an unconstitutional interstate regulation. Johnson *v.* Loper, 46 N. J. L. 321.

9. Where exhibition given on steamboat.—Board *v.* Spalding, 8 La. Ann. 87.

10. Wharfage fees.—Keckevoet *v.* Dubuque (Iowa), 138 N. W. 540.

11. The John M. Welch, Fed. Cas. No. 7,359, 9 Ben. 507, reversed in Broeck *v.* The Barge John M. Welch, 2 Fed. 364.

Laws N. Y. 1897, p. 701, c. 592, § 63, which provides that "the master, owner or consignee of every steamboat or vessel entering the port of Albany or loading, unloading or making fast to any wharf therein, shall, within forty-eight hours after the arrival thereof, pay to the harbor master for his services the sum of one and one-half cents per ton per annum, which shall be computed upon the registered tonnage of such steamboat or vessel," is void as imposing a tonnage tax, in violation of article 1, § 10, of the constitution of the United States. Way *v.* New Jersey Steamboat Co., 133 Fed. 188.

Wharfage charges imposed by the board of harbor commissioners on the owner of a barge and lighter, which were kept within a slip constructed, repaired, and dredged by the board, are valid, and not in violation of the Constitution of the United States, art. 1, § 10, which prohibits a state from levying duty on tonnage without the consent of congress. People *v.* Roberts (Cal.), 25 Pac. 496.

Wharfage, or a compensation payable by a vessel for use of a wharf, is not a tonnage duty, although directed to be computed in proportion to the tonnage of vessels. Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 196.

Act March 24, 1899 (P. L. 1899, p. 506) § 10, authorizing the state oyster commission to fix the license tax imposed on boats entitled to engage in oyster planting in certain tidal waters within the state, according to the tonnage measurement of the boats, does not violate the constitution of the United States, art. 1, § 10, par. 3, declaring that no state shall, without the consent of congress, levy any duty of tonnage; the tax being imposed on the business of oyster planting, and not on ship as in instrument of commerce. State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

12. Ouachita, etc., Packet Co. *v.* Aiken, 16 Fed. 890.

"The constitutionality of wharfage taxes exacted by the city of New Orleans has been settled by this court in this district. Leathers *v.* Aiken, 9 Fed. 679, and Ouachita, etc., Packet Co. *v.* Aiken, 16 Fed. 890." Silver *v.* Tobin, 28 Fed. 545.

13. Cape Girardeau *v.* Campbell, 26 Mo. App. 12.

14. Tax on ferries.—Conway *v.* Taylor (U. S.), 1 Black 603, 17 L. Ed. 191.

The owner of a ferryboat plying between the United States and Canada, on the Detroit River, may be convicted under an ordinance of the city of Detroit forbidding the operation of ferryboats

exclusively engaged in ferrying passengers across a river from one state to another, is a burden on interstate commerce, which a state may not impose.[15]

Transferring Railroad Cars.—An unconstitutional burden is imposed on interstate commerce by a law of Illinois penalizing the carrying on of a ferry without a license, when applied to the transportation of loaded or unloaded railroad cars across the Mississippi river from the Illinois to the Missouri shore, even assuming that a state may regulate a ferry upon a navigable stream forming the boundary between two states, where such statute makes the granting of the license discretionary, with citizens of Illinois preferred, and compels the licensee to conduct a general ferry business.[16] A state has no power to exact a license fee for the operation of a ferry for the transfer of railroad cars across a navigable river between a point within such state and a point in another state, where the corporation owning and operating such ferry is a citizen and resident of the latter state, and the vessels employed have their situs in such state for purposes of taxation, and the only property of the company within the state seeking to impose the license consists of its landing place and facilities. As applied to such case, the license fee is a direct burden upon interstate commerce.[17]

§ 3974. Tax on Bridges.—It is no defense to an action for taxes levied upon the property of a bridge company situated exclusively in the state, and upon the value of its franchise granted by the state, that the bridge connected two states, and was used entirely for interstate business.[18] A proportional state tax on the intangible property, within the state, of a bridge company owning a bridge over a river between adjoining states, is not a tax on interstate commerce, when the busi-

without a license, though the boat was duly enrolled and licensed for the coasting and foreign trade under the laws of the United States. Chilvers *v.* People, 11 Mich. 43.

An annual license tax of a fixed sum, imposed by a municipal corporation on each boat of a ferry company located within its limits, is valid exercise of the police power, and, though the other landing of the ferry is in another state, can not be considered as a regulation of interstate commerce, within the constitution, art. 1, § 8. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257.

An ordinance requiring keepers of ferries to pay a license fee, enacted in pursuance of a power conferred upon the city by the legislature to "license, tax and regulate ferries," is not in restraint of interstate commerce. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560.

The fact that a Kentucky ferry company, domiciled in Kentucky, is engaged in interstate commerce, does not deprive the state of Kentucky of the right to tax its franchise; and its income may be considered in fixing the value of that franchise. Louisville, etc., Ferry Co. *v.* Commonwealth, 57 S. W. 624, 22 Ky. L. Rep. 446, 108 Ky. 717; S. C., 57 S. W. 626, 22 Ky. L. Rep. 480, 24 Ky. L. Rep. 1339. Reversed in Louisville, etc., Ferry Co. *v.* Kentucky, 23 S. Ct. 463, 188 U. S. 385, 47 L. Ed. 513.

Tax on capital stock.—A ferry company engaged in transporting freight and passengers across the Delaware River from P., in Pennsylvania, to G., N. J., was incorporated under the laws of the latter state, and had all its boats registered there. It had no property in Pennsylvania, other than the lease of a wharf, and did no other business there than the landing and receiving of freight and passengers at said wharf. Held, that a tax imposed by Pennsylvania upon the capital stock of said company was void, as an interference with interstate commerce. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 S. Ct. 826.

15. Helena-Glendale Steam Ferry Co. *v.* State, 101 Miss. 65, 57 So. 362.

16. Transferring railroad cars.—Judgment, St. Clair County *v.* Interstate Car-Transfer Co., 109 Fed. 741, affirmed in 24 S. Ct. 300, 192 U. S. 454, 48 L. Ed. 518.

17. St. Clair County *v.* Interstate Car-Transfer Co., 109 Fed. 741, affirmed in 24 S. Ct. 300, 192 U. S. 454, 48 L. Ed. 518.

18. Tax on bridges.—Henderson Bridge Co. *v.* Commonwealth, 99 Ky. 623, 17 Ky. L. Rep. 389, 31 S. W. 486.

The city of Henderson, Ky., whose corporate limits extend to low water on the Indiana shore of the Ohio River, by an ordinance granted to a Kentucky bridge company the right to build a railroad bridge within its boundaries, and made certain stipulations as to taxation thereof. Held, that the taxation of the bridge was not a regulation of interstate commerce, or the taxation of an agency of the federal government. Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 35 L. Ed. 900, 12 S. Ct. 114.

ness of transportation is not carried on by the bridge company, but by persons and corporations who pay tolls to the bridge company. The fact that the tax may tend to increase the tolls is too remote and incidental to make it a tax on the business transacted.[19] The fact that a bridge across a navigable stream between two states is an instrument of interstate commerce does not exempt so much of it as is within one of the states from taxation by such state.[20]

Toll Bridge.—That a toll bridge is part of a structure which carries trains engaged in interstate commerce does not prevent its taxation.[21]

Tax on Receipts from Interstate Commerce.—A proportional state tax, levied under a statute of Kentucky, on the intangible property within the state of a bridge company owning a bridge over a river between the state and another state, is not a tax on interstate commerce, though the bridge is used for interstate commerce by street cars and other vehicles, and though, in arriving at the value, the income is considered, and the income is derived in whole or in part from interstate commerce.[22]

Tax on Capital Stock.—Interstate commerce is not taxed by taxing the capital stock of a bridge company which owns an interstate bridge but does not transact any interstate business over it.[23]

§ 3975. Tax on Automobiles.—A state may lawfully charge an annual tax for registering an automobile, imposed as a charge for the use of its highways and to raise revenue to defray their cost and repair. Such tax is without discrimination against nonresidents, and, while applying to persons engaged in interstate commerce, is not unconstitutional as contravening the commerce clause of the constitution of the United States.[24] A state may do this because, having expended moneys, either itself or by the agencies created by it, in increasing the facility with which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay made by it, and for the maintenance of the public work which it has constructed.[25] The charging of an annual sum for the use of its highways by automobiles, instead of a mileage fee, is clearly a matter within the discretion of the state. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. The

19. Judgment, 99 Ky. 623, 17 Ky. L. Rep. 389, 31 S. W. 486, affirmed in Henderson Bridge Co. *v.* Commonwealth, 17 S. Ct. 532, 166 U. S. 150, 41 L. Ed. 953.

The acts of congress prescribing the height, width of span, etc., of bridges to be erected over the Ohio, and declaring that they shall be post roads, do not affect the power of the states to tax the intangible property of the bridge companies. Henderson Bridge Co. *v.* Commonwealth, 17 S. Ct. 532, 166 U. S. 150, 41 L. Ed. 953.

20. Pittsburgh, etc., R. Co. *v.* Board, 172 U. S. 32, 43 L. Ed. 354, 19 S. Ct. 90.

21. **Toll bridge.**—Southern R. Co. *v.* Mitchell, 139 Ala. 629, 37 So. 85.

22. **Tax on receipts from interstate commerce.**—Covington, etc., Bridge Co. *v.* Covington, 89 S. W. 296, 28 Ky. L. Rep. 396.

23. **Tax on capital stock.**—Judgment, 52 N. E. 117, 176 Ill. 267, affirmed. Keokuk, etc., Bridge Co. *v.* Illinois, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299.

24. **Tax on automobiles.**—The provisions of P. L. 1908, p. 615, § 4, which fix an annual fee of $3 for registering an automobile of less than 30 horse power and a fee of $5 for each automobile of 30 horse power and more, and which fixes a fee of $1 for a license for the driver of the first, and $2 for a license for the driver of the second class of automobiles, imposed as a charge for the use of highways and to raise revenue to defray their cost and repair, is without discrimination against nonresidents, and, while applying to persons engaged in interstate commerce, is not unconstitutional, as contravening the commerce provision of the federal constitution. Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237.

P. L. 1908, p. 615, § 4, which fixes an annual fee of $3 for registering an automobile of less than 30 horse power, and a fee of $5 for each automobile of 30 horse power and more, is not unconstitutional, as a property tax imposed without regard to the value of the property on which it is made, but is a license tax, since the character of the tax is not determined by the mode adopted in fixing its amount. Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237.

25. Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453, Ann Cas. 1912D, 237.

only limit upon its power is that the amount charged shall not be unreasonable; and there is no suggestion that such a condition is created by the present law.[26] Where a city grants an electric railway company exclusively engaged in the transportation of interstate freight and passengers permission to use certain of its streets by running its cars over the tracks of a local street railway company under conditions specified in the contract between the two companies, it can not impose a special annual tax on the business of such railway, it being a tax on interstate commerce, and the regulation of it under the federal constitution belongs alone to congress.[27]

§ 3976. Tax on Draymen.—Gen. St. N. J., p. 2236, § 532, grants to the common council of any borough power to enact ordinances to license and regulate cartmen, carriages, and vehicles used for the transportation of goods and chattels, and to fix rates of compensation to be paid for such licenses, for purposes of revenue. The borough of Atlantic Highlands passed an ordinance imposing an arbitrary annual license tax of $10 on every two-horse truck or vehicle engaged in the transportation of merchandise, and a tax of $7.50 on every one-horse vehicle similarly engaged. Held, that such ordinance was not an exercise of police power, but a revenue measure, and was inapplicable to interstate commerce, though it operated equally on both interstate and domestic commerce, interstate commerce not being subject to taxation by the states.[28] A franchise tax, imposed under appropriate statutes of the state of New York upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York city, the charges for which are entirely separate from those for other transportation, is not an unconstitutional burden on interstate commerce, but is a tax upon an independent local service, preliminary or subsequent to any interstate transportation.[29]

§ 3977. Tax on Pipe Lines.—Where the business of a pipe line company consists in the transportation of oil from points in New York and Pennsylvania to points in New Jersey, and a tax levied by the state of New Jersey, designated as an annual tax, for the use of the state, by way of a license for the company's corporate franchise, and consists of a certain per centum of the gross amount of the company's receipts from the transportation of oil during the year preceding the levy, the amount being such proportion of its gross receipts for the transportation of oil over its whole line as the length of its line in the state bears to the length of its whole line, the tax is not in violation of the interstate commerce clause of the constitution of the United States.[30] Oil pumped through a pipe line, on its way from one state to a point in another, is a subject of interstate commerce, and is exempt from local taxation.[31]

§ 3978. Tax on Warehouses and Elevators.—A state can not tax German warehouse receipts, valuing them at the value of the whiskey they represent, where it can not tax the whiskey itself, either because it was exported from the

26. Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237.
The charging of an annual sum for the use of its highways by automobiles, under P. L. 1908, p. 615, § 4, instead of a mileage fee, is a matter clearly within the discretion of the state, and no constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for a privilege it bestows. Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237.

27. City Council *v.* Augusta, etc., R. Co., 130 Ga. 815, 61 S. E. 992.

28. **Tax on draymen.**—Simpson-Crawford Co. *v.* Borough, 158 Fed. 372.

29. Judgment, 64 N. E. 152, 171 N. Y. 354, 98 Am. St. Rep. 610, affirmed in Pennsylvania R. Co. *v.* Knight, 24 S. Ct. 202, 192 U. S. 21, 48 L. Ed. 325.

30. **Tax on pipe lines.**—Tide Water Pipe Co. *v.* State Board, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684.

31. Prairie Oil, etc., Co. *v.* Ehrhardt, 244 Ill. 634, 91 N. E. 680.

United States or because of its situs.[32] The fact that grain stored in an elevator is to be shipped out of the state does not make a state statute requiring a license for conducting the business of such elevator in the state amount to a regulation of interstate commerce.[33] A domestic railroad corporation owning land within the state, upon which it has a grain elevator and freight warehouse, and several lines of railroad tracks to afford access to the buildings, but which owns no rolling stock, its entire business consisting in loading, unloading, and storing grain and other freight in process of interstate transportation, which it receives from other companies, is liable to a gross earnings tax on its franchise under the laws of a state taxing railroad companies, it not being engaged in interstate commerce within the provision of the federal constitution vesting the regulation of interstate commerce in congress.[34]

§ 3979. Tax on Packing Houses.—The license tax imposed by the laws of North Carolina on packing houses carrying on business in the state, and applying to a foreign corporation engaged in the slaughtering of animals and the preparation of their carcasses for food and other purposes, is not an interference with interstate commerce.[35]

§ 3980. The Unit Rule.—When the taxable property of a corporation engaged in interstate commerce is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though other parts of the system are outside of the state.[36] It has been expressly held, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation.[37] And the uniform hold-

32. Tax on warehouses and elevators.—Judgment, Commonwealth *v.* Selliger, 98 S. W. 1040, 126 Ky. 66, 39 Ky. L. Rep. 451, reversed in 213 U. S. 200, 53 L. Ed. 161, 29 S. Ct. 449.

33. Judgment, Railroad, etc., Comm. *v.* Cargill Co., 77 Minn. 223, 79 N. W. 962, affirmed in Cargill Co. *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423.

34. Connecting Terminal R. Co. *v.* Miller, 82 N. Y. S. 582, 84 App. Div. 174, affirmed in 70 N. E. 472, 178 N. Y. 194.

35. Tax on packing houses.—Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53, affirmed in 200 U. S. 226, 50 L. Ed. 451, 26 S. Ct. 232.

36. The unit rule.—Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412, 47 L. Ed. 1116, 23 S. Ct. 730. See Leloup *v.* Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380.

The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054.

37. Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Erie R. Co. *v.* Pennsylvania (U. S.), 21 Wall. 492, 22 L. Ed. 595. See State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876.

An act does not interfere with interstate commerce because imposing a privilege tax on railroad companies according to mileage, as follows: "Each company operating or controlling 400 miles or more of road in this state, for taking up and transporting freight and passengers from one point to another in this state, per annum $10,000; each company operating or controlling from 100 to 400 miles of road in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum $5,000;" and in like language imposing such a tax on railroads operating or controlling a less number of miles of road in the state, for the same privilege. Knoxville, etc., R. Co. *v.* Harris, 43 S. W. 115, 99 Tenn. 684, 53 L. R. A. 921.

The defendant railroad company was organized under a charter from the state of Maryland, and its line was operated partly in that state and partly in another. Held, that a tax by the state of Maryland on such proportion of the entire gross receipts of the road as the length of its line in Maryland bears to the whole length of its line was not invalid as an interference with interstate commerce. Cumberland, etc., R. Co. *v.* State, 48 Atl. 503, 92 Md. 668, 52 L. R. A. 764.

ing is that the property of interstate railroads, in the several states through which their lines or business extend, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction.[38] The valuation is thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but includes the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation.[39] So it may be said that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state, is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole,[40] or taking as the basis of assessment such proportion of the capital stock of a sleeping car company, express company, etc., as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states,[41] or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state.[42] And this latter rule holds good although nothing is, in terms, directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states.[43] It is true, there may be exceptional

38. Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114; Indianapolis, etc., R. Co. *v.* Backus, 154 U. S. 438, 38 L. Ed. 1040, 14 S. Ct. 1114; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889; American Exp. Co. *v.* Indiana, 165 U. S. 255, 41 L. Ed. 707, 17 S. Ct. 991; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Erie R. Co. *v.* Pennsylvania (U. S.), 21 Wall. 492, 22 L. Ed. 595; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, 163; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255; Columbus, etc., R. Co. *v.* Wright, 151 U. S. 470, 38 L. Ed. 238, 14 S. Ct. 396; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054.

39. Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, 163.

40. Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122.

41. Sleeping car company—Express company.—Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599.

42. Telegraph company.—Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; S. C., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889.

43. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961; S. C., 141 U. S. 40, 35 L. Ed. 628, 11 S. Ct. 889. See, also, Reagan *v.* Mercantile Trust Co., 154 U. S. 413, 38 L. Ed. 1028, 14 S. Ct. 1060; Central Pac. R. Co. *v.* People, 162 U. S. 91, 40 L. Ed. 903, 16 S. Ct. 766; Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 263; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; Western Union

cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock.[44] No unconstitutional interference with interstate commerce is made by the Act of Michigan of June 4, 1897, levying a specific tax upon the property and business of any railroad corporation operated within the state and providing that "when the railroad lies partly within and partly without this state, prima facie the gross income of said company from such road for the purpose of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried." [45]

Value of Road Arising from Interstate Transportation.—Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, this is not placing a burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad as a while is created partly—and perhaps largely—by the iinterstate commerce which it is doing.[46]

Tax on Basis of Mileage.—The action of state authorities in taking the entire valuation of the property of a railroad company, without as well as within the state, and dividing it upon a mileage basis for the purpose of fixing the value of that within the state for purposes of taxation, is not in violation of the commerce clause of the federal constitution.[47] A state statute provided that railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the state, should have their intangible property assessed on the basis of the mileage of their lines within and without the state. But from the valuation on the mileage basis the value of all tangible property is deducted before the taxation is applied. So far as the commerce clause of the federal constitution is concerned, this scheme of taxation is not in contravention thereof.[48] The mode which the state of Pennsylvania adopted to ascertain the

Tel. Co. *v.* Pennsylvania, 195 U. S. 540, 49 L. Ed. 312, 25 S. Ct. 133; Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412, 47 L. Ed. 1116, 23 S. Ct. 730.

44. Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054.

If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis. Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114.

45. Wisconsin, etc., R. Co. *v.* Powers, 24 S. Ct. 107, 191 U. S. 379, 48 L. Ed. 229.

46. Value of road arising from interstate transportation.—Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122.

47. Tax on basis of mileage.—St. Louis, etc., R. Co. *v.* Davis, 132 Fed. 629.

48. Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; Adams Exp. Co. *v.* Kentucky, 166 U. S. 171, 41 L. Ed. 960, 17 S. Ct. 527.

So, in the case of Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114, the validity of a state tax law, whereby a railroad which traversed several states was valued for the purposes of taxation by taking that part of the value of the entire road which was measured by the proportion of the length of the particular part in that state to that of the whole road, was upheld. See New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 39 L. Ed. 1043, 15 S. Ct. 896.

Act Del. April 8, 1869, § 1, provides for a tax upon the net earnings of railroad

proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran its cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole of its capital stock and no more.[49]

Tax Computed upon Relation of Mileage to Gross Income.—The supreme court of the United States has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of valuation.[50] The statute of Michigan passed June 4, 1897, levying a specific tax upon the property and business of every railroad corporation operated within the state, providing that when the railroad lies partly within and partly without the state, prima facie the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in the state, computed by adding to the income derived from the business transacted by the company entirely within the state, such proportion of the income of the said company arising from the interstate business as the length of the road over which said interstate business is carried on in the state bears to the entire length of the road over which said interstate business is carried, is not an unconstitutional interference with interstate commerce. In form the tax is a tax on the property and business of such railroad corporation operated within the state, and computed upon certain percentage of gross income.[51]

Tax Computed upon Relation of Mileage to Capital Stock.—If the stock of a transportation company be taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles or railroad over which its cars are run within the state bear to the whole number of miles over which its cars are run throughout the United States, such assessment does not impinge upon the power of congress.[52]

Tax on Value of Use of Property.—The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and

and canal companies, with a proviso that, when a line of road or canal lies partly within the state and partly without, only such part of the net earnings shall be subject to the tax as is in that proportion to the whole net earnings which the length of the road or canal within the limits of the state bears to the length of the whole road or canal; and § 4 provides for a tax upon the actual cash value of every share of capital stock of such companies, with a proviso that, when a line of road or canal lies partly within and partly without the state, the company shall be required to pay the tax on only such number of shares of stock as is in that proportion to the whole number of shares which the length of the road or canal within the state bears to its whole length. Held, that such statute does not unlawfully interfere with interstate commerce, since there is no discrimination against rights held in other states. Minot *v.* Philadelphia, etc., R. Co. (U. S.), 18 Wall. 206, 21 L. Ed. 888.

49. American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599.

50. Tax computed upon relation of mileage to gross income.—Delaware Railroad Tax (U. S.), 18 Wall. 206, 21 L. Ed. 888; Erie R. Co. *v.* Pennsylvania (U. S.), 21 Wall. 492, 22 L. Ed. 595; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114.

51. The prima facie measure of the railroad's gross income is substantially that which was approved in Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 12 S. Ct. 121, 163. See, also, Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054; Wisconsin, etc., R. Co. *v.* Powers, 191 U. S. 379, 48 L. Ed. 229, 24 S. Ct. 107.

52. Tax computed upon relation of mileage to capital stock.—Kehrer *v.* Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 S. Ct. 403.

prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put.[53]

Tax on Express Companies.—The property of an express company distributed through different states is an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

"Doubtless there is a distinction between property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use." [54]

§ 3981. Stamp Duty on Bills of Lading.—A state statute imposing a stamp duty on bills of lading for gold or silver transported from a port within to a port without the state, was held to affect a matter national in its character, requiring uniformity of regulation, and therefore to be invalid, though not in conflict with any regulation prescribed by congress.[55]

53. Value of use of property.—Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 38 L. Ed. 1041, 14 S. Ct. 1122.

54. Express companies.—Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; American Refrigerator Trans. Co. *v.* Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599; American Exp. Co. *v.* Indiana, 165 U. S. 255, 41 L. Ed. 707, 17 S. Ct. 991.

"This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 41 L. Ed. 49, 16 S. Ct. 1054. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases." Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761, 24 S. Ct. 498. See, also, Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 S. Ct. 305; American Exp. Co. *v.* Indiana, 165 U. S. 255, 41 L. Ed. 707, 17 S. Ct. 991.

55. Stamp duty on bills of lading.—Almy *v.* California (U. S.), 24 How. 169, 16 L. Ed. 644; Case of the State Freight Tax (U. S.), 15 Wall. 232, 21 L. Ed. 146; Fairbank *v.* United States, 181 U. S. 283, 45 L. Ed. 862, 21 S. Ct. 648.

"In Almy *v.* California (U. S.), 24 How. 169, 16 L. Ed. 644, a stamp tax had been imposed by the state on bills of lading for the transportation of gold or silver from any point within the state to any point without it, and was held by this court to be invalid; and in Woodruff *v.* Parham (U. S.), 8 Wall. 123, 19 L. Ed. 382, it was said by this court, Mr. Justice Miller delivering its opinion, that that stamp tax 'was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with the freedom of transit of goods and persons between one state and another, which is within the rule laid down in Crandall *v.* Nevada (U. S.), 6 Wall. 35, 18 L. Ed. 744, and with the authority of congress to regulate commerce among the states.'" Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 48, 29 L. Ed. 785, 6 S. Ct. 635.

"In Almy *v.* California (U. S.), 24 How. 169, 16 L. Ed. 644, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented." Fairbank *v.* United States, 181 U. S. 283, 45 L. Ed. 862, 21 S. Ct. 648.

CHAPTER XXXVII.

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F. Evidence, § 4244.

§§ 3982-3989. Statutory Provisions—§ 3982. Purpose and Object.—The purpose of the Interstate Commerce Act is to promote and facilitate commerce [1] by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations.[2] Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to congress.[3] The provisions of the act look to the prevention of discrimination,[4] to the furnishing of equal facilities for the interchange of traffic,[5] to the rate of compensation for

1. **Purpose and object.**—United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844. See, also, Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

2. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

3. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

4. See post, "Discrimination and Preferences," §§ 4016-4044.

5. See post, "Facilities," §§ 3995-3997.

what is termed the long and the short haul,[6] to the attainment of a continuous passage from the point of shipment to the point of destination,[7] at a known and published schedule,[8] without reference to the location of those points or the lines over which it is necessary for the traffic to pass, and to procure uniformity of rates charged by each company to its patrons, and to other objects of a similar nature.[9] The great purpose of the act, while seeking to prevent unjust and unreasonable rates, is to secure equality of rates as to all, and to destroy favoritism, the last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.[10]

To Destroy Competition.—It is not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road.[11] When it is sought to show that a charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.[12] But the act does not authorize an agreement between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, as will produce a restraint of trade or commerce, nor does it authorize any other agreements which would be inconsistent with the provisions of the Sherman Anti-Trust Act.[13]

To Reinforce Tariff Laws.—It is not the purpose of the act to reinforce the tariff laws.[14]

Interference with Commerce.—It can not be readily supposed that congress intended, when regulating such commerce, to interfere with and interrupt, much

6. See post, "Long and Short Haul," §§ 4097-4110.

7. See post, "To Establish Through Routes," § 3993.

8. See post, "Printing and Publishing Schedules," §§ 4125-4145.

9. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination; in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

The objects of the Interstate Commerce Act are to secure just rates, prohibit unjust discrimination, prevent undue preference, prohibit greater compensation for a shorter than for a longer distance, and abolish combinations. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

10. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272. See, also, Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

11. **To destroy competition.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844. See, also, Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as a maximum or mimimum of rates. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

12. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

13. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

14. **To reinforce tariff laws.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interest of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.[15]

Not Intended to Cover Whole Field.—Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated therein, it can not be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.[16]

§ 3983. History of Act.—Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states acts had been passed intended to secure the public against unreasonable and unjust discrimination.[17]

§ 3984. Constitutionality of Act.—Congress has the power, and a corresponding duty, under the federal constitution, to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.[18] The constitutionality of the provision imposing upon the initial carrier liability for loss regardless of whether the same occurred on its portion of the route or upon that of a connecting carrier, can not be attacked upon the ground that it deprives the receiving carrier of his liberty to select his own agencies for a continuous route of the transportation beyond his own line, where it appears that in the instant case the

15. **Interference with commerce.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

16. **Not intended to cover whole field.**—United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

17. **History of act.**—24 Stat. 379, ch. 104; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844. See, also, Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 S. Ct. 561; Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

Congress has freely exercised the power to regulate commerce so far as relates to commerce with foreign nations and with the Indian tribes, but in regard to commerce among the several states it has, until Act of February 4, 1887, refrained from the passage of any very important regulation upon this subject, except perhaps the statutes regulating steamboats and their occupation upon the navigable waters of the country. Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857.

18. **Constitutionality of act.**—Fargo *v.* Michigan, 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857; New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

Act of congress known as the "Carmack Amendment to the Hepburn Bill," and as the "Initial Carriers' Act" (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), is constitutional. Sturges *v.* Detroit, etc., R. Co., 166 Mich. 231, 131 N. W. 706.

Equal protection of the laws.—Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), is not unconstitutional as denying equal protection of the laws. Galveston, etc., R. Co. *v.* Wallace (Tex. Civ. App.), 117 S. W. 169.

Taking private property for public purposes.—The act Cong. June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149) is a valid regulation of interstate commerce, and is not unconstitutional as taking private property for public purposes. Houston, etc., R. Co. *v.* Lewis, 103 Tex. 452, 129 S. W. 594.

defendant had selected its own agencies and the connecting carriers and made its own arrangements and rates before receiving the goods in question for shipment.[19]

Investigation and Compelling Attendance of Witnesses.—The same observation may be made in respect to those provisions empowering the commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of congress. It is clearly competent for congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation.[20]

Prohibition of Discrimination.—There can be no question of the power of congress to regulate interstate commerce to prevent favoritism, and to secure equal rights to all engaged in interstate trade.[21] The prohibition of unjust charges, discriminations or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one state to another, is a proper regulation of interstate commerce, and the object that congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished.[22] In so doing congress may control those who are conducting interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.[23]

Levying Export Taxes and Duties.—The mere incidental effect upon exports which may be produced by applying to a shipment from an interior point of the United States to a foreign port the provisions of the Elkins Act, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to the United States constitution, forbidding the levying of export taxes or duties.[24]

Preference to Ports.—Preference is not given to the ports of one state over those of another by applying to articles intended for foreign export the provisions of the Elkins Act [25] making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.[26]

Who May Raise Question.—A law will not be declared invalid at the instance of one not affected by it; hence persons not affected by statutory provi-

19. Imposing liability on initial carrier.—Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7; Louisville, etc., R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171.

The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), making the initial carrier who issued a bill of lading liable for the default of each successive carrier to the point of destination, merely declares the common law and is constitutional. Reid *v.* Southern R. Co., 69 S. E. 618, 153 N. C. 490.

20. Investigation and compelling attendance of witnesses.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125.

21. Prohibition of discrimination.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

22. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125.

23. New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

24. Levying export taxes and duties.—Const. U. S., art. 1, § 9; Act. Feb. 19, 1903; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

25. Preference to ports.—Act Feb. 19, 1903.

26. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

sions alleged to be unconstitutional have no standing to urge constitutional objections against the same.[27]

Due Process of Law.—The validity of the act as applied to the due process of law clauses of the constitution has several times been declared.[28] A corporate carrier engaged in interstate commerce has no standing to object that the last paragraph of § 1 of the Elkins Act[29] is unconstitutional in that it applies to individual carriers as well as those of a corporate character and attributes the acts of the agents of such individual carriers to them, thereby making the crime of one person that of another, thus depriving the latter of due process of law and the presumption of innocence which the law raises in his favor.[30]

Partial Invalidity.—Moreover this section of the statute is separable, and even if the presumption thus created as to individuals were unconstitutional, the act would still remain valid as to corporate carriers.[31]

§ 3985. Construction of Act.—The courts should adopt a reasonable construction of the act in order to accomplish its general purpose obtaining fair treatment for the public from carriers, and reasonable charges for transportation, and the honest performance of duty, with no improper or unjust preference or discrimination.[32] The Interstate Commerce Act is applicable and is intended to apply, only to matters involved in the regulation of commerce, and which congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act.[33] A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted in accordance with the economical or physical conditions prevailing at the time of its enactment.[34]

The interpretation given by the commission to the act to regulate commerce that these prohibitions are not applicable to carriers which, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market, is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; at least, until congress has legislated on the subject. This is in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.[35]

27. Who may raise question of constitutionality.—Williams *v.* Walsh, 222 U. S. 415, 56 L. Ed. 253, 32 S. Ct. 137; Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7.

28. Due process of law.—Pittsburgh, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996, citing Riverside Mills *v.* Atlantic, etc., R. Co., 168 Fed. 987; Smeltzer *v.* St. Louis, etc., R. Co., 158 Fed. 649; Greenwald *v.* Weir, 59 Misc. Rep. 431, 111 N. Y. S. 235; Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170; Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107.

29. Act Feb. 19, 1903, 32 Stat. 847.

30. New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304; S. C., 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

31. Partial invalidity.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

32. Construction of act.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

33. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125.

34. Omaha, etc., R. Co. *v.* Interstate Commerce Comm., 191 Fed. 40.

Construction of amendments. — Elkins Act as amended by Act June 29, 1906, forbidding concessions or discrimination in respect to transportation, held not to be restricted by the narrower language of Interstate Commerce Act, §§ 2, 3, prohibiting "unjust" discrimination and "undue" or "unreasonable" prejudice or disadvantage. Hocking Valley R. Co. *v.* United States, 210 Fed. 735; Sunday Creek Co. *v.* United States, 210 Fed. 747.

35. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

Construed as English Traffic Act.—The Interstate Commerce Act having adopted substantially some of the provisions of the English railway traffic acts the construction given to such provisions by the English courts must be received as incorporated into the act.[36] The construction of the phrase "undue or unreasonable preference or advantage," as used in the interstate commerce act, when applied to any particular description of traffic, must be the same as when applied to any particular person, company, firm, corporation, or locality. All of said terms being contained in a single sentence, the same construction must be given to each and every part of the sentence.[37]

Clause Limiting Operation of Act.—The proviso in § 1 of the Interstate Commerce Act of Feb. 4, 1887, that the act shall not apply to transportation wholly within one state, was not intended as a limitation of its provisions, where they are within the powers of congress, and does not prevent the application of the provision of § 3 prohibiting discrimination between localities to cases where such discrimination is brought about by state action reducing intrastate rates.[38]

§ 3986. Operation and Effect.—Transactions to which this act relates being interstate in their character, the act is of paramount operation, and no state enactment can be of any avail, since the subject has been covered by an act of congress, acting within the limits of its constitutional powers.[39] Parties to an interstate shipment are presumed to contract with reference to the acts of congress on that subject, and such contracts can not be construed with reference to any other law.[40] And contracts made in contravention of the interstate commerce act are contrary to public policy and void, regardless of the intent of the parties.[41] Because opportunities of the violation of the act may occur by reason of a rule of a carrier, is no ground for holding, as a matter of law that violations must occur, and that the rule itself is therefore illegal.[42]

Common-Law Liability for Negligence.—The original Interstate Commerce Act and the amendment thereto do not in any manner supersede or amend the common-law rule as to liability of a carrier for its negligence in interstate shipments.[43]

On Rights Arising under State Statute.—The right of a shipper to invoke the provisions of the interstate commerce law against discrimination on interstate shipments against a railroad company on whose line he is located is not affected by the fact that the duty of such company to receive and handle all freight consigned over its line without discrimination arises from a state statute, rather than from a voluntary arrangement with connecting lines.[44]

On Existing Contracts.—A contract which would be illegal if made after the passage of the act is illegal and unenforcible although made before the act took effect.[45] A contract entered into prior to the passage of the interstate commerce law for the carriage of freight by a railway company at rates contrary to the provisions of that law can not be enforced after its passage, and the shipper

36. **Construed as English Traffic Act.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 43 Fed. 37.

37. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

38. **Clause limiting operation of act.**—Texas, etc., R. Co. *v.* United States, 205 Fed. 380; Houston, etc., R. Co. *v.* United States, 205 Fed. 391.

39. **Operation and effect.**—Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272.

40. Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

41. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

42. Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

43. **Common-law liability for negligence.**—Miller *v.* Chicago, etc., R. Co., 85 Neb. 458, 123 N. W. 449.

44. **On rights arising under state statute.**—Interstate Stockyards Co. *v.* Indianapolis, etc., R. Co., 99 Fed. 472.

45. **On existing contracts.**—Cowley *v.* Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A., N. S., 559.

can not recover any rebates stipulated for in such contracts.[46] Since the common law, as such, is no part of the national jurisprudence, and since the exclusive right to regulate commerce is vested in congress, overcharges for freight on an interstate shipment, involving unjust discrimination, made prior to the interstate commerce act, can not be recovered. And the provision of § 22 that the act shall not abridge the remedies now existing at common law or by statute, does not confer on the shipper the right to recover such overcharges, on the ground that it recognizes a common-law or statutory liability on the part of the carrier therefor.[47]

On Pending Proceedings.—The special saving clause in the Act of June 29, 1906, does not mention the particular subject of the general saving clause in the Revised Statutes of the United States,[48] as to the effect on existing penalties, forfeitures, and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intent of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts from what, in its absence, and in the presence of the general saving clause, will be the effect on them of the amendments in that act. It does not necessarily supersede the general saving clause.[49]

As to Intrastate Commerce.—A carrier engaged in interstate commerce becomes subject, as to such commerce, to the commands of the statute, and may not set its provisions at naught, whatever otherwise may be its power when carrying on commerce not interstate in character.[50]

§ 3987. Time of Taking Effect.—Since the Act of June 29, 1906, relating to interstate commerce, became effective on that day by virtue of an express provision in section eleven, its taking effect was not deferred by the joint resolution of congress passed June 30, 1906, providing that the act amending an act regulating commerce approved February 4, 1887, and all acts amendatory thereof, and enlarging the powers of the interstate commerce commission, should take effect sixty days after its approval by the president.[51]

§ 3988. Repeal.—Under the provision of an act of congress that the repeal of any statute shall not operate as a release from liability incurred under such statute unless the repealing act shall expressly so provide,[52] the saving clause contained in the Act of June 29, 1906, relating to interstate commerce, did not repeal the Act of Feb. 19, 1903, in so far as it affected an indictable offense thereunder, previously committed.[53] Section 10 of the rate law of June 29, 1906,

46. Bullard *v.* Northern Pac. R. Co., 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246.

47. Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556.

48. On pending proceedings.—Rev. St., § 13 [U. S. Comp. St. 1901, p. 6].

49. Great Northern R. Co. *v.* United States, 155 Fed. 945, 84 C. C. A. 93, judgment affirmed in 208 U. S. 452, 52 L. Ed. 567, 28 S. Ct. 313.

50. As to intrastate commerce.—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

51. Time of taking effect.—Southern Pac. Co. *v.* Meadors & Co. (Tex. Civ. App.), 129 S. W. 170.

52. Repeal.—U. S. Comp. St. 1901, p. 6, § 13.

53. United States *v.* New York, etc., R. Co., 153 Fed. 630.

The provision of the Hepburn law (Act June 29, 1906, c. 3591, § 10, 34 Stat. 584), repealing laws in conflict with the act, that "the amendments herein provided for shall not affect causes now pending * * * but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," in view of Rev. St., § 13 [U. S. Comp. St. 1901, p. 6], providing that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability," applies to rebate offenses committed before, but prosecution for which was commenced after, the passage of such act; so that an indictment in such a case alleging that a carrier "unlawfully and willfully" gave rebates, which would be enough under the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), is sufficient, though under the Hepburn law it would

which provides that all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law, was not intended to relieve offenders under the old law from subsequent indictment and prosecution for such offenses, while leaving those previously indicted subject to punishment, but merely to prescribe the rule of procedure which should control in pending causes, and in view of the above provision, must be so construed.[54]

§ 3989. Definitions.—The term "common carrier" as used in this act shall include express companies and sleeping car companies.[55]

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any said property.[56]

Regulation.—Within the term "regulation" are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word "regulation," as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation, in this sense, is attempted, it necessarily affects the property interests of the railroad owners; and it is "regulation" in this sense of the term.[57]

The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.[58] It is evidently the intention of congress, in the employment of the term "transportation," to include all kinds of instrumentalities of shipment and carriage.[59] Elevation as a grain is included in "transportation."[60] Cartage of sugar from

be necessary to allege that they were given "knowingly." United States *v.* Delaware, etc., R. Co., 152 Fed. 269.

54. United States *v.* Standard Oil Co., 148 Fed. 719.

55. Definitions.—Act June 18, 1910, ch. 309, Fed. St. Anno. Sup. 1912, p. 113.

56. Railroad. — Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125.

57. Regulation.—Ames *v.* Union Pac. R. Co., 64 Fed. 165. See Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

58. Transportation.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

Transportation within the meaning of the Interstate Commerce Act means not only the physical instrumentalities, but all services in connection with receipt, delivery, and handling of property transported. Southern R. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140.

59. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

60. Elevation of grain.—"The long mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the interstate commerce commission was answered by the Act of June 29, 1906 (34 Stat. at L. 584, 590, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), in which congress declared that the term 'transportation' shall include * * * all * * * facilities of shipment, * * * irrespective of ownership, * * * and all services in connection with the * * * elevation and transfer in transit * * * and handling of property transported." Carriers were required "to provide and furnish such transportation upon reasonable request therefor." Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

refinery to cars is not transportation, nor a service connected with such transportation, within the Interstate Commerce Act, and hence an allowance therefor in the freight rate constituted an illegal rebate.[61]

Wharfage and Terminal Company.—A corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the interstate commerce commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences.[62]

Rebate.—The word "rate," means the net amount the carrier receives from the shipper and retains, and any device by which such amount is reduced below the rate given in the published schedule is one for the giving of a rebate.[63]

"Charges."—In the provision contained in the first section of the interstate commerce law, that all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith, or for receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unreasonable charge for such service is prohibited and declared to be unlawful, the word "charges" is used in the technical sense of segregated items of expense, or dues demanded in connection with the "transportation," or with the "receiving," etc., the accessorial service described by the latter terms (which include cartage) being thus distinguished from the transportation. And, although these terms are not repeated with the same particularity in §§ 2, 3, and 4, this segregation of the two kinds of service is not to be overlooked, in their construction.[64]

"Rates in Force."—See elsewhere.[65]

Terminal Charges.—As used in the Act to Regulate Commerce, § 6, providing that the published schedules shall state separately all "terminal charges," the words quoted mean a separate rate for a service at a terminal, not always rendered in transportation from place to place, for a privilege or facility not furnished to all shippers.[66]

The words "knowingly and willfully" violating such act, in the Act of June 29, 1906, providing that cattle shall not be confined for a longer period than thirty-six hours, are intended to mean either an intentional violation of the statute or an indifferent disregard of its requirements.[67] They described an essential element of the offense on account of which penalties are prescribed, without proof of which they can not be recovered; "knowingly" meaning with knowledge of the facts which, taken together, constitute a failure to comply with the statute,

61. Cartage.—So held under Act Feb. 4, 1887, § 15, amended June 18, 1910, § 12. American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 200 Fed. 652.

62. Wharfage and terminal company.—"There is a separation of the companies if we regard only their charter; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations can not alter the facts. The control and operation of the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies." Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.

63. Rebate.—United States *v.* Chicago, etc., R. Co., 148 Fed. 646.

64. "Charges."—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

65. "Rates in forces."—See post, "Statutory Provision," § 4126.

66. Terminal charges.—New York, etc., R. Co. *v.* General Elect. Co., 146 N. Y. S. 322, 83 Misc. Rep. 529.

67. Knowingly and willfully.—United States *v.* Stockyards Terminal R. Co., 178 Fed. 19, 101 C. C. A. 147, affirming 172 Fed. 452.

and "willfully" meaning purposely or obstinately, describing the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute, or is indifferent to its requirements.[68]

§§ 3990-3991. Carriers Subject to Act—§ 3990. In General.—The first section of the act makes it clear that congress had in view the whole field of commerce, except commerce wholly within a state, as well that between the states and territories as that going to or coming from foreign countries. It includes in its scope the entire commerce of the United States, foreign and interstate, and subjects to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage.[69] The provisions of the interstate commerce act apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from any foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.[70]

Engaged in Intrastate Commerce.—The provisions of the interstate commerce act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory.[71] It is expressly provided that the provisions of the act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.[72] This provision is not an exception of the intrastate carriage of interstate commerce from the operation in the act, while leaving the intrastate carriage of foreign commerce subject to its provisions, but is merely a disclaimer of the intention to include purely intrastate business over which congress has no jurisdiction; and the exception therefrom of shipments to or from a foreign country is to avoid any possible conflict with the preceding clause, which makes such shipments subject to the act, although their carriage in this country to or from a port of transshipment or entry may be wholly a single state,[73] unless, although its entire line is intrastate, a carrier enters into the carriage of foreign freight under an arrangement for continuous carriage or shipment from one state to another.[74] But when such railroad company enters into the carriage

68. United States *v.* St. Joseph Stock Yards Co., 181 Fed. 625.

69. **Carriers subject to act.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

70. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

71. **Engaged in intrastate commerce.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223.

72. Fed. Stat. Anno. Supp. (1912), p. 112; [35 Stat. L. 544]. Act June 18, 1910.

73. Denver, etc., R. Co. *v.* Interstate Commerce Comm., 195 Fed. 968.

74. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L.

of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. The railroad company does not escape from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the state when the goods were shipped to local points on its road, having still left its arrangement to stand with respect to other designated points.[75] While a through bill of lading is the usual method in use by connecting companies, this must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.[76]

Between Points in Same State Through Other State.—A shipment of grain over a single railroad between two points, both within the same state, is not an interstate shipment, so as to bring it within the terms of the Interstate Commerce Act, and authorize a federal court to compel such shipment, by mandamus, at the same rates charged other shippers of a like commodity, merely because the line of road between the two terminal points passes through other states.[77] A shipment from New York City to Buffalo, by way of New Jersey and Pennsylvania, is interstate commerce, and so is subject to the provisions of the Act of Feb. 19, 1903, as to rebates; the Interstate Commerce Act of Feb. 4, 1887, though providing that the provisions of the act shall apply to any carrier engaged in the transportation of passengers or property from one state to any other state, having a proviso that the provisions of this act shall not apply to the transportation of property "wholly" within one state.[78] A shipment of grain over a single railroad between two points, both within the same state, is not an interstate shipment, so as to bring it within the terms of the Interstate Commerce Act, by reason of the fact that the grain was received at the initial point from a carrier by which it was transported from a point in another state, and was there stored in an elevator for further shipment, where it was not taken by the first carrier under a through bill of lading.[79]

Under Common Control for Continuous Carriage.—This act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway, or a railway and watercraft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one state to another; nor does it apply to the carriage of property by rail wholly within the state, although shipped from or destined to a place without the state, so that such place is not in a foreign country.[80] When a carrier unites with

Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

75. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223, followed in Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

76. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223.

77. Between points in same state through other state.—United States *v.* Lehigh Valley R. Co., 115 Fed. 373.

78. United States *v.* Delaware, etc., R. Co., 152 Fed. 269.

79. United States *v.* Lehigh Valley R. Co., 115 Fed. 373.

80. Under common control for continuous carriage.—Ex parte Koehler, 30 Fed. 867.

When a railroad company whose line is situated entirely within a state, enters into the carriage of foreign freight, by agreeing to receive goods under through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, and accordingly is amenable to the Interstate Commerce Act. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223. See also Boston & A. R. Co. *v.* Boston & L. R. Co., 1 Int. Com. Rep. 571; Chicago, etc., R. Co. *v.* Osborne, 53 Am. & Eng. R. Cas. 18, 3 C. C. A. 347, 52 Fed. 912.

The Oregon Railway & Navigation Company carries certain kinds of goods

one or more others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the interstate commerce act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage constitutes assent to such common arrangement, and makes the carrier a party to the contract, within the meaning of the act.[81] The shipment of freight over a number of lines of railroad from a point in one state to a point in another, at a through rate of charges, under an agreement, express or implied, for a conventional division of the charges among the different roads, constitutes a "common arrangement for a continuous carriage or shipment," within the meaning of the interstate commerce act, and a road participating in such arrangement is subject to the provisions of the act, though its line lies entirely within one state, and its part of the joint charge is its regular local rate.[82] When goods are shipped through from Cincinnati to local stations on the Georgia Railroad, the initial carrier at Cincinnati issues through bills of lading, and quotes through rates. Said rates are arrived at by adding to the rates from Cincinnati to Atlanta the full local rates of the Georgia Railroad from Atlanta to said local stations. The Georgia Railroad Company receives the goods at Atlanta, and transports them continuously to its local stations, but collects full local rates from Atlanta to said local stations. The reception, and continuous transportation, by the Georgia Railroad Company, of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading and quoted through rates, does not constitute such an "arrangement" as is contemplated by the first section of the act to regulate commerce, where the through rates so quoted allow to that company its full local rates.[83]

on its steamers between Portland and San Francisco at special and reduced rates. The Oregon & California Railway, under the management of the petitioner, carries the same kinds of goods between Portland and Ashland, and way stations in Oregon, at special and reduced rates. The Oregon Pacific Railway Company carries the same kinds of goods between certain points on the line of the Oregon & California road and San Francisco via its railway from Albany to Yaquina Bay, and thence by steamer, at reduced rates, and thereby competes with the Oregon & California Railway and the Oregon Railway & Navigation Company for business between said points and San Francisco. The Oregon Railway & Navigation Company and the receiver of the Oregon & California Railway act independently, though concurrently, in making these reduced rates, but no through bill of lading or freight receipt is given, nor is either interested in or liable for the carriage of the goods beyond its own line of transportation. Held, that the Oregon & California road and the steamers of the Oregon Railway & Navigation Company, in the carriage of the goods in question, are not "used under any common control, management, or arrangement for a continuous carriage or shipment" thereof to and from San Francisco, within the intent and meaning of the act, and that the carriage and handling of said goods, so far as the receiver is concerned, is performed wholly within the state, and therefore specially exempted by the terms of the act from its operation, provided the same are not directly shipped to or from a foreign country. Ex parte Koehler, 30 Fed. 867.

81. United States *v.* Wood, 145 Fed. 405.

82. United States *v.* Seaboard R. Co., 82 Fed. 563.

83. Interstate Commerce Act (Feb. 4, 1887, 24 Stat. 379) § 1, provides that such act "shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water where both are used under a common control, management, or arrangement, for a continuous carriage or shipment," etc. The Georgia Railroad extends from Atlanta to Augusta. It requested its connections that in issuing bills of lading to its local stations no rates be inserted east of Atlanta. There is no agreement on the part of said company for any such joint tariff as implies a reduced rate from Cincinnati, Ohio, to its local stations. On the contrary, that company collects and retains its entire local rates on all freight shipped from Cincinnati to its local stations. Held, that there is no such "arrangement for a continuous carriage or shipment" existing between said company and its connections as to bring the rates which are charged to said local stations within the first sec-

A steamship company, which joins with a railroad carrier in making, filing, and publishing joint through rates for intestate traffic, is as to such traffic used under a "common arrangement" with the railroad company, within the meaning of the act and subject to regulation and control by the interstate commerce commission; but such power to regulate and control does not extend to the other port-to-port business of the company, whether interstate or intrastate. Under § 20 of the act, the commission has power to require reports from such company, and to prescribe a system of bookkeeping and accounting with respect to such joint traffic and directly relating thereto, but it has no power to extend such requirements to include other matters or business of the company having no direct relation to such joint traffic.[84]

Engaged in Commerce in Territories.—By the Act of 1906, the provisions of the Interstate Commerce Act were extended to carriers engaged in the transportation of passengers or property from one state or territory of the United States to any other state or territory, or from one place in a territory to another place in the same territory.[85] Alaska is a territory within the meaning of this act.[86] The authority of the secretary of the interior to review and modify railway rates in Alaska conferred upon him by the Act of May 14, 1898,[87] is superseded by the amendment of June 29, 1906, to the Interstate Commerce Act, which gave to the interstate commerce commission the power to prescribe rates, and extended the provisions of the act to intraterritorial commerce.[88]

Corporation Organized under State Law.—Corporations organized under state laws, engaged in interstate commerce, are subject to control by the interstate commerce commission, relating to uniform system of accounting and annual reports.[89] An electric interurban street railway company doing an interstate business in the carriage of passengers, although incorporated under the street railroad statutes of a state, and not authorized to carry freight, nor vested with the right of eminent domain, is subject to the provisions of the Interstate Commerce Act and the interstate commerce commission has jurisdiction to prescribe just and reasonable maximum rates to be charged by such company for the interstate carriage of passengers.[90]

When Actually Engaged in Transportation.—A corporation is a common carrier, within the meaning of Interstate Commerce Act, only when it is actually engaged in the business of transportation.[91]

Engaged in Transportation Through Foreign Country.—Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through

tion of the act to regulate commerce. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

84. Goodrich Trans. Co. *v.* Interstate Commerce Comm., 190 Fed. 943.

85. **Engaged in commerce in territories.**—Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), Fed. St. Anno. Sup. 1909, p. 255; Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

86. **Alaska is a territory** of the United States within the meaning of the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), extending the provisions of the Interstate Commerce Act to carriers engaged in the transportation of passengers or property from one state or territory of the United States to any other state or territory, or from one place in a territory to another place in the same territory. Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

87. **Authority of Secretary of Interior.**—Act of May 14, 1898 (30 Stat. at L. 409, chap. 299, U. S. Comp. Stat. 1901, p. 1576), § 2.

88. Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

89. **Corporation organized under state law.**—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

90. Omaha, etc., R. Co. *v.* Interstate Commerce Comm., 191 Fed. 40.

91. **When actually engaged in transportation.**—Attorney General *v.* Union Stock Yard, etc., Co., 192 Fed. 330.

rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.[92]

Shipment to Foreign Port.—Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of the act of February 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.[93]

The hauling of empty cars from one state to another is interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in actions based upon the Safety Appliance Act. And the like reason applies to actions founded upon the Employers' Liability Act, which, indeed, is in pari materia with the other.[94]

§ 3991. Particular Carriers.—Railroads in General.—The fact that a railroad lies wholly within one state does not exempt it from the obligations imposed by the interstate commerce act, if the transportation over it is part of a shipment from one state to another, or to or from a foreign country.[95]

Lessor Railroad.—The owner of a railroad, which is leased and operated by the lessee as a common carrier engaged in interstate commerce, may be required by the interstate commerce commission to make annual reports, under the Interstate Commerce Act, § 20.[96] A stockyard company operating a railway system for cars to and from trunk lines in their transportation from and beyond the state does not cease to be an interstate carrier within the Interstate Commerce Act, and as such is obliged to file its tariffs under § 6 of the act by leasing its railway to another corporation for a division of profits.[97] Where a railroad company owning a part of the through route over which oil was transported under an alleged discriminating rate leased its line to another company, and the lessee, by virtue of the lease or otherwise, was not a partner, agent, or representative of the lessor company during the time the former was operating such portion of the through route, the lessor was not personally liable for violation of the interstate commerce act by the lessee's participation in such discriminating rate during the continuance of the lease.[98]

Lessee Railroad.—A railway company operating as lessee for division of profits a railroad system owned by a stockyard company for the transportation of cars to and from trunk lines is an interstate carrier within the Interstate Commerce Act, and obliged to file its tariffs with the interstate commerce commission as required by § 6.[99] A railroad company chartered by a state owned a short

92. **Transportation through foreign country.**—Act Feb. 4, 1887, § 6.

93. **Shipment to foreign port.**—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A., 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment 157 Fed. 830.

94. North Carolina R. Co. *v.* Zachary, 232 U. S. 248, 34 S. Ct. 305.

95. **Railroads in general.**—Augusta, etc., R. Co. *v.* Wrightsville, etc., R. Co., 74 Fed. 522.

96. **Lessor railroad.**—Attorney General *v.* Union Stock Yard, etc., Co., 192 Fed. 330.

A lessor of a railroad to an independent operating company held not a common carrier engaged in interstate commerce, within the meaning of Interstate Commerce Act Feb. 4, 1887, § 1, as amended by Act June 29, 1906, § 1. Attorney General *v.* Union Stock Yard, etc., Co., 192 Fed. 330.

97. United States *v.* Union Stockyard, etc., Co., 226 U. S. 286, 33 S. Ct. 83.

98. Western New York, etc., R. Co. *v.* Penn Refin. Co., 70 C. C. A. 23, 137 Fed. 343, affirmed in 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268.

99. **Lessee railroad.**—United States *v.* Union Stock Yard, etc., Co., 226 U. S. 286, 33 S. Ct. 83, modifying judgment Attorney General *v.* Union Stock Yard, etc., Co., 192 Fed. 330.

road wholly in the state, but did not own any rolling stock nor operate the road. The road was used and operated as a means of conducting interstate traffic in coal, by companies owning connecting interstate roads. Such road was one of the facilities and instrumentalities of interstate commerce, and hence the carriers using it were subject to the provisions of the act to regulate commerce.[1]

Sleeping Car Companies.—The act provides that the term "common carrier" shall include sleeping car companies.[2]

Express Companies.—The act now provides that the term "common carrier" shall include express companies also. The amendment to the Interstate Commerce Act by the Act of June 29, 1906, brought express companies within the terms of the act.[3] The express companies are therefore obliged to file and publish their rates for the transportation of property under the act thus as amended.[4] Express companies, independently organized as corporations for the transaction of the express business on their own account, are not subject to the provisions of the Interstate Commerce Act.[5]

Electric Railway Companies.—It seems an electric street railway doing an interstate business in the carriage of passengers, although incorporated under the street railroad statutes of a state, and not authorized to carry freight, nor vested with the right of eminent domain, is not a railroad within the Interstate Commerce Act.[6]

Carriers by Water.—When engaged in carrying on traffic under joint rates with railroads, filed with the commission, carriers by water are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates,

1. Heck *v.* East Tennessee, etc., R. Co., 1 Interst. Com. R. 495.

2. **Sleeping car companies.**—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 113.

3. **Express companies.**—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 113.

A joint-stock company doing a general express business, having filed its schedule of rates with the Interstate Commerce Commission, held a quasi corporation, and subject to indictment as a legal entity for discrimination and violation of the Interstate Commerce Act, as amended by the Hepburn Act. United States *v.* American Exp. Co., 199 Fed. 321.

By the provision of Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), amendatory of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), that "the term 'common carrier' as used in this act shall include express companies," such companies are made subject to all provisions of said Interstate Commerce Act and its amendments, so far as the same may be applicable, to the same extent as though they had been named in the original act, including the provisions of §§ 2 and 3 (24 Stat. 379, 380 [U. S. Comp. St. 1901, p. 3155]) against unjust and unreasonable discriminations, of § 6 (24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]) as amended by the Hepburn Act (34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 897]), prohibiting the taking of any greater or less sum for transportation of property than that named in the tariffs filed, and § 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), as so amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given. United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

4. Act June 29, 1906, c. 3591, 34 Stat. 584, Fed. Stat. Anno. Sup. 1912, p. 225; American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315.

5. United States *v.* Morsman, 42 Fed. 448.

The Interstate Commerce Act does not apply to independent express companies not operating railway lines. Decree, 88 Fed. 659, affirmed in Southern Indiana Exp. Co. *v.* United States Exp. Co., 92 Fed. 1022, 35 C. C. A. 172.

6. **Electric railway companies.**—Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), being acts to regulate commerce, do not apply to street railway companies engaged in the transportation of passengers between cities in different states. Omaha, etc., St. R. Co. *v.* Interstate Commerce Comm., 179 Fed. 243.

Street railroads carrying passengers across a state line are not governed by the Interstate Commerce Act of Feb. 4, 1887, which applies to carriers engaged in transportation of passengers or property by railroad. Omaha, etc., St. R. Co. *v.* Interstate Commerce Comm., 33 S. Ct. 890, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A., N. S., 385, reversing decree 191 Fed. 40.

and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism, and other practices denounced in the various sections of the act. They are undoubtedly subject to the provisions of the act, which permits the commission to inquire into the management of business of all common carriers subject to the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers the full and complete information necessary to enable the commission to carry out the objects for which it was created.[7] But it is not the purpose of the Interstate Commerce Act to subject independent carriers by water to its provisions, and it does not vest the interstate commerce commission with any control over the business of such carriers, except such interstate traffic as is carried on under a joint arrangement with rail carriers.[8]

Pipe Lines.—The provisions of the act apply to any corporation, person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water.[9] Oil companies controlling interstate pipe lines carrying oil offered between oil fields east of California and the Atlantic seaboard on condition that the offerer shall first sell the oil to them on their own terms, are embraced within the Act of June 29, 1906, extending the operation of the Interstate Commerce Act to pipe lines, which shall be considered to be common carriers within the act.[10] But an oil company using a pipe line solely to conduct its own oil from its own wells in one state to its own refinery in another state is not within the act.[11]

Bridges and Ferries.—The act provides that the term "railroads" shall include all bridges and ferries used or operated in connection with any railroad.[12]

7. Carriers by water.—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

"The terms of the act of congress, as amended June 29, 1906, 34 Stat. 584, c. 3591, and in force at the time when these orders were made, are plain and simple, and, we think, not difficult to comprehend. They are: 'The provisions of this act [to regulate commerce] shall apply to * * * any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, etc. The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one State was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic. The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same term as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier named therein." Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

8. Goodrich Trans. Co. *v.* Interstate Commerce Comm., 190 Fed. 943.

9. Pipe lines.—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 112.

10. United States *v.* Ohio Oil Co., 234 U. S. 548, 34 S. Ct. 956.

The amendment of § 1 of the Interstate Commerce Act by Act June 29, 1906, § 1, providing that the act shall apply to owners of oil pipe lines, who shall be considered common carriers, held not ambiguous, and intended to apply to all owners of interstate oil pipe lines, regardless of their previous status as common carriers, or as conducting a purely private business. Prairie Oil, etc., Co. *v.* United States, 204 Fed. 798.

11. United States *v.* Ohio Oil Co., 234 U. S. 548, 34 S. Ct. 956.

12. Bridges and ferries.—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 113.

Telephone, Telegraph and Cable Companies.—The act applies to telegraph, telephone and cable companies, whether wire or wireless, engaged in sending messages from one state, territory or district of the United States, to any other state, territory or district of the United States, or to any foreign country.[13]

Terminal Companies.—A corporation maintaining a stockyard which operates a railroad system for cars to and from trunk lines in the course of their transportation from beyond the state is an interstate railway carrier within the Interstate Commerce Act and obliged to file its tariffs with the Interstate Commerce Commission under § 6 of the act.[14] Railroad service known as "switching" is local, and the charge made for it is not a part of the through rate fixed beforehand, and has no reference to interstate shipment, but may be regulated by a commission appointed under a state act by virtue of the police power of the state.[15] A terminal company which received cars of coal coming from another state, and delivered them within its yards to the engines of a railroad company, was engaged in moving interstate traffic, within the Safety Appliance Act.[16]

Truckmen and Draymen.—Under the Interstate Commerce Act, providing that the act applies to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or party by railroad and partly by water, when both are used under a common control, etc., for a continuous carriage or interstate shipment, the act does not apply to a truckman in a city, so as to make him responsible for the loss of goods shipped from one state to another on the theory that he was the initial carrier, when his engagement was only to haul the goods from the store to the dock or depot as an independent employment.[17]

Holding Companies.—A holding company is not a common carrier, within the meaning of the Interstate Commerce Act, because of the fact that it owns all of the stock of a corporation which is such a common carrier.[18]

Where Carrier Is Also Manufacturer.—The act makes it unlawful for any railroad company to engage in the interstate or foreign transportation of any article or commodity, other than timber and the manufacture of products thereof, manufactured, mined or produced by the carrier, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.[19] The provision of the act applies to a railroad having termini in different states and transporting coal thereon from mines, the capital stock of which is owned by the railroad company, though all the coal mined by said railroad company is sold at the mine and title is passed before the coal is transported to another state.[20]

§§ 3992-4015. Duties Imposed upon Carrier—§ 3992. Transportation.—Section 1 of the act, makes it the plain duty of a carrier to furnish transportation upon reasonable request. This duty is imposed upon the carrier, and it is clearly the intent of the framers of the act that the carrier should, upon reasonable request for the same, furnish vehicles for transportation. This duty in no sense of the word rests upon the shipper, but relates solely to the carrier. In

13. **Telephone, telegraph and cable companies.**—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 112.

14. **Terminal companies.**—United States *v.* Union Stockyard, etc., Co., 226 U. S. 286, 33 S. Ct. 83. See Grand Trunk R. Co. *v.* Michigan R. Comm., 231 U. S. 457, 34 S. Ct. 152.

15. Chicago, etc., R. Co. *v.* Becker, 32 Fed. 849.

16. Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; United States *v.* Northern Pac. Terminal Co., 144 Fed. 861.

17. **Truckmen and draymen.**—Hirsch *v.* New England Nav. Co., 113 N. Y. S. 395, 129 App. Div. 178.

18. **Holding companies.**—Attorney General *v.* Union Stockyard, etc., Co., 192 Fed. 330.

19. **Where carrier is also manufacturer.**—Act June 18, 1910, ch. 309, Fed. St. Anno. Supp. 1912, p. 114.

20. Central Trust Co. *v.* Pittsburg, etc., R. Co., 101 N. Y. S. 837, 52 Misc. Rep. 195.

this instance, as is the case in the enactment of almost every statute, there must have been strong reasons for the passage of this act.[21]

Receipts for Goods Accepted for Transportation.—The requirement of the Carmack Amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, does not require other receipts than baggage checks.[22]

§ 3993. To Establish Through Routes.—See elsewhere.[23]

§ 3994. Continuous Carriage.—See elsewhere.[24]

§§ 3995-3997. Facilities—§ 3995. In General.—The third section of the Interstate Commerce Act provides that every common carrier subject to the provisions of the act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.[25] The duty of furnishing equal facilities relates to and involves purely the question of transportation, and when the court is called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated.[26]

§ 3996. Switches.—Any common carrier subject to the provisions of the act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the commission, as provided in § 13 of the act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation

21. **Duties imposed upon carrier.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

22. **Receipts for goods accepted for transportation.** — "Such checks are receipts, and there is no special requirement in the statute as to their form. It is doubtless in the power of the interstate commerce commission to make requirements as to the checks or receipts to be given for baggage if that subject needs regulation. Act of June 18, 1910, §§ 1 and 15, c. 309, 36 Stat. 539." Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

23. **To establish through routes.**—See post, "Joint Through Routes," § 4053.

24. **Continuous carriage.**—See post, "Connecting Carriers," §§ 4050-4057.

25. **Facilities.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; In re Lennon, 166 U. S. 548, 41 L. Ed. 1110, 17 S. Ct. 658; Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

"The statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the shipper." Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

26. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

therefor and the commission may make an order, as provided in § 15 of the act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.[27] Under this section, it is held that the remedy given by the act on complaint by the shipper to the commission, when an interstate carrier refuses to establish a switch connection with a lateral, branch line, is exclusive, and that the general powers given by other sections of the statute can not be deemed to authorize a complaint to the commission by the lateral branch railway company.[28]

§ 3997. As to Connecting Carriers.—See elsewhere.[29]

§ 3998. Just and Reasonable Rates.—See elsewhere.[30]

§ 3999. Printing and Publishing Schedules of Rates.—See elsewhere.[31]

§ 4000. Reports to Commission.—See elsewhere.[32]

§§ 4001-4014. Unloading, Feeding and Watering Stock—§ 4001. Statutory Provision.—The Act of June 29, 1906, commonly known as the "twenty-eight hour law," prohibits interstate carriers of live stock from confining the same in cars or vessels for more than twenty-eight consecutive hours without unloading them for feed, water, and rest, and imposes a penalty for its violation.[33] The statute is criminal and the rule of strict construction is appli-

27. Switches.—Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. Stat. Supp. 1909, p. 1149).

28. Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 S. Ct. 415, affirming 166 Fed. 498.

29. As to connecting carriers.—See post, "Facilities," §§ 4051-4052.

30. Just and reasonable rates.—See post, "Just and Reasonable," § 4059.

31. Printing and publishing schedules of rates.—See post, "Printing and Publishing Schedules," §§ 4125-4145.

32. Reports to commission.—See post, "Particular Powers," § 4154.

33. Unloading, feeding and watering stock.—Rev. St. U. S., § 4386, providing that no interstate railroad shall confine cattle in cars for a longer period than twenty-eight hours without unloading the same for rest, water, and feeding, unless prevented from so doing by storm or other accidental cause, was not intended to fix a period during which the company could, without incurring liability, hold cattle without unloading for such purposes. Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444, 15 S. W. 692.

A statute requiring a carrier to feed and water, "sufficiently," live stock in transit, is not too indefinite to carry a penalty. Gulf, etc., R. Co. *v.* Gray (Tex. Civ. App.), 24 S. W. 837.

Shipment of sheep.—Under the twenty-eight-hour law (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), prohibiting the confinement of live stock in interstate shipment for more than twenty-eight consecutive hours without unloading for rest, water, and feeding, subject to the extension of such time to thirty-six hours on written request of the shipper, "provided that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours," the proviso does not authorize the confinement of sheep for more than thirty-six consecutive hours in any case, but applies only where there has been no extension at request of the shipper and the twenty-eight hour period expires in the nighttime. United States *v.* Atchison, etc., R. Co., 185 Fed. 105.

Shipment of horses and mules.—Rev. St. U. S., § 4386, requiring railroads over which "cattle, sheep, swine, or other animals" are shipped to unload them for rest, water, and feeding once every twenty-eight hours, applies to a shipment of horses and mules. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

"Contingencies hereinbefore stated."—Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), forbids railroads from confining cattle longer than twenty-eight hours without unloading, unless prevented by storm or other accidental or other unavoidable unanticipated causes, provided that on the written request of the owner the time may be extended to thirty-six hours; it being the intent of the act to prohibit continuous confinement for more than twenty-eight hours except "upon the contingencies hereinbefore stated." Held, that "the contingencies hereinbefore

cable thereto.[34]

Compliance with Statute.—A railroad company which delivers the cars containing such stock to a connecting carrier or to the consignee within the prescribed time is relieved from further responsibility.[35]

The time consumed in loading and unloading stock is not to be considered as a part of their confinement in the cars permitted by the law.[36]

Carrier Not Insurer.—The carrier is not made an absolute insurer of the safety of sheep in transit, but its duty is fully performed by providing pens properly equipped, unless it has notice, or by reasonable diligence could have discovered, that the surrounding conditions were such that injury to the sheep, while in the pens, from dogs or wild animals, might be expected, in which case it would be bound to make reasonable provision for their safety.[37]

§ 4002. Carriers Liable for Penalty.—Receiver.—Railroad receivers are not liable to an action for penalties for failure to comply with the regulations as to transportation of live stock by "any company, owner, or custodian of such animals," since receivers are plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and therefore, as the statute is penal, it can not be construed to extend to them.[38]

Carrier of Intrastate Shipment.—The statute does not apply to a railroad carrying live stock from a point within a state to another point therein, but only to such as convey stock from one state to another.[39]

Connecting Carriers.—The duty of a connecting carrier of live stock is not discharged until it has been imposed upon the carrier next in order.[40]

Terminal Company.—A terminal railroad company, though controlled by associated railroads for which it operated terminal yards, was nevertheless a distinct corporation and separate entity from any of such associated railroads. The terminal company operated under a contract providing that its employees should be regarded as the servants of the associated railroad companies during the time they were working for them. One of such companies, after having retained certain cattle transported in interstate commerce in the cars for a time longer than that authorized by the twenty-eight hour law turned over the cattle to the terminal

stated" included both the case where the carrier was prevented from unloading by storm or other accidental or unavoidable causes and the contingency of the owner having filed a written request extending the time of confinement to thirty-six hours. United States *v.* Pere Marquette R. Co., 171 Fed. 586.

34. United States *v.* New York, etc., R. Co., 156 Fed. 249; United States *v.* Louisville, etc., R. Co., 157 Fed. 979.

But it has been held that the statute is not a criminal statute, nor subject to the strict rules of construction or of evidence applied in criminal prosecutions. Montana Cent. R. Co. *v.* United States, 164 Fed. 400.

The twenty-eight hour law (Act June 29, 1906, c. 3594, § 3, 34 Stat. 608 [U. S. Comp. St. Supp. 1907, p. 919]) declares that any railroad or common carrier other than by water, which "knowingly and willfully" fails to comply with the provisions of the act, for every such failure shall be liable for and forfeit and pay a penalty of not less than $100 or more than $500. Held, that the statute is not criminal in the sense that a violation thereof constitutes a crime, and hence the words "knowingly and willfully" should not be construed to require the confinement of transported animals beyond the prescribed period with a malevolent purpose on the part of the carrier to cruelly torture them, but only to require that the animals be knowingly and intentionally confined beyond the prescribed period. United States *v.* Sioux City Stock Yards Co., 162 Fed. 556, judgment affirmed in 167 Fed. 126.

35. Compliance with statute.—United States *v.* Southern Pac. Co., 157 Fed. 459.

36. United States *v.* Northern Pac. Terminal Co., 186 Fed. 947.

37. Carrier not insurer.—Beckman *v.* Southern Pac. Co., 118 Pac. 118, 39 Utah 472.

38. Carriers liable for penalty.—United States *v.* Harris, 177 U. S. 305, 44 L. Ed. 780, 20 S. Ct. 609, affirming 78 Fed. 290, and 29 C. C. A. 327, 85 Fed. 533.

39. Carrier of intrastate shipment.—United States *v.* East Tennessee, etc., R. Co., 13 Fed. 642.

40. Connecting carriers.—United States *v.* Union Pac. R. Co., 213 Fed. 332.

company, which continued the transportation to the stockyards where the cattle were unloaded. The fact that the original company was convicted and fined because of such transportation did not relieve the terminal company from its violation of the act on the theory that it was acting merely as an agent of the initial carrier.[41]

Where Stock Had Been Previously Confined.—Where the defendant, a terminal railroad company, received cattle from a connecting carrier for the sole purpose of transporting them to certain stockyards to feed, water, and rest them, and then to return them to the carrier from which they have been received, not knowing that such carrier had already confined them in the cars exceeding the time allowed by Act of June 29, 1906, providing that cattle shall not be confined for a longer period than thirty-six hours, the terminal carrier, having used due diligence in carrying the cattle to the stockyards and unloading them, was not guilty of itself "knowingly and willfully" violating such act; such words being intended to mean either an intentional violation of the statute or an indifferent disregard of its requirements.[42] Where a terminal company's railroad formed a part of a continuous line of interstate transportation over which live stock was transported, and the animals had been confined in the cars without being unloaded for food, water, and rest for a period longer than that prescribed by the act before being delivered to the terminal company for transportation to the stockyard for unloading, the terminal company could not relieve itself from liability for continuing such transportation on the ground that it found the cattle so confined at a place where they could not be unloaded except by being taken to the stockyards, nor except in exceptional cases, because its violation of the law would subserve a humane purpose; the terminal company being under no obligation to accept the cattle from its connecting carrier under such circumstances.[43] But a stock yards company without actual knowledge that cattle had been confined nearly twenty-eight hours, and without making any effort to find out whether they had been or not, which receives from a common carrier, and hauls a few miles to its stockyards, and there unloads, cattle for rest, food, and water, when the stockyards are nearer to the place of the receipt of the cattle than any other place where they could be unloaded, fed, and watered, is not guilty of knowingly and willfully confining the cattle, in violation of the act.[44] A terminal railroad

41. **Terminal company.**—United States *v.* Northern Pac. Terminal Co., 186 Fed. 947; New York, etc., R. Co. *v.* United States, 203 Fed. 953, following United States *v.* Lehigh Valley R. Co., 184 Fed. 971, affirmed in 187 Fed. 1006, 109 C. C. A. 211.

Where defendant stockyards company, as authorized by its articles of incorporation, constructed and maintained railroad tracks on acquired real estate and owned or leased and operated engines and cars for hire, by which it transported live stock brought to the Sioux City market by other interstate railroad companies between their terminals and the stockyards, and also hauled such of the products or freight of the packing houses from one to the other, as required, and cars loaded with fuel or ice to such houses from the different railroads entering the city, it was a railroad company or common carrier other than by water within the twenty-eight hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), prohibiting any railroad or common carrier other than by water, whose road forms a part of a line of road over which animals shall be conveyed from one state to another, from confining the same for a longer period than twenty-eight consecutive hours without unloading, etc. United States *v.* Sioux City Stock Yards Co., 162 Fed. 556, judgment affirmed in 167 Fed. 126.

42. **Where stock had been previously confined.**—Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178); United States *v.* Stock Yards Terminal R. Co., 101 C. C. A. 147, 178 Fed. 19, affirming judgment, 172 Fed. 452.

Where a terminal carrier received horses with knowledge that its connecting carrier had already confined them for a period longer than that permitted by twenty-eight hour law, §§ 1, 3, it was the duty of such terminal carrier to transport them to destination as quickly as possible. New York, etc., R. Co. *v.* United States, 203 Fed. 953.

43. United States *v.* Northern Pac. Terminal Co., 186 Fed. 947.

44. St. Joseph Stock Yards Co. *v.* United States, 110 C. C. A. 432, 187 Fed. 104, reversing judgment, 181 Fed. 625.

company, received a carload of horses from a connecting railroad company, which had transported them in interstate commerce. Such carrier had kept them confined in the car for more than twenty-eight hours without unloading for rest, water, and feeding, and was indicted and fined therefor. The terminal company received them for transportation over its line for some one thousand feet to stockyards, and moved them to such yards with all speed possible, and there unloaded them for rest, water, and feed. The terminal company was not chargeable with violation of the statute, but, on the contrary, its action aided in giving effect to its object and purpose.[45]

§ 4003. Knowingly and Willfully.—The words "knowingly and willfully" described an essential element of the offense on account of which penalties are prescribed, without proof of which they can not be recovered;[46] "knowingly" meaning with knowledge of the facts which, taken together, constitute a failure to comply with the statute, and "willfully" meaning purposely or obstinately, describing the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute, or is indifferent to its requirements.[47] The words

45. Northern Pac. Terminal Co. *v.* United States, 106 C. C. A. 583, 184 Fed. 603.

46. Knowingly and willfully.—St. Louis, etc., R. Co. *v.* United States, 94 C. C. A. 437, 169 Fed. 69.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibits the confinement of live stock in transit for more than twenty-eight consecutive hours, and § 3 provides that any common carrier who "knowingly and willfully" fails to comply with the law shall be subject to a penalty. Held, that a complaint under such act, failing to charge that defendant carrier "knowingly and willfully" restrained stock in its possession, which had been confined for a period longer than twenty-eight hours, was fatally defective. United States *v.* Oregon, etc., R. Co., 160 Fed. 526.

The words "knowingly and willfully," as used in the twenty-eight hour law, mean with a knowledge of the facts which, taken together, constitute failure to comply with the statute, and "purposely" or "obstinately" describe the attitude of the carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. Oregon-Washington R., etc., Co. *v.* United States, 205 Fed. 337, 123 C. C. A. 471.

"Willfully," as used in twenty-eight hour law, § 1, providing for a penalty or forfeiture by a carrier who knowingly and willfully fails to comply with the provisions of the act, means purposely or obstinately and describes the attitude of a carrier who, having free will or choice, either intentionally disregards the statute or is plainly indifferent to it. St. Louis, etc., R. Co. *v.* United States, 209 Fed. 600.

But it has been held that it is not essential to a recovery for violation of the twenty-eight hour law to show that defendant knew that the animals did not have proper food, water, or space to rest in the cars. Chicago, etc., R. Co. *v.* United States, 195 Fed. 241.

Allegation of negligence only.—In an action by the government against an interstate carrier for violation of the twenty-eight hour law, mere proof warranting a conclusion that the carrier's employees negligently, as distinguished from "willfully" and "intentionally," omitted to feed and water certain sheep, in transportation, during the rest period, was insufficient to subject the carrier to a penalty. United States *v.* Lehigh Valley R. Co., 204 Fed. 705, 123 C. C. A. 9.

47. United States *v.* St. Joseph Stock Yards Co., 181 Fed. 625.

The word "knowingly," means with a knowledge of the facts which taken together constitute a failure to comply with the statute, as is the case where a carrier receives from another a car loaded with cattle, and, with knowledge how long they have been confined without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. St. Louis, etc., R. Co. *v.* United States, 94 C. C. A. 437, 169 Fed. 69.

The word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily. United States *v.* Atchison, etc., R. Co., 166 Fed. 160; United States *v.* Union Pac. R. Co., 94 C. C. A. 433, 169 Fed. 65.

"Willfully," means purposely or obstinately, and describes the attitude of a carrier who having the free choice either intentionally disregards the statute, or is indifferent to its requirements. St. Louis, etc., R. Co. *v.* United States, 169 Fed. 69, 94 C. C. A. 437.

"Willfully" means "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Chicago, etc., R. Co. *v.* United States, 194 Fed. 342.

"knowingly and willfully" require only that defendant should have failed to obey the statute purposely and with knowledge of the facts.[48]

Knowledge of Servants.—A railroad company is subject to the penalty imposed by the Act for knowingly and willfully failing to comply with its provisions as to the unloading of live stock for rest, water, and feeding, where its servants or employees in charge of its train knowingly keep such stock confined in cars for more than twenty-eight consecutive hours without any lawful excuse, as prescribed by the act.[49]

§ 4004. Separate Offenses.—Under the penal clause of such law, each shipment of stock confined beyond the period prescribed in violation of its provisions constitutes a separate offense.[50] Where several shipments of live stock, belonging to different owners, are contained in the same train, and the carrier fails to unload, as provided in such act, a penalty is recoverable for each shipment, the shipment, and not the train load, being the integer contemplated as the objective thing to which the offense relates.[51] Where a railroad train carried a number of different consignments of live stock, and the company failed to unload any of them for rest, water, and feeding, as required, it became subject to a penalty thereunder for each consignment.[52] The act provides that no railroad or common carrier other than by water, whose road forms any part of a line over which cattle shall be conveyed from one state or territory into or through another state or territory, shall confine the same longer than twenty-eight consecutive hours, except that on the written request of the owner the time of confinement may be extended to thirty-six hours, and that any carrier knowingly and willfully violating such provisions for every such failure shall be liable to a penalty. But a single penalty is incurred for confining live stock beyond the period of twenty-eight or thirty-six hours, so that the time of confinement beyond that period is not material, unless it be for another period of twenty-eight or thirty-six hours.[53] Where cars of cattle are loaded at nearly the same time, although at different points, are forwarded to the same destination, the consignor and consignee are the same, and they are consolidated into one train and so received by a connecting carrier, the failure of such carrier to unload the same for rest, water, and feeding as required by the act constitutes but one violation of the statute.[54]

The confinement of each animal does not constitute a separate offense, multiplying the penalty by the whole number of animals carried, but the confinement of an entire number of animals is a single offense.[55]

§ 4005. Negligence of Servant.—It is no defense to an action for "knowingly and willfully" violating the act that the defendant made rules requiring its

48. New York, etc., R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

49. Knowledge of servants.—United States *v.* Southern Pac. Co., 157 Fed. 459.

50. Separate offenses.—United States *v.* Atchison, etc., R. Co., 166 Fed. 160.

51. United States *v.* Baltimore, etc., R. Co., 159 Fed. 33, 86 C. C. A. 223; United States *v.* Oregon R., etc., Co., 163 Fed. 642. But see United States *v.* St. Louis, etc., R. Co., 107 Fed. 870.

The individual shipment, and not the car load, is the unit in case of violation of the act. Judgment, United States *v.* Southern Pac. Co., 162 Fed. 412, affirmed in 171 Fed. 360, 96 C. C. A. 252.

Where several shipments of live stock belonging to different owners are carried in the same train in violation of the act, each shipment, and not the train load, is the integer for the purpose of ascertaining the number of offenses committed. United States *v.* New York, etc., R. Co., 168 Fed. 699, 94 C. C. A. 76.

Each independent shipment or consignment of stock constitutes the basis for a separate charge, and each separate confinement of the same stock for longer than the prescribed time, although during the same continuous transportation, also constitutes a separate offense. United States *v.* Southern Pac. Co., 157 Fed. 459.

52. New York, etc., R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

53. United States *v.* Sioux City Stock Yards Co., 162 Fed. 556, judgment affirmed, 167 Fed. 126.

54. United States *v.* New York, etc., R. Co., 191 Fed. 938.

55. United States *v.* Boston, etc., R. Co., 15 Fed. 209.

employees to comply with such statute, and that its failure to do so was through the negligence of an employee, and in violation of its rules.[56] A carrier of live stock may employ a subordinate agency to perform a service undertaken by it, but the agency must be subordinate to the carrier, and not to one who neither employs it, pays it, nor has any right to interfere with it.[57]

§ 4006. Preparation and Facilities.—Under the act providing that no railroad company shall confine live stock in cars for a longer period than twenty-eight hours without unloading for rest, water, and feed, it is the duty of a railroad to be reasonably well prepared to care for stock at the places where it is unloaded for rest, water, and feed.[58]

§ 4007. Shipment Through Foreign Country.—The act prohibiting interstate carriers of live stock from confining the same in cars for a period longer than twenty-eight consecutive hours without unloading for rest, water, and feeding, is applicable to a shipment originating in one state and ending in another, when confinement for more than the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country.[59]

§ 4008. Shipment under Agreement.—A legal request for an extension of time of confinement of cattle, may be made before the transportation commences, although it is not induced by any unforeseen contingency.[60] But an agreement

56. Negligence of servant. — United States *v.* Atlantic, etc., R. Co., 98 C. C. A. 110, 173 Fed. 764.

In an action against a railroad company, to recover the penalty for knowingly and willfully violating such act, it is not a defense that such violation was by reason of the "oversight, forgetfulness, and unintentional neglect" of its train dispatchers, contrary to its rules and orders. Montana Cent. R. Co. *v.* United States, 164 Fed. 400.

57. United States *v.* Union Pac. R. Co., 213 Fed. 332.

58. Preparation and facilities.—Illinois Cent. R. Co. *v.* Curry, 106 S. W. 294, 32 Ky. L. Rep. 513; St. Louis, etc., R. Co. *v.* Piburn, 120 Pac. 923, 30 Okla. 262.

The twenty-eight hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) does not require a carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise, except in so far as to render them suitable for the humane purpose of properly feeding, watering, and resting the particular shipment of stock unloaded into them. United States *v.* St. Louis, etc., R. Co., 177 Fed. 205, 101 C. C. A. 375.

59. Shipment through foreign country.—Grand Trunk R. Co. *v.* United States, 191 Fed. 803.

Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), prohibiting interstate carriers from confining animals transported in interstate commerce for more than twenty-eight or thirty-six hours without unloading them for feed, water, and rest, applies to shipments passing from one state through a foreign country (Canada) to another state. United States *v.* Lehigh Valley R. Co., 184 Fed. 971, judgment affirmed in 187 Fed. 1006, 109 C. C. A. 211.

60. Shipment under agreement.—Atchison, etc., R. Co. *v.* United States, 101 C. C. A. 140, 178 Fed. 12.

A request for extension of time for confinement of cattle, under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), may be made, though not induced by any contingency arising after transportation commences. Missouri, etc., R. Co. *v.* United States, 178 Fed. 15, 101 C. C. A. 143; Wabash R. Co. *v.* United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819.

The twenty-eight hour law (Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, c. 918]) provides for the unloading of cattle, etc., for food, water, and rest at the expiration of twenty-eight consecutive hours' transportation, except that the time may be extended to thirty-six hours by the written request of the shipper, except that it shall not be required that sheep be unloaded in the nighttime; but where the time expires in the night, in the case of sheep, the same may be continued in transit to a suitable place for unloading, subject to the thirty-six hour limitation. Held, that such provision was not fatally defective for uncertainty; the meaning being that in case of sheep, if the twenty-eight hour limit expires at night, the transit may be continued to a suitable place for unloading, without the consent of the owner or custodian, except that in no case shall the thirty-six hour limit be exceeded. Judgment, United States *v.* Southern Pac. Co., 162 Fed. 412, affirmed in 171 Fed. 360, 96 C. C. A. 252.

between an interstate carrier and the owner of certain animals transported in interstate commerce for the confinement of the animals for a period longer than thirty-six hours is void.[61]

Form of Agreement.—An application for extension of time of confinement of cattle, may be printed, engraved, or stamped, or partly printed or stamped and partly in handwriting.[62]

Agreement Written on Waybill.—While a request for the continued confinement of cattle must be separate from any printed bill of lading or other railroad form, it is necessary that it be written on a virgin sheet, and is effective if written at the bottom of a waybill and signed by the shipper.[63]

Separate Agreement for Each Shipment.—The shipper of cattle, to justify their confinement longer than twenty-eight hours, must file a written request for each shipment, and may not file a single general request applicable to all future shipments of his cattle.[64]

By Whom Agreement Made.—A legal request for extension of time of confinement of shipment of cattle may be made by the authorized agent of the owner, or by the person in custody of the particular shipment.[65] There is a legal presumption that one to whom an owner of animals has intrusted their possession for delivery to a railroad for shipment is authorized to make the request and a railroad relying on this presumption can not be held to have knowingly violated the law by confining animals more than twenty-eight hours and less than thirty-six without knowledge of any defect in the authority of the agent.[66]

Agreement for Feeding by Shipper.—The railroad is not liable when it appears that there was a special contract that the shipper should feed and water the live stock, and there is no specific evidence as to amount of the damage from the failure to feed and water.[67]

§ 4009. Where Stock Confined by Another Carrier.—It is immaterial that a part of the period of confinement elapses while the stock is in possession of a connecting carrier; the carrier having possession of the stock being required to unload, feed, and water them as soon as the time limit is reached.[68] Where con-

61. Webster *v.* Union Pac. R. Co., 200 Fed. 597.

62. Form of agreement.—Atchison, etc., R. Co. *v.* United States, 178 Fed. 12, 101 C. C. A. 140; Missouri, etc., R. Co. *v.* United States, 178 Fed. 15, 101 C. C. A. 143; Wabash R. Co. *v.* United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819.

A legal request for extension of time of confinement of shipment of cattle, under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), may be made on a railroad form separate from a bill of lading. Wabash R. Co. *v.* United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819.

63. Agreement written on waybill.—Mobile, etc., R. Co. *v.* United States, 209 Fed. 605.

64. Separate agreement for each shipment.—United States *v.* Pere Marquette R. Co., 171 Fed. 586.

65. By whom agreement made.—Atchison, etc., R. Co. *v.* United States, 178 Fed. 12, 101 C. C. A. 140; Wabash R. Co. *v.* United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819.

66. Wabash R. Co. *v.* United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819.

67. Agreement for feeding by shipper.—Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 913.

The carrier is not liable, when it appears that it was agreed that plaintiff should water and feed the cattle, and the carrier was to stop for the purpose at a particular place, and there is no evidence that the carrier was requested to stop before reaching the place named. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 913.

68. Where stock confined by another carrier.—United States *v.* Oregon, etc., R. Co., 160 Fed. 526.

A railroad company, which receives live stock from a connecting carrier after it has already been continuously confined in cars for more than twenty-eight hours and allows several more hours to pass before unloading the same, is prima facie guilty of a violation of the statute. United States *v.* New York, etc., R. Co., 156 Fed. 249.

Under the twenty-eight hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), prohibiting interstate carriers in transportation of animals from retaining them in the cars for a longer period than twenty-eight or thirty-six hours without unload-

necting carriers are engaged in a continuous transportation of cattle in interstate commerce, the fact that the initial carrier had kept the cattle confined without unloading for a period longer than that authorized by the act when they were delivered to defendant, the connecting carrier, did not authorize the latter to confine the cattle for another period equal to the statutory time before it would be liable for violating the act, since, while there is no violation of the act so long as the carrier does not exceed the time fixed, yet, whenever the continuous carriage without unloading does exceed it, then every carrier forming any part of an interstate line over which the stock is being shipped that participates in such carriage beyond the limit is guilty of an independent offense.[69]

Fact Not Known to Defendant.—The defendant's railroad constituted a part of a line of railroad over which live stock was transported under an interstate shipment to the defendant's stockyards. At the time the cattle were delivered to the defendant by the connecting carrier, they had all been kept in the cars without being unloaded for rest, water, and feed for more than thirty-six hours, which fact was disclosed by the waybills, which were not delivered to the defendant until after the cattle were in the defendant's custody. The next and only place where the cattle could have been unloaded and watered was at defendant's yards at destination, where defendant delivered the cattle with all reasonable dispatch with the facilities it had for handling them. The defendant had not knowingly and willfully failed to comply with the provisions of the act, and was therefore not liable for a penalty for its violation.[70]

Presumption.—Where defendant received horses from a connecting carrier, which had confined them for a period longer than permitted by the act and transported them to destination without unloading, it would be presumed that it did so with knowledge of the connecting carrier's default, or in the absence of evidence that it made reasonable inquiry and could not ascertain the fact.[71]

Liability of Terminal Company.—A terminal railroad company is not liable for accepting from a connecting carrier cars of cattle which had already been confined for a longer time than permitted by the statute, and moving them with all reasonable dispatch to the nearest stockyards and there unloading them for rest, feed, and water.[72]

Where defendant carrier maintained only switching service and transported animals that had already been confined by trunk line carriers longer than the statutory period, to unloading chutes without unreasonable delay, it was not guilty of knowingly and willfully confining the animals in violation of the twenty-eight-hour law.[73]

§ 4010. Where Penalty Exacted from Another Carrier.—Initial Carrier.—It is no defense to a charge that a railroad company in transporting animals has confined them knowingly and willfully more than twenty-eight hours without unloading them, that another carrier, participating in the transportation of the shipment, was also guilty of a violation of the statute and has paid the

ing them for food, water, and rest, where animals have been confined for the entire statutory period before being delivered to a connecting carrier, it is not necessary that a new period equal to the statutory time must again expire before the connecting carrier can be held guilty of violating the act; the liability being complete on the connecting carrier continuing the transportation toward the destination except to transport them to the yards at the junction point to unload them, under the provision that, in estimating the confinement, the time consumed in loading and unloading shall not be considered, but the time during which they have been confined on connecting roads is to be included. United States *v.* Lehigh Valley R. Co., 184 Fed. 971.

69. United States *v.* Northern Pac. Terminal Co., 186 Fed. 947.

70. **Fact not known to defendant.**—United States *v.* Sioux City Stockyards Co., 162 Fed. 556, judgment affirmed in 167 Fed. 126.

71. **Presumption.**—New York, etc., R. Co. *v.* United States, 203 Fed. 953.

72. **Liability of terminal company.**—St. Louis, etc., R. Co. *v.* United States, 209 Fed. 600.

73. United States *v.* Chicago Junction R. Co., 211 Fed. 724.

penalty therefor.[74] But it has been held where the initial carrier of live stock has been subjected to the penalty for confining live stock longer than thereby permitted without unloading for rest, water, and feeding, in a second action against a connecting carrier to recover for the same confinement, the first twenty-eight hours of the confinement, which was necessarily included in the period covered by the judgment in the first action, can not be counted against the defendant.[75]

Subsequent Carrier.—A carrier that delivers a shipment of cattle to a connecting carrier in time according to the usual course of transportation for their carriage to and unloading within the time limit at pens suitably equipped, either at their destination or on the way, without notice that they must be delayed in their arrival, beyond such time, does not violate the act.[76]

§ 4011. Excuses for Failure to Unload, etc.—The act prohibits confinement of live stock in transit for more than twenty-eight hours, unless unloading is prevented by storm or other accidental or unavoidable causes, which can not be anticipated or avoided by the exercise of due diligence and foresight. The act also imposes penalties recoverable by a civil action in the name of the United States. Though the exception is contained in the enacting clause of such act created a general offense, and not one limited to particular conditions; and hence a complaint to recover penalties imposed was not defective for failure to negative the exception.[77]

An "accidental or unavoidable cause which can not be anticipated or avoided by the exercise of due diligence and foresight," and which will legally excuse an interstate carrier of live stock for confining such stock in cars for a period longer than twenty eight consecutive hours without unloading for rest, water, and feeding, is one which can not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case, and as would have been exercised by a man of ordinary prudence under such circumstances. An accident occurring to a train through the negligence of the transportation company is not such a cause; nor is mere press of business, or the sidetracking of the train to allow for the passing of other trains, the meeting or passing of which could have been anticipated when the transportation was begun, or the lack of facilities for unloading or feeding.[78] A train load of cars of sheep started at 5 o'clock in the morning to make a run which ordinarily requires eleven hours. This train and its drawbars were inspected and found in good condition on the morning it started. In order to unload the sheep in time, it was necessary that this train should make the run in twelve hours. It was delayed about two hours by the breaking of a drawbar and chain of a train which met and passed it, by the slipping of a knuckle in the coupler which separated it into two parts and by the pulling out of two drawbars in its cars which made it necessary to draw the two parts of the train upon a side track and recouple them. Upon its arrival the company dragged the sheep out of two of the cars in the dark within the thirty-six hours, but left the others unloaded until the next morning after the expiration of the thirty-six

74. **Where penalty exacted from another carrier.**—United States *v.* Wabash R. Co., 182 Fed. 802; United States *v.* Northern Pac. Terminal Co., 181 Fed. 879; New York, etc., R. Co. *v.* United States, 203 Fed. 953.

75. United States *v.* Stockyards Terminal Co., 172 Fed. 452.

76. **Subsequent carrier.**—Missouri, etc., R. Co. *v.* United States, 101 C. C. A. 143, 178 Fed. 15.

77. **Excuses for failure to unload, etc.**—United States *v.* Oregon, etc., R. Co., 160 Fed. 526.

78. United States *v.* Southern Pac. Co., 157 Fed. 459. See, also, Chicago, etc., R. Co. *v.* United States, 194 Fed. 342.

An accident to a railroad train through negligence does not excuse noncompliance with Rev. St., §§ 4386-4388, forbidding interstate carriers of animals to confine them more than twenty-eight consecutive hours without unloading for rest, water, and feeding, unless prevented "by storm or other accidental causes." Newport News, etc., Co. *v.* United States, 61 Fed. 488, 9 C. C. A. 579.

hours. These facts afford no substantial evidence that the company willfully violated the law, but they do afford substantial evidence that it was prevented from unloading the sheep within the time by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.[79]

The measure of "due diligence and foresight" is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the act is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances.[80]

Rush of Business.—A great unusual press of business does not, unexplained and of itself, excuse the confinement of live stock by a railroad company beyond time limited by the act, nor constitute a defense to an action to recover the penalty for its violation.[81]

Act of Person Accompanying Stock.—Where stock is transported in charge of a caretaker, the fact that, on the car being spotted at the carrier's stockyards for unloading for rest, the caretaker agreed to notify the consignee to unload the stock, did not relieve the carrier from using due diligence and foresight to see that the stock was unloaded within the time prescribed.[82]

Stock Refused by Another Carrier.—Where the defendant, an initial carrier of certain stock, tendered the same to its connecting carrier when nine hours of the statutory confinement period remained, and the connecting carrier refused to receive the stock, because it would probably be rejected by its next connecting carrier, the defendant's subsequent transportation to its own stockyards for unloading after the time expired did not constitute a willful and knowing confinement of the stock.[83]

Burden of Proof.—The burden is not on the government to show that the carrier was not prevented by storm or other accidental or unavoidable cause, which it could not have anticipated by the exercise of diligence and foresight, within the exception from liability created by such act, complaint contains the necessary allegation that the carrier acted "willfully" such allegation in itself is sufficient to negative the exception.[84]

§ 4012. Cars Provided for Food, Water and Rest.—To bring a case within the proviso which exempts a carrier of live stock from compliance with the requirements of unloading the same at least once in twenty-eight hours for rest, water, and feeding when the animals are carried in cars in which they can and do have proper food, water, space and opportunity to rest, the cars must not only be properly equipped for such purposes, but it is incumbent on the carrier to see that the animals do have proper and sufficient quantity of food and water supplied where they can reach it, and they are not so overcrowded but that they have sufficient space for all to lie down at the same time.[85] Unless cars provided

79. Chicago, etc., R. Co. *v.* United States, 194 Fed. 342.

80. Chicago, etc., R. Co. *v.* United States, 194 Fed. 342.

81. **Rush of business.**—United States *v.* Union Pac. R. Co., 94 C. C. A. 433, 169 Fed. 65.

Failure of a railroad company to provide unloading stations, congested traffic conditions reasonably to be anticipated from past experience, and breakdowns en route resulting from negligent operation or omission to furnish properly equipped and inspected engines and cars are not such accidental or unavoidable causes as will relieve the carrier from liability for a violation of such act. United States *v.* Atchison, etc., R. Co., 166 Fed. 160.

82. **Act of person accompanying stock.**—Oregon-Washington R., etc., Co. *v.* United States, 123 C. C. A. 471, 205 Fed. 337.

83. **Stock refused by another carrier.**—United States *v.* Chicago, etc., R. Co., 211 Fed. 770.

84. **Burden of proof.**—United States *v.* Oregon, etc., R. Co., 160 Fed. 526.

85. **Cars provided for food, water and rest.**—(Act June 29, 1906, c. 3594, 34 Stat. 608 [U. S. Comp. St. Supp. 1909, p. 1179]);

for the carriage of cattle afford sufficient space for all to lie down at the same time, they are not sufficient to exempt the carrier from unloading for rest, water, and feeding.[86]

Where Stock Not Watered.—Where cattle were transported in patent cattle cars, equipped with troughs affording an opportunity to water them without unloading, but the cattle were kept in the cars for a period longer than that authorized by statute, without water being introduced in the troughs for at lease a part of the cattle, the carrier is liable for the penalty provided by the act.[87]

Where Stock May Lie Down at Different Times.—Where cars provided for the transportation of cattle were sufficiently large to enable all the cattle to lie down at different times, but not sufficient to permit all of them to lie down at the same time, they were not sufficient to exempt the carrier from the duty to unload for rest.[88]

Where Stock in Charge of Owner.—A carrier, in order to bring itself within the exception, must not only show that the animals can have the supplies specified, but that they are in fact afforded proper food, water, space, and opportunity to rest, so that where animals were in charge of the shipper, and were retained in the cars for a longer period than twenty-eight hours without proper food, water, and an opportunity to rest, it was no answer to the carrier's liability that the shipper could have provided proper attention, and, on being inquired of en route as to how he was faring, stated that he was "all right," and that he could feed and water his stock.[89]

Stockyards on Fire.—The failure of a railroad company to comply with the statute and with its contract of shipment, wherein it agreed to furnish the owner with reasonable facilities for taking care of the horses, is not excused by the fact that its stockyards at one of its intermediate stations were on fire when the train arrived there, so as to relieve it from liability for injury to the horses caused by such failure.[90]

Condition of Stock When Accepted.—Under the statute allowing the recovery of a penalty from a carrier for a failure to properly care for stock in shipment, a carrier has the right to act on the presumption that stock is in proper condition when tendered for shipment, and is not required to water or feed oftener than would be done by an ordinarily prudent man with his own stock.[91]

United States *v.* New York, etc., R. Co., 191 Fed. 938.

If the stock is transported in cars which are not properly constructed for feeding and watering the stock, then it becomes the duty of the carrier to furnish places where the stock may be unloaded, watered, and fed, without injury, in any kind of weather. International, etc., R. Co. *v.* McRae, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

That the two cars, in which 43 horses were shipped, were two feet longer than ordinary cars, with racks and troughs in which to feed and water, is insufficient to show that the cars were such that the cattle could have "proper food, water, space, and opportunity for rest" (Rev. St. U. S., § 4388), so as to relieve the carrier from the duty of unloading them at stated intervals for rest, water, and feeding. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

86. United States *v.* Erie R. Co., 191 Fed. 941.

87. Where stock not watered.—United States *v.* New York, etc., R. Co., 186 Fed. 541.

88. Where stock may lie down at different times.—"It seems to us that it is the object of the statute to secure to every animal in the shipment proper space and opportunity to rest. Not only is cruelty to a single one 'cruelty to animals,' but the landing of a single one in a condition bad for slaughtering exposes the persons who may eat the meat from that one carcass to a risk which might not exist if this statute were strictly conformed to. Every animal in this shipment might have proper opportunity to rest if they all agreed to take turns in occupying space." Erie R. Co. *v.* United States, 200 Fed. 406.

89. Where stock in charge of owner.—United States *v.* Chicago, etc., R. Co., 184 Fed. 984.

90. Stockyards on fire.—Nashville, etc., R. Co. *v.* Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

91. Condition of stock when accepted.—Texas, etc., R. Co. *v.* Stribling (Tex. Civ. App.), 34 S. W. 1002.

§ 4013. Damages.—A railroad company, engaged in the transportation of horses from one state to another, which keeps them confined in a car for more than twenty-eight consecutive hours, without unloading them for rest, water, or food, is guilty of negligence per se, and is liable, not only for the penalty provided in said section but also for any damage or injury that may be thereby sustained by the owner of the stock.[92]

§ 4014. Proceedings.—Nature of Proceeding.—Although the action to enforce the penalty is civil in form,[93] the statute is a criminal one.[94]

Pleading.—Technical objections to the declaration are without merit after verdict.[95] The plaintiff need not allege or prove the nonexistence of "accidental or unavoidable causes," which are matters of defense. A description of the defendant as "lessee" of the road, and otherwise following the language of the statute, is sufficient after verdict, although it does not expressly allege that defendant was at the time operating the road.[96] A carrier's confinement of a train load of cattle for a longer period than permitted by the act without unloading is a single offense, within the meaning of the act; and hence, in an action therefor, separate counts in the complaint of declaration for each car, intended to multiply the penalty by the number of cars, are not permissible.[97]

Province of Court and Jury.—In an action for the violation of the act, it is the province of the court to fix the amount of recovery, and that of the jury to determine the question of violation.[98] The question of the legality of written requests for an extension of time of confinement of cattle, is a question of law for the court.[99]

Instructions.—Where, notwithstanding the jury found in defendant's favor on the recitals and conditions in a requested charge, they could also conclude under the evidence that defendant "knowingly" and "willfully" failed to comply with the food and rest law, an instruction charging that if such conditions were found the jury should find for defendant was properly refused.[1]

Presumptions and Burden of Proof.—A proceeding under the statute to enforce the penalty, although the action is civil in form, the defendant is presumed innocent until every essential element of the offense is proved beyond a reasonable doubt.[2] In an action under such statute against a railroad company to recover the penalty imposed thereby for "knowingly and willfully" failing to

92. **Damages.**—Nashville, etc., R. Co. *v.* Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; Chicago, etc., R. Co. *v.* Slattery, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

The failure of a railway company, on an interstate shipment of stock, to unload it for rest, water, and feed, after being confined in cars for twenty-eight consecutive hours, as required by Rev. St. U. S., § 4386, constitutes actionable negligence at the suit of the owner injured thereby; nor does the fact that a penalty is imposed for breach of such duty prevent an action for negligence, such penalty not being given to the injured party in satisfaction of the injury. Burns *v.* Chicago, etc., R. Co., 80 N. W. 927, 104 Wis. 646.

93. **Proceedings.**—United States *v.* Louisville, etc., R. Co., 157 Fed. 979; New York, etc., R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

94. United States *v.* Louisville, etc., R. Co., 157 Fed. 979.

95. **Pleading.**—New York, etc., R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

96. New York, etc., R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

97. United States *v.* St. Louis, etc., R. Co., 107 Fed. 870.

98. **Province of court and jury.**—Atchison, etc., R. Co. *v.* United States, 101 C. C. A. 140, 178 Fed. 12.

In an action by the United States against a carrier for violation of the twenty-eight hour law, whether the animals were knowingly and willfully confined beyond the time limit, and whether this was due to accident, in that the carrier was justified in believing that the caretaker would unload the stock, held for the jury. Oregon-Washington R., etc., Co. *v.* United States, 205 Fed. 337, 123 C. C. A. 471.

99. Missouri, etc., R. Co. *v.* United States, 101 C. C. A. 143, 178 Fed. 15.

1. **Instructions.**—Houston, etc., R. Co. *v.* United States, 94 C. C. A. 307, 168 Fed. 895.

2. **Presumptions and burden of proof.**—United States *v.* Louisville, etc., R. Co., 157 Fed. 979.

comply with its provisions, based on the failure of defendant to unload a car load of cattle until nearly six hours after their receipt from a connecting road, by which they had been loaded twenty-four hours previously, the government is not entitled to recover on proof merely of such facts; there being no evidence that they were not unloaded and fed during such time, or that defendant had knowledge of the time when they were loaded.[3]

Weight and Sufficiency of Evidence.—In an action by the United States against a railroad company to recover the penalty imposed by the Act for knowingly and willfully failing to comply with its provisions requiring the unloading of live stock for rest, water, and feeding, the government is required to establish its case only by a preponderance of the evidence.[4] The greater weight of evidence is sufficient, and proof beyond a reasonable doubt is unnecessary.[5]

§ 4015. Icing Perishable Goods.—Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another. But of course this does not mean that, because the carriers have ice on hand, they can compel the shipper to have his fruit refrigerated, when, on account of the state of the weather or for other cause, he prefers to have it forwarded under ventilation only.[6] Carriers of citrus fruits from California to eastern points may be compelled by the interstate commerce commission to permit the consignors to ice the car bunkers at their warehouses, until the carriers shall offer to furnish ice at the

3. United States *v.* Louisville, etc., R. Co., 157 Fed. 979.

4. **Weight and sufficiency of evidence.**—United States *v.* Southern Pac. Co., 157 Fed. 459.

5. Atchison, etc., R. Co. *v.* United States, 101 C. C. A. 140, 178 Fed. 12; Missouri, etc., R. Co. *v.* United States, 101 C. C. A. 143, 178 Fed. 15.

6. **Icing perishable goods.**—Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

"The icing may have been so related to refrigeration as to authorize the carriers to render that service. But manifestly they could not be expected to build refrigerating plants near each warehouse; and, the carrier not being in a position to do such icing, the consignor had the same right to provide the necessary supply that he would have had to ice a shipment of fish, to furnish and place standards to secure lumber on an open car, or to fasten to the floor articles which otherwise might be damaged by the jerks and jolts of a moving train. In the absence, therefore, of the carriers' offer, under a filed tariff, to furnish ice at the time and place needed in pre-cooled shipments, or to substitute a service of equal value at practically the same cost, they had no right to prevent the consignor from filling the bunkers so as to fit the freight for proper transportation." Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

"When ice is actually needed and is actually used, the question arises as to whether icing is a part of preparation which can be done by the shipper; or a part of refrigeration (transportation) which, by statute the carrier has the exclusive right to furnish. To this question no answer can be given that will apply in all cases. For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the claims of the parties are based rather on interest than on some definite principle. Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. National Lumber Dealers Association *v.* Atlantic Coast Line, 14 I. C. C. 154; Schultz *v.* Southern Pacific, 18 I. C. C. 234; In re Allowance for Lining and Heating Cars, 26 I. C. C. 681; 25 I. C. C. 497." Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

time and place needed at practically the same cost.[7]

§§ 4016-4049. Prohibitions upon Carriers—§§ 4016-4044. Discrimination and Preferences—§ 4016. In General.—Statutory Provision.—The interstate commerce act provides that it shall be unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[8]

The purpose of this act is to place all shippers on an absolute equality,[9] to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them.[10] The sections in question were intended to prevent discrimination in all branches of freight traffic.[11]

Declaratory of Common Law.—The provision of the act which relates to undue preference is declaratory of the common law.[12]

Construction.—Although the English traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination, yet so far as relates to the question of "undue preferences," it may be presumed that congress, adopting the language of the English Act, had in mind the construction given to their words by the English courts, and intended to incorporate them into the statute.[13]

7. Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

8. **Discriminating and preferences.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

A common carrier engaged in interstate commerce can not grant special favors to anybody. Johnson *v.* New York, etc., Railroad (Me.), 88 Atl. 988.

9. United States *v.* Norfolk, etc., R. Co., 74 C. C. A. 466, 143 Fed. 266.

10. United States *v.* Union Stockyard, etc., Co., 226 U. S. 286, 33 S. Ct. 83, citing New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671; Chicago, etc., R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 S. Ct. 648, Ann. Cas. 1914A, 501.

11. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

12. **Declaratory of common law.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

13. **Construction.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844. See, also, McDonald *v.* Hovey, 110 U. S. 619, 28 L. Ed. 269, 4 S. Ct. 142; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

The provisions of § 3 of the Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] have their near protype in § 2 of the English Railway Traffic Act of 1854, and the courts of this country have adopted the English interpretation of that section. Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975, citing Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 43 Fed. 37; S. C., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

It was modeled upon § 2 of the English Act of July 10, 1854, and § 11 of the Act of July 21, 1873. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

Under the express provisions of Interstate Commerce Act, Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], a common carrier is required not to make or give any undue or unreasonable preference or advantage to

Necessity for Advantage to Carrier or Other Shipper.—By the provision of the act prohibiting discrimination in railroad rates by the giving of unreasonable preference to any person or locality, all discriminations are not forbidden, but only discrimination against some person, locality, or corporation, made for the advantage of the carrier, or by receiving greater or less compensation from one class of persons than from another for similar services;[14] and hence a contract by a railroad to maintain rates from a factory not exceeding, to competitive points, the rates from two other places, is not, on its face, void for discrimination.[15]

§ 4017. Undue and Unreasonable.—The Interstate Commerce Act does not prohibit the giving of all preferences and advantages, but prohibits only those that are undue and unreasonable.[16] And the mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act.[17] The discrimination must be unjust between shippers, persons, localities, or corporations, by granting undue preference to one, or subjecting another to unreasonable disadvantage.[18] That a carrier, to injure or harass the business of a consignee, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or create any cause of action therefor.[19]

The use of the word "discrimination" in the amendatory acts of February 19, 1903, and June 29, 1906, without the qualifying words "unjust," "undue," or "unreasonable," used in the original act of February 4, 1887, is not intended to broaden the provisions of the earlier act in that respect; the word "discrimination" itself, as so applied, implies an unjust or unfair distinction.[20]

any particular firm, person, or corporation, or locality, or to any particular description of traffic, or subject any particular firm, corporation, or locality, or any particular description of traffic, nor to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, but this duty only applies where the circumstances or conditions are substantially similar. Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

14. Necessity for advantage to carrier or other shipper.—Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

15. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 37 So. 134, 84 Miss. 339, 66 L. R. A. 453.

16. Undue and unreasonable.—Union Pac. R. Co. *v.* Updike Grain Co., 101 C. C. A. 583, 178 Fed. 223; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

Interstate Commerce Act, Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], authorizes a preference, advantage, or discrimination between persons, localities, or traffics, provided such preference, advantage, or discrimination be not undue and unreasonable. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

17. Delaware, etc., R. Co. *v.* Kutter, 77 C. C. A. 315, 147 Fed. 51, citing Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

18. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

19. Gamble-Robinson Comm. Co. *v.* Chicago, etc., R. Co., 168 Fed. 161.

The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) held not to prohibit the giving of all preference and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. Gamble-Robinson Comm. Co. *v.* Chicago, etc., R. Co., 168 Fed. 161.

20. The use of the word "discrimination" in § 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), as amended by Hepburn Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1907, p. 897), without the qualifying words "unjust," etc., used in the original Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 (U. S. Comp. St. 1901, p. 3155), was not intended to broaden the provisions of the earlier act. United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

All special contracts or traffic arrangements between carrier and shipper are not forbidden or condemned, but only such as operate unfairly, and evidence undue favoritism toward one, or deprive another of his just rights.[21]

What Constitutes Undue Preference.—That portion of the Interstate Commerce Act which relates to undue preference is declaratory of the common law, and, when considered in connection therewith, any undue preference which is based upon the theory that the preference is made with a view of promoting the interests either of a shipper or a carrier, without due regard to the interests of shippers who are similarly situated, must be considered violative of such sections.[22]

Question of Fact.—What is an undue or unreasonable preference or advantage given by a carrier of goods to a shipper within the inhibition of the interstate commerce act is a question of fact.[23] As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, it can not be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, is a question of fact depending on the matters proved in each case.[24]

Evidence of Preference Alone.—The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act.[25]

Real Advantage to One Shipper.—Though under the Act of June 29, 1906, trifling differentiations may not be a forbidden discrimination, if the court can say that the distinction gives one shipper a real advantage over others, it is a forbidden discrimination.[26]

§ 4018. Similar Service and Circumstances.—To come within the inhibition of the act the positions of the respective persons or classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other.[27] As between commodities and localities, special distinctions may be made where there is some basis therefore in reason and in fact; distinctions found, for example, in the character of the freight, the risk of injury, the increased difficulty of handling, and the increased damages which the carrier would be called upon to pay in case of loss or injury in one case as compared with another.[28] But a rule or classification, although couched in terms similarly fair on their face, can not be sustained where the practical effect thereof is to work an arbitrary and unreasonable discrimination or preference as between persons,

21. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

22. **What constitutes undue preference.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

23. **Question of fact.**—State *v.* Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A., N. S., 93, rehearing denied in 85 N. E. 966.

24. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

25. **Evidence of preference alone.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

26. **Real advantage to one shipper.**—Hocking Valley R. Co. *v.* United States, 210 Fed. 735.

27. **Similar service and circumstances.**—Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

28. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

places, or commodities.[29] To carry two barrels of sugar for one person on a given date, and to carry one barrel of sugar for another person, between the same points over the same route, two days later, are contemporaneous, and like services within the meaning of the Interstate Commerce Act.[30]

Similar Rates Charged.—The fact that a railroad company, in its schedule of freight rates, groups together two cities on its line, some distance apart, and charges the same rate for carriage to both, is not to be treated as a conclusive admission that the service is performed under substantially similar circumstances and conditions, within the meaning of the interstate commerce law, so as to make it necessarily unlawful to furnish, without additional charge, an additional service at the further city, by cartage from its depot to the places of business of the consignees.[31]

Competition.—The requirement of § 2 of the Interstate Commerce Act, that, in order to constitute the offense of unjust discrimination, the transportation must be "under substantially similar circumstances and conditions," refers to the matter of carriage, and does not include competition, though it may be that the same phrase found in § 4 of the act has a broader meaning.[32]

Justifying Long and Short Haul Charges.—The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other in violation of § 3 of the Interstate Commerce Act.[33]

Nature of Goods Shipped.—Special distinctions may be made as to special kinds of freight without violating the provision making it unlawful for any carrier to make or give any undue or unreasonable preference or advantage to any particular person or any particular description of traffic.[34]

Live Stock and Dressed Meats.—The cost of carriage, the risk of injury, and the larger amount which the railway companies are called upon to pay out in damages for losses may excuse a higher freight rate on live stock than on dressed meats and packing house products.[35]

Quantity of Goods Shipped.—Where common laundry soap in less than car-load lots was assigned to the fourth class in the first classification made under the Interstate Commerce Act, and was voluntarily maintained there by defendant railroad companies for more than thirteen years, defendants were not justified in reclassifying such freight so that it would pay twenty per cent less than third class rates, without changing the car-load classification, on the mere claim that the prior classifications had been inadequate to pay the cost of carriage in less than car-load lots, there having been no general reclassification which would prox-

29. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

30. United States *v.* Tozer, 39 Fed. 369.

31. **Similar rates charged.**—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

32. **Competition.**—Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

33. **Justifying long and short haul charges.**—Interstate Commerce Comm. *v.* Nashville, etc., R. Co., 57 C. C. A. 224, 120 Fed. 934.

34. **Nature of goods shipped.**—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

35. **Live stock and dressed meats.**—A reduction of freight rates for dressed meats and packing house products from Missouri river points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not directly influence or injure shippers of live stock. Judgment 141 Fed. 1003, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

imately apportion the cost of the service equally among the different articles of traffic as between car loads and less than car-load lots.[36] Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at twenty per cent less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than car-load lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.[37] The fact that defendant's road received much more traffic from the first shipper than from the second does not make the circumstances and conditions under which the two services were rendered substantially dissimilar.[38]

Custom and Usage.—The long existence, before the enactment of the interstate commerce law, of a custom to collect and deliver freight by cartage, in a particular city, and not in others, may be one of the "circumstances" mentioned in the act as elements entering into the question of unjust and unfair discrimination.[39] Other circumstances and conditions of great importance may be that, having long ago adopted such a plan of accessorial services by furnishing cartage, and adapted its terminal facilities thereto, the carrier's station is located a great distance from the traffic center of the city, and to now abandon such service, and extend its road and appliances to the traffic centers, would entail enormous expense for rights of way, and for construction and reconstruction; also, the fact that rival and competing carriers have their stations near the traffic centers, so that to abandon the cartage service would result in the annihilation of the company's business.[40]

Difference in Population and Traffic in Cities.—Differences in population and tonnage traffic may constitute a "circumstance" or "condition" of dissimilarity, within the meaning of the statute; and it can not be said that a railroad company may not reasonably and without undue preference or advantage, or unlawful discrimination, collect and deliver, at its own expense, goods at one city, and not at another when the difference in population and traffic is great.[41]

Findings of Commission Conclusive.—The findings of the Interstate Commerce Commission that industrial spur tracks within switching limits in a city were part of the carrier's terminals, and that the receipt and delivery on these tracks of car load freight in interstate commerce was a like service as compared with such receipt and delivery at team tracks and freight sheds within such switching limits, are conclusive on the courts.[42]

36. Quantity of goods shipped.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 146 Fed. 559, decree affirmed in 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

37. The disturbance in the relations between freight rates for soap in car load and less than car-load lots created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than car-load lots at twenty per cent less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than car-load lots in the fourth class in portions of the territory, and in a higher class in other portions. Decree, Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 146 Fed. 559, affirmed in 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

38. United States *v.* Tozer, 39 Fed. 369.

39. Custom and usage.—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

40. Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

41. Difference in population and traffic in cities.—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

42. Findings of commission conclusive.—Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 234 U. S. 294, 34 S. Ct. 814; Interstate Commerce Comm. *v.* Southern Pac. Co., 234 U. S. 315, 34 S. Ct. 820.

§ 4019. Persons Discriminated against.—The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another.[43] But the provisions of Interstate Commerce Act, prohibiting unjust discriminations and undue and unreasonable preferences, have reference to the service rendered, and not to the sender or consignee.[44]

Identity of Situation and Circumstances.—To come within the inhibition of the act, the positions of the respective persons or classes between whom discriminations are made, must be compared with each other, and there must be found to exist substantial identity of situation and circumstances, accompanied by irregularity and partiality resulting in undue advantage to one or undue disadvantage to the other.[45]

Shipper under Special Contract to Build Up Milk Business.—A railroad company may enter into a contract with a person for a term of years to conduct the business of the transportation of milk on the lines of the railroad, such person to have full charge of the business and to receive as compensation a percentage of the freights earned, provided such person should charge rates not in excess of those charged by competitive lines. In the execution of the contract the rates were made by the railroad and such person was not given a monopoly of the milk traffic. The contract was not violative of the Interstate Commerce Act as giving an undue and unreasonable preference. The privileges granted to such person were only those which were incident to the anomalous relations existing between him and the railroad created by the contract. It is quite inconceivable that there were or could have been any shippers of milk who would have been willing or able to undertake such duties and responsibilities. In consideration of his assumption of peculiar obligations and hazards, the railroad gave such person privileges appertaining to his relation as a manager of the traffic, which was not an undue and unreasonable preference.[46]

Shipper Engaged in Foreign Commerce.—Where the plaintiff sought to establish his banana business in Central America, and expended considerable money in his plant, it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States and Central American ports in furtherance of its business, and was therefore entitled to compel defendant to furnish transportation facilities on the same terms that defendant furnished to others.[47]

§ 4020. Determining Discrimination or Preference.—The interstate commerce act does not attempt to define what particular acts shall constitute

43. Persons discriminated against.—Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315, citing Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

44. United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

45. Identity of situation and circumstances.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315.

46. Shipper under special contract to build up milk business.—Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business, and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by the competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. Held, that such contract was not violative of § 3 of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], as giving an undue and unreasonable preference to plaintiff. Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315.

47. Shipper engaged in foreign commerce.—American Banana Co. *v.* United Fruit Co., 160 Fed. 184.

unlawful discrimination, but commits that to the Interstate Commerce Commission.[48]

Facts Considered.—That the surrounding circumstances and conditions are to be considered in determining whether there has been an undue and unreasonable preference in favor of another particular shipper is undoubtedly true; but in determining that question it necessarily follows that the circumstances and conditions surrounding the shipper should be considered, and not those that may happen to surround the carrier. Where the court is called upon to deal with the question of rates as between rival lines, it would have to consider the peculiar conditions and circumstances surrounding the carrier.[49]

Competition.—In applying the provision of the third section of the act which makes it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, competition which affects rates is one of the matters to be considered,[50] for the Interstate Commerce Act was not designed to prevent competition between different roads.[51] In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable.[52]

But the mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking the matter into consideration.[53]

48. Determining discrimination or preference.—Puritan Coal Min. Co. *v.* Pennsylvania R. Co., 237 Pa. 420, 85 Atl. 426.

49. Facts considered.—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

50. Competition.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687. See, also, Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844, and Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

51. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

It is not the purpose of the third section of the act to prevent competition in rates between different points on different lines of road. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

Competition between carriers is not a circumstance to be considered in applying the provisions of the second section, which seeks to prevent discrimination between shippers over the same line of road, and thus leaves no room for the operation of competition. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree 74 Fed. 715, 21 C. C. A. 51.

For a carrier to protect itself against the physical disadvantage it is under in relation to its rivals is not an unlawful discrimination, if it be not used as a colorable device to evade the statute. Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 74 Fed. 803, 21 C. C. A. 103.

52. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

53. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

Ocean competition as constituting a dissimilar condition and as justifying a difference in rates between import and domestic traffic is a proper circumstance to be considered by the commission, which is not shut up by the terms of the act of congress, to consider only such "circumstances and conditions" as pertained to the articles after they had reached and been delivered at a port of the United States or Canada.[54]

Competition between Other Cities.—Where there exists great competition between two cities in trunk line territory and which are entered by a number of rail and water carrying lines, the fact that the charge to a third city is greater than that charge to the former cities, does not give such cities an undue or unreasonable preference or advantage, or subject the latter city to an undue or unreasonably prejudice or disadvantage, in violation of the Interstate Commerce Act.[55]

§ 4021. In Charges.—See elsewhere.[56]

§ 4022. In Facilities.—Terminal and Wharfage Facilities.—An order of the Interstate Commerce Commission forbidding a carrier to give an undue preference in the use of its wharves at a seaport to an exporter of cotton seed products is not a regulation of purely intrastate or purely foreign commerce, which would be beyond the power of the commission, where the cotton seed products purchased by him, whether at points within or without the state, are all destined for export, and the concentration and manufacture of cotton seed cake into meal on the wharves are but incidents in the transshipment of the products in export trade.[57] Where all shippers are in fact treated alike, the mere fact that a carrier leases a terminal from a shipper does not constitute a discrimination in such shipper's favor.[58]

Lease of Wharfage Facilities to Shipper.—A lease to a shipper of one of the piers and improvements thereon, belonging to a terminal company, which relieves him from the payment of all wharfage and storage charges other than as the same may be included in the yearly rental, and has enabled him to acquire practically a monopoly of the export of certain products from that port, constitutes an unlawful or undue preference under the act to regulate commerce, where other shippers are not and can not be afforded the same facilities on the same conditions.[59] A corporation created to carry on, conformably to a municipal

54. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666. See, also, Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

55. Competition between other cities.—Conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory," as to create a very active competition on shipments from the West, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis, and East St. Louis by a material reduction from local tariff rates by the connecting line west of the Ohio river, while substantially the local rates are charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory, but in the southern territory, and has fewer lines of transportation, and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue, or unreasonable prejudice or disadvantage, in violation of § 3 of the act to regulate commerce (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]). Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 124 Fed. 624.

56. In charges.—See post, "Discrimination and Preference," §§ 4075-4096.

57. In facilities.—Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.

58. United States *v.* Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75.

59. Lease of wharfage facilities to shipper.—Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.

ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences.[60]

Establishing Station.—A railroad company may, in the exercise of its right to private property, establish a station for the special accommodation of a particular customer, and refuse to establish a like station elsewhere for the accommodation of others.[61]

Switch Service.—Under the Interstate Commerce Act a common carrier of interstate freight can not lawfully deny switch connections or service to one person, place, locality, or kind of traffic which it affords to others similarly situated; and one who has built a switch connection with the track of a railroad, with the consent of the company, has an implied right to service at such switch, and, unless such service is limited, either expressly or by implication, he may lawfully insist that the carrier shall there receive and deliver all such freight as it customarily carries, and for the receipt and delivery of which the switch is suitable and convenient.[62] A contract between two railroad companies providing for the construction of a spur track to a customer and the switching of cars over the same for a specified charge does not violate the interstate commerce law, unless it contemplates some discrimination against other customers seeking or enjoying like privileges.[63]

Grant of Right to Build Warehouse.—A railroad company may grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another, in the exercise of its right to private property.[64]

§§ 4023-4035. In Distribution of Cars—§ 4023. In General.—A contract with a carrier to supply to an interstate shipper a specified number of cars on certain dates is not a violation of the Interstate Commerce Act, unless the contract, if performed, will extend to that shipper an undue performance over other shippers.[65] The refusal of an interstate carrier to furnish cars for the shipment of complainant's crossties, while furnishing cars to others for interstate shipment of other freight, constitutes an unjust discrimination in violation of the Interstate Commerce Act for which plaintiff is entitled to recover full damages with an attorney's fee and costs.[66]

§§ 4024-4033. Between Mining Companies—§ 4024. In General.—A system of coal-car distribution which a railroad company has applied in a given field, if that system, under the circumstances and conditions peculiar to that field, be a reasonable one, and fair to all, and is applied to all alike, affords no just cause of complaint on the part of any shipper.[67]

Power to Regulate.—The governmental power of regulation extends, in time of car shortage, to compelling a just and equal distribution of cars among shippers, and to the prevention of an unjust and discriminatory one.[68] It may

60. Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279.

61. **Establishing station.**—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

62. **Switch service.**—Interstate Stockyards Co. *v.* Indianapolis, etc., R. Co., 99 Fed. 472.

63. Cedar Rapids, etc., Light Co. *v.* Chicago, etc., R. Co., 145 Iowa 528, 124 N. W. 323.

64. **Grant of right to build warehouse.**—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

65. **In distribution of cars.**—Ferrell & Co. *v.* Great Northern R. Co., 119 Minn. 302, 138 N. W. 284.

66. American, etc., Timber Co. *v.* Kansas, etc., R. Co., 175 Fed. 28.

67. **Between mining companies.**—United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

68. **Power to regulate.**—Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one.[69]

At Common Law.—If it should appear in any such case that any particular shipper was given preference in excess in his pro rata share of its cars, then such preference would necessarily be an undue preference at common law.[70]

Under Statute.—The Interstate Commerce Act prohibits discrimination[71] and requires carriers to furnish transportation on reasonable request therefor, make it the duty of an interstate carrier to furnish equal facilities for transportation, as well as equal rates, to all shippers who are similarly situated.[72] Authority to regulate the distribution of a railway company's fuel cars in times of car shortage to the bituminous coal mines along its line was delegated to the Interstate Commerce Commission by the act to regulate commerce (Act Feb. 4, 1887), as a means of prohibiting the unjust preferences or undue discriminations forbidden by the act.[73] It is obvious, from even a casual reading of the statute, that at the time of its enactment certain shippers were unable to operate their mines so as to develop them, owing to the lack of car service, due to the unequal distribution of cars among those who were engaged in operating coal mines, and it was to correct this inequality that legislation of this character was deemed to be advisable and expedient.[74]

Under Agreement.—An arrangement between an interstate railroad company and coal shippers in a certain field, fixing a basis which should be considered equitable for the distribution of cars between such shippers, does not operate to relieve the railroad company from the obligations imposed on it by § 3 of the Interstate Commerce Act of February 4, 1887, to treat shippers without discrimination.[75]

On Request for Full Service.—When called upon by a shipper for full car service the only defense which the carrier can interpose, in case of failure to comply with the demand, is that the supply which it has furnished is sufficient for normal demands, or that in case of shortage it has fairly and impartially prorated all of its car equipment.[76]

Prorating Cars.—While the capacity of a shipper of coal may be greater than his allotment of cars, yet, where such is also the case with every other operation similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand, without un-

69. Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

70. **At common law.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

71. **Under statute.**—Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155).

72. Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892).

"The Interstate Commerce Act, in pursuance of which this suit was instituted, was passed on the 4th day of February, 1887, and was intended, among other things, to secure an equal and fair distribution of car facilities to all shippers similarly situated." Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

Where a short railroad is used and operated as a means of conducting interstate traffic in coal by companies owning connecting interstate roads, it must be accessible to all interstate shippers on equal and reasonable terms; the public can not be deprived of this right by the separate or joint action of the carriers, and they can not be permitted to use it for purposes of discrimination between mine owners on its line. Heck *v.* East Tennessee, V. & G. R. Co., 1 Interst. Com. R. 495.

73. Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

74. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

75. **Under agreement.**—United States *v.* Norfolk, etc., R. Co., 74 C. C. A. 466, 143 Fed. 266.

76. **On request for full service.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

just discrimination, among all the operations, including the shipper in question.[77] Under the provisions of § 3 of the Interstate Commerce Law it is the legal duty of a railroad company, in furnishing cars to coal mines along its line, where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination of favoritism.[78]

Profitable to Carrier or Mining Company.—The Interstate Commerce Commission has power to compel an equitable distribution as between the carrier and the shipper, and to preventing the carrier from unduly favoring itself to the prejudice of shippers in allotting cars for hauling freight for its own use.[79] An interstate carrier, in the distribution of cars, can not give a shipper a preference in order that it may profit thereby, or that the shipper may profit thereby.[80]

§ 4025. Ownership of Cars.—"There is nothing in the Interstate Commerce Act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which is left entirely with the carrier; but, while such is the case, it is equally true that the carrier can not, by any such arrangement, by indirection, accomplish that which is prohibited by the statute."[81] Cars should be furnished irrespective of ownership or of any contract, express or implied, for the use thereof.[82] In the distribution of cars by an interstate railroad company between the operators of coal mines on its line, its own fuel cars, the fuel cars of other roads sent upon its line to be loaded, its regular equipment of cars, and the private or individual cars of any mine operator should be placed absolutely on the same basis as together forming the available car equipment of the road as a whole;[83] and where its own fuel cars or those of other roads are consigned to a particular mine, or the operator's own private cars are delivered to it, they should be charged against such mine, and it should be allotted only so many of the system cars as are necessary to make up its pro rata share of the whole.[84] The carrier can not evade such duty in the distribution of cars by claiming that it is not the owner of a portion of the cars carried over its lines.[85] The act provides that cars shall be furnished irrespective of ownership or any contract, express or implied, for the use thereof. This makes it the duty of the company to furnish cars, regardless of ownership or of any contract, express or implied. Therefore the question as to the ownership of the cars or the purposes for which they are used can have no bearing in this controversy. In other words, in a proceeding instituted pursuant to § 23 of the act, it would not be a good defense for the railroad company to insist that it was using a portion of its cars for the purpose of transporting fuel, and was therefore unable to give the relator its pro rata share of cars upon the basis agreed upon.[86]

Cars Owned by Mining Company.—In the distribution of cars by an interstate railroad company between coal mining companies on its line, when the supply is insufficient to meet all demands, a mining company which owns cars indi-

77. **Prorating cars.**—United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

78. United States *v.* West Virginia Northern R. Co., 125 Fed. 252, affirmed 134 Fed. 198, 67 C. C. A. 220.

79. **Profitable to carrier or mining company.**—Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163.

80. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

81. **Ownership of cars.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

82. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113; Logan Coal Co. *v.* Pennsylvania R. Co., 154 Fed. 497.

83. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

84. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

85. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

86. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

vidually is entitled to have such cars assigned to its use.[87] If a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement can not in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of § 1 and 3 of the Interstate Commerce Act was enacted.[88] A railroad company's duty to allot cars without unjust discrimination among coal shippers can not be altered by the furnishing of special cars to the railroad company by one shipper, to be used exclusively in the transportation of coal for that shipper, whether the cars are sold by the shipper to the railroad company on the installment plan, or the shipper retains title to the cars.[89] The mining company is not entitled in addition to a pro rata share of the cars owned by the railroad company, and such a distribution, if made, resulting in giving to such company larger facilities for transporting its product than are given to other companies similarly situated, but which own no private cars, constitutes the giving of an undue preference or advantage to such company, in violation of the interstate commerce law.[90]

Cars Owned by Consignee.—Under a rule providing that, in the distribution of the cars of a railroad company available for the transportation of coal, cars for the railroad's fuel supply, foreign railroad cars, specially consigned for the fuel supply of the consigning railroads, and individual cars owned by shippers and assigned to specified mines for loading, should be charged against the capacity of the mines at which they were placed, and that the difference between the rated capacity of the mine and the capacity of such assigned cars should be the rate on which all the other cars of the railroad company would be prorated, which rule operated slightly to the advantage of the owners of individual cars, was not objectionable as a discrimination against them.[91]

Cars Sold by Mining Company to Carrier.—If the cars are purchased from the shipper by the railroad company on the installment plan, the company thereby becoming interested therein at once, and finally the absolute owner thereof, then, in the event of an exclusive application of the same to the business of that shipper,

87. **Cars owned by mining company.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

88. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

89. United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

90. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

Where some of the operators of coal mines along a line of interstate railroad own coal cars individually which are moved by the railroad company, they are entitled to the exclusive use of such cars, but in times when the total supply of coal cars, including such individual cars and those owned by the railroad company, is insufficient to meet the demand, in the distribution by the railroad company of cars between the different mine operators on a percentage basis, calculated on the production of the several mines, each operator is entitled to its percentage of all of the available cars, whether owned by the company or individually, in so far as it will not interfere with such right of the individual owners to the exclusive use of their own cars, and the action of the railroad company in deducting such individual cars before making the distribution and allowing their owners in addition thereto their full quota of its own cars subjects other operators who own no cars to an undue and unreasonable prejudice and disadvantage, in violation of § 3 of the interstate commerce act of February 4, 1887 (24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]). Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

91. **Cars owned by consignee.**—It was so held under Pa. Const. 1874, art. 17, §§ 1, 3, 7, Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), prohibiting discrimination by carriers either in rates or transportation facilities, and P. L. 1846, p. 323, § 21, requiring railroads to transport cars owned by individual shippers on reasonable rules and regulations. Logan Coal Co. *v.* Pennsylvania R. Co., 154 Fed. 497.

there never would be a time, from first to last, during which the railroad company, by such a course, would not be devoting rolling stock which it owns, or in which it is interested as a common carrier, to the demands of one shipper to the exclusion of others similarly situated, which it may not do; or, even if it should never become interested in, or the owner of, the cars, still it may not rent its tracks or permit them to be appropriated by any one to the detriment of other shippers whom it should serve to the uttermost; and in the stress of unusual business such special cars in its service would have to be applied to the accommodation of all shippers alike.[92]

Cars to Be Charged Regardless of Ownership.—The fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. There is no theory upon which the carrier can relieve itself from a charge of discrimination, when it is shown that such cars are arbitrarily allotted to certain mines, and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken to secure a fair distribution of car service among shippers on its line.[93] Where the mining company's own private cars are delivered to it, they should be charged against such mining company, and the company should be allotted only so many of the cars of the railroad system as are necessary to make up its pro rata share of the whole.[94]

§ 4026. Fuel Cars.—Commerce, in the constitutional sense, includes the instrumentalities by which commerce is carried on, and extends to the coal cars owned by a railway company engaged in interstate commerce, in which it receives from the tipple of the coal mines along its line coal purchased by it and used solely for its own fuel purposes.[95] The rule in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigsed by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other.[96] The same considerations apply to coal purchased by any buyer for its own use to be delivered into its own cars at the mine, and which does not become a subject of interstate commerce.[97]

92. **Cars sold by mining company to carrier.**—United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

93. **Cars to be charged regardless of ownership.**—This question has been passed upon by the Interstate Commerce Commission in the case of Railroad Commissioner *v.* Hocking Valley R. Co., 12 Interst. Com. Rep. 398. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

94. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

95. **Fuel cars.**—Decree, Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 173 Fed. 930, reversed in Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163.

96. Logan Coal Co. *v.* Pennsylvania R. Co., 154 Fed. 497, quoted in Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

The practice of a railroad company in distributing coal cars for use between mine operators on its line in times of shortage of cars not to charge against a mine as a part of its quota cars of other railroad companies who had bought coal for fuel from such mine and sent the same, when the coal so sold is not taken into consideration in computing such mine's percentage, does not subject other mine operators to an undue or unreasonable prejudice or disadvantage in violation of § 3 of the interstate commerce act of February 4, 1887 (24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]). Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

97. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

Charged to Mining Company.—An order of the interstate commerce commission commanding a railway company to desist from its practice not to take into account the company's fuel cars in the daily distribution of coal cars in times of car shortage to the bituminous coal mines on its line, and requiring it for a future period of two years to count such cars against the share of the mine receiving them, is within the authority delegated by Act June 29, 1906, upon complaint duly made, to declare a rate of practice affecting rates illegal, and to determine and prescribe for a term not exceeding two years what will be a just and reasonable rate, and what regulation or practice in respect to transportation is just, fair, and reasonable thereafter to be followed.[98]

Freedom of Contract Not Destroyed.—Requiring a railway company in making its daily distribution of coal cars in times of car shortage to the bituminous coal mines on its line to desist from it practice not to count the company's fuel cars against the share of the mine receiving them can not be said to destroy the freedom of contract, on the theory that any discriminations or preferences resulting from such practice arose from the fact that the railway company chose to purchase coal for its fuel supply from a particular mine or mines.[99]

§ 4027. Cars Used in Intrastate Commerce Only.—A railroad company engaged in interstate commerce in making distribution of cars between coal mining companies engaged in such commerce where there is a shortage has no legal right under Interstate Commerce Act to leave out of consideration private or foreign cars usd by such a company, although only in intrastate commerce, and make the allotment with reference to its own cars alone by which such company is given a preference or advantage over its competitors in interstate commerce.[1]

§§ 4028-4033. Determining Mining Company's Share of Cars—§ 4028.—In General.—The distribution should be based on a disinterested and intelligent examination by experts of the different mines, and upon a consideration of all the factors which go to make up their capacity, both actual and potential, the most important being the number of workings and their capacity for production, the equipment in use for handling and loading the product being secondary, because it may be readily and quickly increased if necessary to meet the requirements.[2] Judge Goff, in a very able and exhaustive opinion on this subject, in discussing the proper rule to be observed in working out the most desirable basis for securing a fair distribution of railroad cars to the mine owners, says: "I am of the opinion that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty is should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employees, the mine openings, and the miners' houses. No one of these various and essential elements can safely be said to be absolutely controlling, though likely

98. **Charged to mining company.**—Decree, Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 173 Fed. 930, reversed in Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163.

99. **Freedom of contract not destroyed.**—Decree, Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 173 Fed. 930, reversed in Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163.

1. **Cars used in intrastate commerce only.**—Majestic Coal, etc., Co. *v.* Illinois Cent. R. Co., 162 Fed. 810.

2. **Determining mining company's share of cars.**—United States *v.* West Virginia Northern R. Co., 125 Fed. 252, affirmed in 134 Fed. 198, 67 C. C. A. 220.

the most important of them all are the real working places, the available points at which coal can be profitably mined. At each true working place a certain quantity of coal, to be determined by the thickness of the seam and conditions peculiar to the different coal fields, can be excavated and removed during stated periods of time; and so it follows that, if other essentials are adequate, the daily output of a mine can be computed by the number of its available working places." [3]

§§ 4029-4033. Facts Considered—§ 4029. Agreement of Parties.—In determining as to whether there has been an undue and unreasonable preference in any particular instance, the sole question to be considered is as to whether all the cars hauled over the carrier's lines have been prorated so as to give each and every shipper on its lines his proportionate share of facilities to which he is entitled on the basis agreed upon as the means by which there should be a fair and equal distribution of such car service.[4]

§ 4030. Rule of Carrier.—Where a railroad has adopted a system of distribution of cars in violation of the Interstate Commerce Act, leaving out of consideration private cars, the court may leave them out of consideration in an action by a shipper for departure from the system of distribution resulting in discrimination.[5]

§ 4031. Capacity and Output of Mine.—In the distribution of cars by a railroad company between operators of coal mines on its line in times of shortage, the percentage of cars to which each mine is entitled should be determined solely by the physical capacity of the mine to furnish coal for shipment; and a rule of distribution by which such capacity is taken as one, while the amount of shipments for the preceding two years is taken as two, the sum of the rated capacity and such shipments being divided by three to determine the basis of distribution, is unfair and inequitable to new mines, and results in giving an undue preference or advantage to old mines, in violation of the interstate commerce law.[6]

Present Output.—Where, in a mandamus proceeding against a carrier to prevent discrimination in the distribution of cars among certain coal companies, it was admitted that the carrier owned no coal cars, but obtained them from another railroad, and allotted cars to the several mining districts according to a specified rating, the court had power to fix the percentage of cars which the carrier should distribute to relator in proportion to the present output of relator's mine, there being nothing to indicate any threatened or probable change in such output.[7]

Allotment to New Mines.—The method adopted by a railroad company for fixing the percentage of cars to which the several coal mines on its line in a certain district were entitled in distributing cars between them in times of shortage, by taking the actual shipments made from each mine during the season when there was a full supply of cars and also the possible output of such mine and making an average, counting the former as two units and the latter as one, is not discriminative as against the newer mines.[8] In such a distribution the allotment of an arbitrary number of cars for development to new mines which have had no opportunity to establish a percentage within reasonable limits is lawful.[9]

3. United States *v.* West Virginia Northern R. Co., 125 Fed. 252, quoted in Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

4. **Facts considered.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

5. **Rule of carrier.**—Puritan Coal Min. Co. *v.* Pennsylvania R. Co., 237 Pa. 420, 85 Atl. 426.

6. **Capacity and output of mine.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

7. **Present output.** — West Virginia Northern R. Co. *v.* United States, 134 Fed. 198, 67 C. C. A. 220.

8. **Allotment to new mines.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

9. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

§ 4032. Unfulfilled Contract of Mining Company.—The contention that a mining company has large contracts, and therefore it must have a preference in cars by which it might keep its contracts, is untenable.[10]

§ 4033. Prompt Return of Cars by Mining Company.—A rule of a railroad company under which any coal mine operator on its line using its terminal tracks at the seacoast and there unloading its cars within five days on an average during any month is given as a premium a fifty per cent larger allotment of cars during the next month is an attempted evasion of the provisions of the Interstate Commerce Act requiring a fair and impartial distribution of cars between shippers, and gives an undue preference or advantage to shippers so favored, in violation of such act.[11] "Relator insists that the court below erred in its ruling in relation to what is known as the 'Curtis Bay premium.' The defendant says that to encourage a prompt discharge and return of coal cars, and also the use of its own tracks at Curtis Bay, the terminal of the railroad, at Baltimore, it put in force a rule by which all shippers or consignors who during the month average not more than five days' detention of the cars assigned to them were granted a premium of fifty per cent additional to their car supply for the next month. It is also insisted that this opportunity is open to all shippers who consign coal to Baltimore for water transportation. It is insisted by the relator that, if the road desires to bring about a quick unloading and return of cars, it should do so by a penalty in the nature of demurrage for delay and that to attempt to secure promptness by offering a premium is in violation of the spirit of the act. The method adopted by the railroad company in this respect seems to us to be still another means by which the carrier is enabled to evade the requirements of the act. By this system it is possible for certain favored companies to secure a large number of cars in excess of the amount to which they would be entitled under a fair and equal distribution of the same, while, on the other hand, the carrier could adopt a plan by which those who are not prompt in making deliveries at that point could be made to pay penalties by demurrage without affecting the car supply one way or the other, and thus, without inconvenience to the carrier, place all shippers on equality. That this system by which premiums are given to those who are prompt in making delivery at Curtis Bay can be used so as to give certain shippers an undue and unreasonable preference over those who are less fortunate is apparent, and we think constitutes a violation of the provisions of the act."[12]

§ 4034. Between Mining Companies on Main and Branch Lines.—Under Interstate Commerce Act, which requires railroad companies to furnish cars to shippers on collateral branch lines "without discrimination in favor of or against any such shipper," shippers on the main line of a road and those on a collateral branch line are entitled to precisely the same treatment in the distribution of cars.[13]

§ 4035. Between Warehousemen.—A railroad having permitted the erection of grain warehouses along its right of way in which grain was stored for

10. **Unfulfilled contract of mining company.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

11. **Prompt return of cars by mining company.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

But it had been held in the circuit court that the statute is not violated by the allowance by the railroad company of an extra percentage of cars to an operator which during the preceding month has unloaded and returned its cars within a certain average time; such practice having been adopted instead of the imposition of a demurrage charge to encourage prompt return of cars, and enlarge the available supply for use, and being open to all alike. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 154 Fed. 108.

12. Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

13. **Between mining companies on main and branch lines.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

producers and owners for hire as well as grain purchased and owned by the warehousemen promulgated a rule requiring all orders for cars for the shipment of grain from such warehouses to be made by the warehousemen. The rule operated to the prejudice of private storers of grain through the use of cars ordered by the warehousemen for the shipment of their own grain before cars could be obtained for the shipment of grain in the warehouse owned by stores, and by the appropriation of cars intended for storers by the warehousemen. The railroad company, under its duty to see that no discrimination was practiced, was bound either to change the rule, or to see that it was not permitted to operate in favor of one shipper and against another.[14]

Warehouseman as Agent of Carrier.—Where a railroad having permitted the erection of grain elevators along its right of way for the storage of grain by producers and other owners, pending shipments, promulgated a rule requiring all orders for cars to be used in the shipment of grain for such warehouses to come through the warehousemen, a warehouseman in ordering cars for a storer of grain pursuant to such rule is the agent of the railroad company for that purpose, and not the agent of the storer, so that the railroad company is liable for the warehouseman's negligent or unfaithful performance of such duty.[15]

§ 4036. In Acceptance and Delivery of Freight.—Place of Loading Live Stock.—A railroad company may designate as its loading place for live stock the stockyards of a private corporation, and may refuse to deliver or receive live stock to or from other stockyards, whether they be public or private.[16]

Delivery to Carrier's Own Stockyards.—Where two stockyards are situated at substantially the same point as depots for live stock having the same general destination, but one is located on and maintained by the defendant railroad company while the other is located on the line of another railroad, that there is nothing in the Interstate Commerce Act, which requires the defendant company to accept live stock billed from foreign states to the yards on the other railroad rather than to its own yards located on its line, even though there is a connection between the two roads.[17] Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the act of congress. Suppose that the other station and the defendant's station were side by side, and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard.[18]

Facilities for Unloading.—If the live stock are to be unloaded, the defend-

14. **Between warehousemen.** — Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

15. **Warehouseman as agent of carrier.** —Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

16. **In acceptance and delivery of freight.**—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975, citing Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

17. **Delivery to carrier's own stockyards.**—Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

"All that was decided in Wisconsin, etc., Railroad *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115, was that by statute two railroad companies might be required to make track connections. So much of the statute as undertook to regulate rates was not passed upon. See Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900. There is no act of congress that attempts to give courts the power to require contracts to be made in a case like this." Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

18. These views are sanctioned by what was said in Covington Stockyards Co. *v.* Keith, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461. The fact that the plaintiff's stockyards are public does not change the case. Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

ant has the right to unload them where its appliances for unloading are, and can not be required to establish other appliances near by.[19]

Where Cattle to Remain in Cars.—If the live stock are to remain in the defendant's cars it can not be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant or to require it to make one.[20]

§ 4037. In Taking on and Letting Off Passengers.—Refusal by a railroad company to stop its train to let off a passenger who purchased a ticket at a point on its own road, outside the state, at a station at which it stopped its trains to let off passengers who purchased tickets over other roads at points outside the state, is a violation of Interstate Commerce Act.[21]

§ 4038. In Manner of Shipment.—The provision of the Interstate Commerce Act, making it unlawful for any common carrier to give any undue or unreasonable preference to any person, company, or locality, or particular description of traffic, and providing that such carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business, does not require a railroad company to receive freight in the cars in which it is tendered by a connecting line, and transport it in such cars, paying car mileage therefor, when it has cars of its own available, and the freight would not be injured by transfer.[22]

§ 4039. In Time of Transportation.—An undue and unreasonable preference is accorded a shipper by an agreement to expedite a shipment of horses so as to reach a connecting carrier in time to be carried by a special fast train; the shipper being charged the regular rates, which make no provision for such special service.[23] But the action of a railroad passenger agent in guarantying that a theater troupe, to whom he sells a party-rate ticket, shall arrive at their destination at a given time, is not the giving of an undue or unreasonable preference or advantage, within the meaning of the interstate commerce law (24 Stat. 380, § 3).[24]

Switching Service.—Where an interstate carrier established a rate for special switching service, which was for particular services rendered individual shippers or consignees, an agreement that perishable shipments should be expedited by quicker switching service was not a discrimination.[25]

19. **Facilities for unloading.**—Covington Stockyards Co. *v.* Keith, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461; Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

20. **Where cattle to remain in cars.**—Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

21. **In taking on and letting off passengers.**—Gulf, etc., R. Co. *v.* Moore (Tex. Civ. App.), 80 S. W. 426, judgment reversed 83 S. W. 362, 98 Tex. 302, 4 Am. & Eng. Ann. Cas. 770.

22. **In manner of shipment.**—Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465.

23. **In time of transportation.**—Act Feb. 4, 1887, §§ 3, 6, and Act Feb. 19, 1903; Chicago, etc., R. Co. *v.* Kirby, 32 S. Ct. 648, 225 U. S. 155, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, reversing judgment, 90 N. E. 252, 242 Ill. 418.

For a common carrier engaged in interstate commerce to agree with a particular shipper to expedite the shipment at regular rates, even where no rate has been established for special expedition, is a discrimination, violative of Act Cong. Feb. 19, 1903. Johnson *v.* New York, etc., Railroad (Me.), 88 Atl. 988.

24. Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434.

25. **Switching service.**—Johnson *v.* New York, etc., Railroad (Me.), 88 Atl. 988.

§ 4040. In Reshipping Privileges.—The granting by the railroad companies operating lines of railroad from Mississippi and Ohio River points to Nashville, and beyond, of the privilege of unloading grain, grain products, and hay shipped from or through such river points at Nashville and reshipping the same for more distant points to the southeast, within six months at through rates, which rule has been in force for forty years, held, on the undisputed facts, to have been due to, and justified by, competition by water transportation on the Cumberland River from the Ohio and not to constitute an undue and unreasonable preference and advantage or an undue and unreasonable prejudice and disadvantage as between Nashville and points in Georgia, in violation of Interstate Commerce Act.[26]

§ 4041. In Allowances to Shipper.—The provision of the Interstate Commerce Act that, if the owner of property transported shall render services connected with the transportation or furnish any instrumentality used therein, a just and reasonable allowance may be made therefor, and giving the interstate commerce commission power to determine and fix such allowance,[27] applies only to allowances provided for by the schedules published by the carrier and applicable to all shippers similarly circumstanced, and such provision is not available as a defense to a carrier when sued for discrimination by making a secret allowance to a favored shipper.[28]

§§ 4042-4044. Remedies—§ 4042. Burden of Proof.—When it is shown that the carrier has not supplied the facilities demanded, the burden is upon the defendant, in order to exonerate itself from such charge of undue preference, to show that it is prorating its cars fairly and equally among all the operators who are similarly situated and engaged in transporting freight over its lines.[29]

§ 4043. Mandamus.—Parties.—Where, on an application for mandamus against a carrier to prevent discrimination in the furnishing of cars to relator and two certain other coal companies, the petition alleged and the return admitted that the president of the railroad company was himself one of, and also largely interested in another of, the coal companies other than relator, and was, in effect, in control of the railroad company, and that what was done by such company was done through the president, he was a proper party to the proceedings.[30] Though the mandate was addressed to the railroad company and to its president, and each of them according to their several and respective powers, the judgment for costs went against the carrier alone, such judgment was not joint, but should be taken distributively, as affecting the president only according to his powers.[31]

Amendment of Writ.—Where an alternative mandamus against a carrier commanded it to furnish relator, for the transportation of its coal, without discrimination, at least a certain per centum of the total car supply to be distributed by the carrier at the time the writ was served, or to show cause to the contrary, the court's power to issue the writ being statutory, was not within the strict rule of the common law with respect to amendments, so that, on the court's announcing its conclusion that relator was only entitled to a less per centum of the car

26. In reshipping privileges.—Louisville, etc., R. Co. *v.* United States, 197 Fed. 58.

27. In allowances to shipper.—(Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 590 (U. S. Comp. St. Supp. 1909, p. 1158); Langdon *v.* Pennsylvania R. Co., 194 Fed. 486. See post, "Allowance for Service of Shipper," §§ 4120-4124.

28. Langdon *v.* Pennsylvania R. Co., 194 Fed. 486.

29. Remedies.—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

30. Mandamus.—West Virginia Northern R. Co. *v.* United States, 134 Fed. 198, 67 C. C. A. 220.

31. West Virginia Northern R. Co. *v.* United States, 134 Fed. 198, 67 C. C. A. 220.

supply, the court was authorized to permit relator to amend the alternative writ to conform to the facts as found.[32]

§ 4044. Summary Remedy.—In the absence of legislation providing the means by which summary relief could be afforded the shipper, it would be an easy matter for the common carrier, by favoritism, to build up one class of shippers and at the same time utterly destroy the business of another class similarly situated, and it was to prevent this kind of discrimination that the original act[33] and the acts amendatory and supplemental thereto were passed.[34]

§ 4045. Combinations and Monopolies.—The seventh section of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provision of the act to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the act.[35] A contract for the carriage of stock provided that the stock should be unloaded at an intermediate point, and the shipper had a contract with live stock dealers at this intermediate point to sell the stock there and substitute other stock in the same cars for transportation to the point of destination; the original shipper receiving compensation for the use of his cars. As the railroad company was not a party to this agreement, it did not, even if in violation of the Interstate Commerce Act, render the railroad's contract for the carriage of the stock invalid.[36]

Establishing Through Routes.—It is no violation of said section for a railroad company to enter into contracts with other companies for the establishment of through routes, and through rates, for the continuous carriage of interstate traffic.[37]

Charging Unlawful Rates.—In an action for injuries to complainant's property and business by an alleged combination and conspiracy between interstate railroads controlling the shipment of anthracite coal, an allegation that plaintiffs' loss resulted from their being obliged to pay "unlawful rates" for the transportation of coal due to such combination and conspiracy was not effective to allege that the rates charged had been declared unlawful by the Interstate Commerce Commission.[38]

Ownership of Lumber Mill by Railroad.—Common ownership or control of a lumber mill and a railroad which is an interstate carrier can not be prohibited

32. Amendment of writ.—West Virginia Northern R. Co. *v.* United States, 134 Fed. 198, 67 C. C. A. 220.

33. Summary remedy.—Act of Feb. 4, 1887, § 3.

34. Act Mar. 2, 1889, § 10, 25 Stat. 862, c. 382, which is now § 23 of Interst. Com. Act; Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

35. Combinations and monopolies.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 S. Ct. 132.

36. "The said contract was not only contrary to his authority and in violation of his duty to this defendant, but was also in violation of law and, particularly in violation of §§ 7 and 10 of the Interstate Commerce Act [Act Feb. 4, 1887, c. 104, §§ 7, 9, 24 Stat. 382; U. S. Comp. St. 1901, p. 3159, 3160], and also paragraphs B, C and D under said § 10, and therefore void, and can not form the basis of plaintiff's suit herein." Southern Kansas R. Co. *v.* Cox, 43 Tex. Civ. App. 79, 95 S. W. 1124.

37. Establishing through routes.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

38. Charging unlawful rates.—Meeker *v.* Lehigh Valley R. Co., 162 Fed. 354.

by the interstate commerce commission nor made the basis of a denial to the railroad of rights accorded to another road not so owned.[39]

§ 4046. Pooling Agreements.—See elsewhere.[40]

§§ 4047-4048. Transportation of Goods Manufactured by Carrier—§ 4047. In General.—The power of congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even though, by existing state laws, the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.[41] Congress could properly enact, as a regulation of commerce, so much of the Act of June 29, 1906, as forbids a carrier from transporting articles or commodities in interstate commerce when they have been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.[42]

Due Process of Law.—Railway companies enjoying the right, under existing state legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranteed by the constitution of the United States, by so much of the provisions of the Act of June 29, 1906, as forbids a carrier from transporting articles or commodities in interstate commerce when they have been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not in good faith, before transporting them, dissociated itself therefrom, or when the carrier owns the article or commodity, to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.[43]

Effect of Partial Invalidity of Act.—The possible invalidity of the clause of the act imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested, can not affect the validity of these provisions, since the penalty clause is wholly separable therefrom.[44]

Purpose and Object of Act.—The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association result from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the act, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, di-

39. Ownership of lumber mill by railroad.—Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

40. Pooling agreements.—See post, "Pooling Freights," § 4111.

41. Transportation of goods manufactured by carrier.—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527; United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 S. Ct. 387.

42. Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527, reversing United States *v.* Delaware, etc., Co., 164 Fed. 215.

43. Due process of law.—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527, reversing United States *v.* Delaware, etc., Co., 164 Fed. 215.

44. Effect of partial invalidity of act.—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

rect or indirect."[45]

What Is Railroad Company.—A company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.[46]

The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered.[47]

Production, Ownership and Interest.—Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the act making it unlawful for a railway carrier to transport in interstate commerce articles or commodities manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect.[48] Following the rule that where a statute is susceptible of two constructions, the court will adopt that construction which will sustain the constitutionality of the act, rather than that which renders it unconstitutional, it is held that the statute must be construed as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (1) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation dissociated itself from such article or commodity; (2) when the carrier owns the article or commodity to be transported, in whole or in part; (3) when the carrier, at the time of transportation, has an interest, direct or indirect, in legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.[49]

Interest as Stockholder.—The ownership by a railway carrier of stock in a bona fide corporation manufacturing mining, producing, or owning the commodity carried is not the interest, direct or indirect, in such commodity, forbidden to the carrier by the act, but such words are to be taken as embracing only

45. **Purpose and object of act.**—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527, reversing United States *v.* Delaware, etc., Co., 164 Fed. 215.

"The commodities clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper." Delaware, etc., R. Co. *v.* United States, 231 U. S. 363, 34 S. Ct. 65.

46. **What is railroad company.**—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

47. Delaware, etc., R. Co. *v.* United States, 231 U. S. 363, 34 S. Ct. 65.

48. **Production, ownership and interest.**—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

49. Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

a legal or equitable interest in the commodities to which they refer.[50] While it had been expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation,[51] it has been held in a subsequent case that nothing in that decision foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes.[52] In view, therefore, of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by the operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits—a duty which plainly would be violated by the unnecessary comminglings of the affairs of the producing company with its own, so as to cause them to be one and inseparable.[53]

Where Railroad Has Controlling Interest in Corporation.—The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of the act, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect.[54]

Mining and Shipping Coal to Separate Company.—The transportation in interstate commerce by a railroad company of coal produced from its mines, but sold at the breakers to a distinct bona fide coal company organized for the purpose, and in which the railroad company owned no stock, is not within the prohibition of the commodities clause of the Hepburn Act.[55] It is insufficient to

50. Interest as stockholder.—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

51. Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

52. Stock ownership in sham corporation.—United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 S. Ct. 387.

53. United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 S. Ct. 387.

54. Where railroad has controlling interest in corporation.—United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 S. Ct. 387.

55. Mining and shipping coal to separate company.—A contract between a railroad company owning coal mines and a coal company, by which the latter agreed to buy the coal produced by the former f. o. b. at the mines, and to pay for certain grades a per cent of the general average prices at tidewater points, held not to leave in the railroad company after such sales any interest in the coal which rendered its transportation by such company unlawful under the commodities clause of the Hepburn Act. United States *v.* Delaware, etc., R. Co., 213 Fed. 240.

render such transportation unlawful that a comparatively small number of persons own a controlling interest in both the railroad company and the coal company, and that some of the officers and directors of the two are the same, where the business of each is separately conducted, and no discrimination is shown to have been made by the railroad company in favor of the coal company as a shipper.[56]

Both Inbound and Outbound Shipments.—The statute relates to all commodities, except lumber, owned by the company and includes inbound as well as outbound shipments.[57]

§ 4048. Manufactured from Wood.—The exception in favor of timber and manufactured products thereof, contained in the provisions of the act, forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.[58]

§ 4049. Limiting Liability. —A limitation of liability in a receipt for an express package is invalid, as to an interstate shipment.[59]

Injury to Goods by Connecting Carrier.—A carrier may not by contract limit the liabilities imposed on it by the Interstate Commerce Act, making the initial carrier of an interstate shipment liable for any loss or injury thereto caused by any connecting carrier, because of the rate charged for the transportation.[60]

§§ 4050-4057. Connecting Carriers—§ 4050. Discriminations.—It is the duty of a connecting carrier to take the cars as they are delivered to it by the initial carrier and in so doing it is not liable for a discrimination practiced by the initial carrier merely because such connecting carrier has participated in the adoption of a joint through rate, reasonable in itself, notwithstanding the provision contained in the Act of February 4, 1887, that a carrier which shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful shall be liable to the full amount of the damages sustained by one injured thereby.[61]

Distinguished from Discriminations against Shippers.—There is a great

56. United States *v.* Delaware, etc., R. Co., 213 Fed. 240.

57. Both inbound and outbound shipments.—Delaware, etc., R. Co. *v.* United States, 231 U. S. 363, 34 S. Ct. 65.

58. Manufactured from wood.—Attorney General *v.* Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 835, 29 S. Ct. 527.

59. Limiting liability.—Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; Mobile, etc., R. Co. *v.* Dismukes, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113; Central, etc., R. Co. *v.* Sims, 169 Ala. 295, 53 So. 826; Southern Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865; Silverman *v.* Weir (App. Term), 114 N. Y. S. 6.

60. Injury to goods by connecting carrier.—Central, etc., R. Co. *v.* Sims, 169 Ala. 295, 53 So. 826.

61. Connecting carriers.—A connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels, which may be practiced by the initial carrier, merely because such connecting carrier has participated in the adoption of a joint through rate for barrel shipments, which is, in itself, reasonable, although, by Act February 4, 1887, c. 104, § 8, 24 Stat. 379 a carrier which "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful," shall be liable to the full amount of the damages sustained by one injured thereby. Judgment, Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268.

Where complainant, an interstate carrier, maintained terminal facilities at N., having physical connection with the tracks of other railroads, including the B. & O. Co., over whose lines the B., R. & P. Co. transported freight into N., the latter was entitled to have its cars transported to terminal destination by complainant on the same terms and under the same conditions as prescribed for the traffic of other lines, under Interstate Commerce Act, § 3. Pennsylvania Co. *v.* United States, 214 Fed. 445.

difference between competing carriers claiming the right to use the facilities of one another, and the patrons of the same carrier contending for equality of treatment.[62]

Recognizing Through Tickets.—The Iron Mountain Railroad from St. Louis to Texarkana with its connections has a branch line to Memphis. The Little Rock and Memphis Railroad runs from Little Rock, where it has a physical connection with the Iron Mountain Railroad, to Memphis. At Memphis each road has equal facilities for connections with, and transfers to, roads running into the states east of the Mississippi River. The East Tennessee, Virginia and Georgia Railroad with its leased line of the Memphis and Charleston Railroad, runs from Memphis to the seaboard. Formerly, and before the building of the branch line of the Iron Mountain Railroad to Little Rock, the Little Rock and Memphis Railroad had traffic arrangements with the Iron Mountain Railroad and the East Tennessee, Virginia and Georgia Railroads for the through ticketing of passengers both ways. Since the building of its branch line the Iron Mountain Railroad refused to recognize through tickets over the Little Rock and Memphis Railroad to or from points in the Iron Mountain system beyond Little Rock, and the East Tennessee, Virginia and Georgia Railroad declined to keep such tickets on sale, or to offer its passengers a choice of routes, because the Iron Mountain Railroad did not make such tickets; but it did issue on equal terms through tickets over either route to Little Rock itself. As between the Iron Mountain and Little Rock & Memphis roads, this was not a discrimination between connecting lines, prohibited by the Interstate Commerce Act, but only a legitimate offer of the superior facilities of a through line over a local line in competition for the through travel, and that the ownership of a rival line authorized such preference of one's own road; that, as between the Little Rock & Memphis and the East Tennessee, Virginia & Georgia roads, there was not any unjust, undue, or unlawful discrimination, because the facilities offered by the Iron Mountain, of a longer and through track to points not reached by the other road, were superior to those offered by the local and shorter road, and, until the Iron Mountain would make through rates with it that would afford equal facilities in this respect, there could be no through tickets sold usefully by the East Tennessee, Virginia & Georgia road, and hence there was no unlawful discrimination in the transaction.[63]

§§ 4051-4052. Facilities—§ 4051. In General.—The Interstate Commerce Act provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines, and for the receiving, forwarding and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.[64] In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the Interstate Commerce Act.[65] A railway maintaining a live stock depot as a point of delivery for cattle having a municipality as their general destination can not be compelled to receive live stock billed to a similar depot at substantially the same

62. **Distinguished from discriminations against shippers.**—Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279, distinguishing Weems Steamboat Co. *v.* People's Steamboat Co., 214 U. S. 345, 53 L. Ed. 1024, 29 S. Ct. 661, 16 Am. & Eng. Ann. Cas. 1222.

63. **Recognizing through tickets.**—Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. 771.

64. **Facilities.**—Act Feb. 4, 1888, St. at Large 1885-87, p. 379.

65. Central Stockyards Co. *v.* Louisville, etc., R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed in 24 S. Ct. 339, 192 U. S. 568, 48 L. Ed. 565.

point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there, by virtue of the provision of the Act of Feb. 4, 1887, making it unlawful for common carriers subject to the act to give unreasonable preferences and requiring them to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property to and from their several lines and those connecting therewith.[66] The provision in the charter of the Northern Pacific Railroad Company requiring the company to permit other companies to form "running connections" with it, includes only such arrangements as to the arrival and departure of freight and passenger trains, and as to stations, platforms, and other facilities, as will enable companies desiring to make connections to do so without serious inconvenience, and does not impose any obligation upon the company to carry freight in the cars in which it is tendered by a connecting line when its own cars are not in use, and the freight would not be injured by transfer to another car.[67]

Wharfage Facilities.—Where a railroad company, owning a wharf extending into public navigable waters, maintained thereon a station and passenger depot, and used the wharf for its own line of steamers, in connection with its railroad traffic. A steamboat company, not a rival of the railroad company in its railroad business, was entitled to the use of the wharf, for a reasonable compensation, to the extent of receiving and discharging passengers and freight.[68] That a wharf is too small to accommodate steamers, other than those of a railroad company which owns it, is not a ground for denying to a steamboat company, not a competitor except in its steamboat business, the right to use the wharf, for a reasonable wharfage, for the purpose of receiving and discharging freight and passengers, since a railroad, as a public carrier, must provide necessary facilities for the transaction of its business with safety and reasonable convenience to its passengers.[69] But a transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the third section of the interstate commerce act, to permit the boats of a competitor to land at such wharf.[70]

Prepayment of Freight.—A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.[71] The act is not violated by receiving and forwarding, without prepayment of freight or car mileage, cars of other companies containing goods coming from one locality, and refusing to do so, unless prepayment is made, when the goods are from

66. Decree 55 C. C. A. 63, 118 Fed. 113, 63 L. R. A. 213, affirmed in Central Stockyards Co. *v.* Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339.

67. Oregon, etc., R. Co. *v.*. Northern Pac. R. Co., 51 Fed. 465, affirmed in 61 Fed. 158, 9 C. C. A. 409. See Act of Cong. July 2, 1864.

68. Wharfage facilities.—Oregon, etc., R. Co. *v.* Ilwaco R., etc., Co., 51 Fed. 611.

69. Oregon, etc., R. Co. *v.* Ilwaco R., etc., Co., 51 Fed. 611.

70. Ilwaco R., etc., Co. *v.* Oregon, etc., R. Co., 57 Fed. 673, 6 C. C. A. 495.

71. Prepayment of freight.—Gulf, etc., R. Co. *v.* Miami Steamship Co., 30 C. C. A. 142, 86 Fed. 407.

The fact that a connecting road carries freight offered by some forwarding roads without prepayment of its charges does not oblige it to do likewise with freight offered by other forwarding roads. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 59 Fed. 400.

An interstate carrier does not subject another carrier to an "undue or unreasonable disadvantage" (Interstate Commerce Act, § 3, cl. 2) by exacting the prepayment of freight on all property received from it at a given station, though it does not require charges to be paid in advance on freight received from other individuals and competing carriers at such station. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192, affirming 59 Fed. 400.

a different locality.[72] The charter of the Northern Pacific Railroad Company requiring that company to permit other companies to form running connections with it on fair and equitable terms, includes only arrangements as to the time of arrival and departure of trains, and to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without inconvenience, and does not apply to discrimination in the prepayment of freight and car mileage on goods tendered by connecting lines.[73]

Place of Interchange.—Where the charter of a railroad company provided "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated," the connection thus authorized is a physical and not a business connection, and it does not require an interchange of traffic at the point of junction.[74] The fact that a railroad company interchanges traffic with certain railroads, at its regular, established yard or depot (where it has provided all reasonable, proper, and equal facilities for that purpose), and refuses to interchange traffic with a new road at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "undue or unreasonable preference or advantage," in favor of the railroads with which such interchange is made.[75]

Establishing New Connections.—The act does not require of a common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights.[76] Under the terms of a contract made by a bridge company and three railroad companies, the railroad companies secured all reasonable and equal facilities for the interchange of cars and traffic between them, which interchange was conducted for many years at the regular, established yard or depot of one of them, and the expenses of such interchange were shared by them in certain fixed proportions. After the passage of the act to regulate commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge, for its own private benefit and advantage, and then sought to compel the company (at whose yard the interchange of traffic had been conducted) to allow such interchange at a new point of connection, and to afford at such point facilities equal to those which the applicant had voluntarily abandoned. The application was properly refused.[77]

Who May Complain.—The Interstate Commerce Act of Feb. 4, 1887, provides that carriers, in certain contingencies, shall construct, switch connections on the application of any lateral branch line of railroad or of any shipper tendering interstate traffic, and that, if the carrier fails to install such connection on application therefor in writing by any shipper, then the shipper may complain to the commission. Such act only contemplated a complaint by a shipper, and that a complaint by a lateral branch line railroad did not confer jurisdiction.[78]

One Line Extension of Other.—The offending line, being a separate, independent company from the favored line, owning no stock therein, neither having built, bought, nor leased it, conducted its business, nor received its earnings, could not escape the inhibition of the statute by a mere contract for the interchange of traffic. The effect of such contract could not be to make the one line a mere extension of the other.[79]

72. Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158, affirming 51 Fed. 465.

73. Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158, affirming 51 Fed. 465. See Act of Cong. July 2, 1864.

74. Place of interchange.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

75. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

76. Establishing new connections.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

77. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

78. Who may complain.—Delaware, etc., R. Co. *v.* Interstate Commerce Comm., 166 Fed. 498.

79. One line extension of other.—New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

Terminal Company.—Though the offending line and the favored line, being members of a terminal company, a combination of carriers by which the terminus of the favored line was connected with New York, were a legal unit within § 1 of the act providing that it shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, when both are used under a common control for a continuous carriage or shipment from one state, it was not thereby relieved from its obligation under the act to all roads connecting directly with itself, of which petitioner was one.[80]

Remedies.—Where one connecting road is about to refuse another equal facilities for the exchange of traffic, in violation of the Interstate Commerce Act, because of a boycott declared by a labor organization, a court of equity may compel such interchange by mandatory injunction.[81]

§ 4052. Use of Tracks.—The Interstate Commerce Act provides that common carriers shall afford equal facilities for the interchange of traffic between

80. **Terminal company.**—New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

81. **Remedies.**—Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 53 Am. & Eng. R. Cas. 293, 19 L. R. A. 395.

The normal condition—the status quo—between connecting common carriers under the interstate commerce law is a continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interruption, exactly as riparian owners have a right to the continuous flow of a stream without obstruction. Since Lord Thurlow's time, the preliminary mandatory injunction has been used to keep clear the stream. Robinson *v.* Lord Byron, 1 Brown Ch. C. 588; Lane *v.* Newdigat, 10 Vesey 192. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The interstate commerce law recognizes the necessity for such a remedy; for in summary equity proceedings at the instance of the interstate commerce commission, provided in § 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violations of the orders of the commission, is given to circuit courts. Moreover, by a subsequent section, upon the application of an interested person, the district and circuit courts may issue mandamus to compel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated cumulative in the statute, it does not prevent the remedy by injunction; nor would it, in any event, because the inadequacy of the legal remedy which justifies equitable intervention by injunction is only the inadequacy of a recovery in damages by action at law. Attorney General *v.* The Mid-Kent Railway Co., L. R., 3 Ch. 100.

In Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481, it was held that the duty imposed upon railroad companies by the Interstate Commerce Act, of receiving from connecting roads freight and passengers, is one which the federal courts will enforce by mandatory injunction where the injury resulting from its nonperformance is continuing; and it was further held, following the case of the Wabash Railroad, that a strike of locomotive engineers and firemen upon the petitioner's road, causing a boycott against it by the engineers and firemen of all other lines, defendant's included, and endangering a strike on defendant's line if it receives cars from plaintiff, is no excuse for refusal to receive them. The court said: "In the next place, what disposition shall be made of the complainant's application for a mandatory injunction against the defendant company and its managing officers, compelling them to perform their duty as required by the law of both congress and the state of Iowa? These defendants have appeared by counsel and admitted the truth of the allegations of the bill, and they do not deny that they are required by law to receive and move the complainant's cars. They admit that they have refused to perform this duty, and they give as a reason for their refusal that, if they receive and haul the complainant's cars their firemen and locomotive engineers will abandon their service and leave the company without the means of operating their lines. There can, of course, be no doubt about the law of both the general and state governments requiring the defendant corporation to receive and move the complainant's cars, whether empty or loaded. The law of Iowa provides that it shall be the duty of any railway corporation to receive and transport the empty or loaded cars furnished by any connecting road to be delivered at any station or stations on the line of its road to be loaded or discharged, or reloaded and returned to the road so connecting. 1 McClain's Ann. St., 367, § 10."

their lines, but this shall not be construed as requiring any such carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.[82] Where the defendant had contracted with a city to allow other roads to use its terminal facilities, and the state had provided by statute that different companies might have a joint use of such facilities. The contract, and the rights of the other roads, were not affected by the above provision but must be determined by the state statutes.[83] And an interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading, and for the use of its tracks and terminals, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same.[84]

§ 4053. Joint Through Routes.—Prior to the passage of the Act of June 29, 1906, connecting railroads were free to adopt or refuse to adopt joint through tariff rates, and this freedom was not abridged, as between the Union Pacific Railroad Company and the Central Pacific Railroad Company, by either § 12 of the Act of July 1, 1862, requiring the roads of such companies to be operated as one continuous line, so far as the public or the government are concerned, or § 15 of the Act of July 2, 1864, which requires them to afford and secure to each equal advantages and facilities as to rates, time, and transportation without discrimination.[85] The personal preferences of many travelers for a southern route

82. Use of tracks.—The provision of the Interstate Commerce Act, that the requirement that all railroads shall provide reasonable facilities for the interchange of traffic shall not require one carrier to give the use of its track or terminal facilities to another engaged in like commerce, is not a substantive enactment, but a mere interpretation clause designed to restrain, if necessary, the generality of the language preceding it. Pittsburgh, etc., R. Co. *v.* Hunt (Ind.), 86 N. E. 328.

83. Iowa *v.* Chicago, etc., R. Co., 33 Fed. 391.

84. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192, affirming 59 Fed. 400.

85. Joint through routes.—United States *v.* Union Pac. R. Co., 188 Fed. 102.

Prior to act of 1906.—A court of equity has no power, either at common law or under the interstate commerce act, to compel a railroad company engaged in interstate commerce to enter into a contract with another company for a joint through rate and joint through-routeing of freight and passengers. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 559.

An interstate carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through water, without being obligated to enter into a similar contract with another connecting carrier. Gulf, etc., R. Co. *v.* Miami Steamship Co., 86 Fed. 567, 2 L. R. A. 289.

No authority is conferred upon common carriers of interstate commerce to issue through tickets to passengers, or through bills of lading for property at through rates, over connecting lines, in the absence of such arrangements between the companies. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 568, 2 L. R. A. 289.

In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination; and in doing so no discrimination is made against the other company on the traffic it carries; nor does the company charging local rates on such freights make or give any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through-routeing, and at through joint rates, which may be lower than its rates to the same points. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

Rev. St. § 5258 (embracing Act June 15, 1866), authorizing the carriage of traffic from one state to another, and, to that end, the formation of continuous lines by mutual agreement, confers no power to compel a railroad company to make through routes and through rates with one connecting line because it has, by agreement, made them with another. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

A railroad company, engaged in interstate commerce, can make an exclusive contract with a connecting carrier for through billing and rating, and such contract can not be alleged, by another connecting carrier, as an unjust discrimination. St. Louis Drayage Co. *v.* Louisville, etc., R. Co., 65 Fed. 39.

between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route via the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the interstate commerce commission in the exercise of its power to establish through routes where no reasonable or satisfactory through route exists, in ordering the establishment of through routes between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.[86]

Where Route Has Been Established.—The commission has no power to make an order for a new through route if a reasonable and satisfactory through route already exists, and the existence of such a route may be inquired into by the courts.[87] While there was no through rate and no through route there was, in fact, a through shipment from St. Louis to Leadville. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation. For when goods shipped from a point in one state to a point in another are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. This common arrangement does not depend upon the establishment of a through route or the issue and recognition of a through bill of lading, but may be otherwise manifested.[88]

Routing Goods.—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the interstate commerce law.[89] Nor is a connecting road which permits through billing and routing with one forwarding road oblige to do likewise with another forwarding road, though the latter possesses all the necessary tracks and terminal facilities; and it may still insist on carrying all freight offered by such road in its own cars, and to that end require reloading and rebilling at local rates.[90] The Interstate Commerce Act as amended June 18, 1910, providing that, in all cases where at the time of delivery of a shipment two or more through routes shall have been established, the person making the shipment shall have the right to designate the route of transportation, does not apply to an interstate shipment made in 1907.[91]

Right of Tap Line to Participate in.—Tap line railroads connecting timber lands and lumber mills with trunk line railroads, though owned by the owners of the timber and mills, are entitled to participate with the trunk lines in joint through rates where organized as common carriers under the state laws.[92]

86. Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417.

87. **Where route exists.**—Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417.

88. Baer Bros. Mercantile Co. *v.* Denver, etc., R. Co., 233 U. S. 479, 34 S. Ct. 641.

89. **Routing goods.**—Prescott, etc., R. Co. *v.* Atchison, etc., R. Co., 73 Fed. 438, explaining New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

90. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 59 Fed. 400.

91. Cleveland, etc., R. Co. *v.* Hayes (Ind.), 103 N. E. 839.

92. **Right of tap line to participate in.**—United States *v.* Louisiana, etc., R. Co., 34 S. Ct. 741, 234 U. S. 1, Ann. Cas. 1913D, 880.

A tap line railroad is entitled to the same allowance from the trunk lines out of joint through rates for logs and lumber offered to the tap line by its proprietary company as it receives out of the joint rate for non-proprietary log and lumber traffic under exceptions in Hepburn Act June 29, 1906, forbidding carriers to transport in interstate commerce articles in which they are associated or interested. United States *v.* Butler County R. Co., 234 U. S. 29, 34 S. Ct. 748.

§ 4054. Rates.—Railroad tracks connecting iron works with the track of an interstate railroad on the grounds of the iron company and engines used thereon are mere plant facilities, although transferred to a separate company organized as a railroad, and the latter is not a common carrier entitled to share in the interstate rates so far as related to the business of the iron company.[93]

The proportion in which freight earned by two connecting railroads under a joint tariff schedule is divided between them is a matter for their consideration alone, and cannot be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust or discriminative rate, under the interstate commerce law.[94] A reasonable division out of joint rates can not be denied a common carrier for transportation services by the interstate commerce commission because of any past or present derelictions or even the fear of further violations of law.[95]

§§ 4055-4057. Liability of Initial Carrier—§ 4055. In General.—The Act of June 29, 1906, provides that any common carrier receiving property for interstate shipment shall be liable for any loss or injury thereto caused by it or any common carrier to which such property may be delivered, or over whose line such property may pass, and that no contract shall exempt such common carrier from such liability.[96] This provision is not unconstitutional; but is in all respects a valid enactment.[97] But the holder of a bill of lading was not bound to sue the initial carrier, but might sue directly an intermediate carrier for loss of or damage to goods on its line.[98]

What Constitutes Through Shipment.—The delivery of an interstate shipment of freight to an intrastate railroad under a through bill of lading and a guarantee of through rate is a through shipment, and is governed by the Act of June 29, 1906, making initial carriars liable for loss or injury caused by connecting carriers.[99] And so is a bill of lading dated in one state, showing a destination in another, and containing stipulations governing the entire transportation, specifying not only rights, duties, or limitations relating to the parties, but also to subsequent carriers.[1] A bill of lading for a through shipment is a through

93. Rate.—Crane Iron Works *v.* United States, 209 Fed. 238.

94. Allen *v.* Oregon R., etc., Co., 98 Fed. 16. See post, "Charges of Connecting Carriers," § 4149.

95. Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

96. Liability of initial carrier.—Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170; Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73; Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900; Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; International, etc., R. Co. *v.* Wilbourne (Tex. Civ. App.), 115 S. W. 111.

Under Rate Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1164), § 7, an initial carrier is liable for damage caused by the wrongful diversion of an interstate shipment by a connecting carrier in another state. Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73.

97. The Act of June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), is not violative of the fourteenth amendment of the constitution, and § 19, art. 1, Const. Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170; Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107.

Due process of law.—Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 909), is not unconstitutional as depriving a common carrier of life or liberty or property without due process of law. Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; Galveston, etc., R. Co. *v.* Wallace (Tex. Civ. App.), 117 S. W. 169.

State sovereignty.—Act June 29, 1906, c. 3591, § 7, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 909), does not interfere in any manner with the rights of a state and is not unconstitutional as infringing state sovereignty. Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170.

98. St. Louis, etc., R. Co. *v.* Ray (Tex. Civ. App.), 127 S. W. 281.

99. What constitutes through shipment.—Houston, etc., R. Co. *v.* Lewis, 103 Tex. 452, 129 S. W. 594.

1. Southern Pac. Co. *v.* Meadors & Co. (Tex. Civ. App.), 129 S. W. 170.

bill, although it names intermediate lines over which the shipment is to pass.[2]

Liability for Delay.—The initial carrier, in an interstate shipment, issuing a through bill of lading and collecting the entire freight charge, is, liable for any damages from delay in shipment over the line of any connecting carrier.[3]

Presumption of Liability.—The common-law presumption that the damage to goods in transportation occurred on the line of the final carrier can have no place in construing the liability over of the carrier on whose line the damages actually occurred to the initial carrier, because the right of the initial carrier to recover against a connecting carrier, under the Act of June 29, 1906, giving a common carrier issuing a receipt or bill of lading to a shipper a right of recovery against the connecting carrier on whose line occurred the actual damage, for which the first carrier became liable to the shipper, since such right is made to rest alone on proof that the damage occurred on such connecting line.[4]

Remedies of Shipper.—The act provides that nothing in the section shall deprive the holder of a bill of lading of any remedy under existing laws.[5]

Jurisdiction and Venue.—An action against an initial carrier to enforce liability under the Act of June 29, 1906,[6] making a common carrier receiving property for interstate shipment liable for loss of or injury to such property caused by any connecting carrier, may be brought before the county court of the county in which the shipment originated, and need not be brought before a federal court, although the Act of Feb. 4, 1887,[7] provides that if any common carrier subject to the provisions of the Interstate Commerce Act shall do any act thereby prohibited or declared unlawful, such carrier shall be liable to the person injured for the full amount of damages, together with a reasonable attorney's fee to be fixed by the court and taxed as costs in the case, as the action is not founded on any violation of the Interstate Commerce Act or any of its amendments, and is not brought for the purpose of collecting any penalty incurred for the violation of such act.[8] The state courts have jurisdiction of a suit against an initial carrier operating a line within the state for goods lost in transit under a contract for through shipment to another state.[9]

Prerequisites to Recovery of Damages.—In an action against an initial carrier for the value of goods consigned to defendant which were never delivered,

2. The initial carrier issued at New Orleans a bill of lading reciting that it had received two cars of fruit to be transported by them and by steamers, railroad companies, or forwarding lines with which it connected to Waco, Tex., with as reasonable dispatch as its general business permitted; the consignment being to Waco via a named line at Houston. Another provision limited the initial carrier's liability to injuries happening on its own line. Rate Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1164]), § 7, amending the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 U. S. Comp. St. 1901, p. 3169), makes any common carrier receiving property for transportation from a point in one state to a point in another state liable for injury caused by it or any carrier over whose lines the property passes, and forbids the exemption of the initial carrier from liability by any contract. Another paragraph provides for recovery over by it against the carrier on whose lines the injury occurred. Held, that the bill of lading was for a through shipment from New Orleans to Waco, though it named intermediate lines over which the shipment was to pass, so that the initial carrier could not limit its liability to negligence on its own line. Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73.

3. **Liability for delay.**—Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900.

4. **Presumption of liability.**—Carlton Produce Co. *v.* Velasco, etc., R. Co. (Tex. Civ. App.), 131 S. W. 1187.

5. **Remedies of shipper.**—St. Louis, etc., R. Co. *v.* Ray (Tex. Civ. App.), 127 S. W. 281.

6. **Jurisdiction and venue.**—Act June 29, 1906, c. 3591, § 7, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 909).

7. Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).

8. Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107, followed in Galveston, etc., R. Co. *v.* Wallace (Tex. Civ. App.), 117 S. W. 169.

9. Houston, etc., R. Co. *v.* Lewis, 103 Tex. 452, 129 S. W. 594.

the plaintiff is under no obligation to prove that the freight had not been paid not what the freight rate was.[10]

Time for Making Claim.—A stipulation in a bill of lading issued by the initial carrier of an interstate shipment that claims for loss must be made to the agent at point of delivery promptly after the arrival of the goods, and if delayed for more than thirty days after due time for delivery no carrier shall be liable, is a reasonable requirement for the protection of the initial carrier, liable for loss or injury caused by it or any connecting carrier, and must be complied with or the carrier is relieved from liability, unless the stipulation is waived.[11]

§ 4056. Limiting Liability.—Under the provision of the act making the initial carrier of an interstate shipment liable for loss on connecting lines, the initial carrier of such a shipment can not limit its liability to damages occurring on its own line.[12] Such liability is not affected by a bill of lading which stipulates that such carrier in receiving the shipment, limited its liability to damages done on its own line.[13]

§ 4057. Recovery over against Other Carrier.—The Act of June 29, 1906, provides for the recovery over by the initial carrier against the carrier on whose lines the damage or injury to the goods occurred.[14] A common carrier who has been held liable in damages at the suit of a shipper to whom it has issued a receipt may recover from a common carrier on whose connecting line the actual loss or damage occurred the amount that it may have been required to pay the shipper under the provisions of the same section. The right so granted to the carrier giving such receipt or bill of lading can not be impaired by any agreement between the shipper or holder of the receipt or bill of lading and any of the connecting carriers.[15] A shipper brought action against the defendant who had issued the receipt and two other carriers, and, upon the payment of the money to the shipper by the other carriers, the suit was discontinued as to them, and they were given an indemnity by the shipper against all liability. If the damage was caused by the indemnified companies, they could, under their indemnity, recover over against the shipper, so that the effect would be to raise an estoppel against the shipper's recovery from them or from the initial carrier, but that no such estoppel would arise unless the damage was caused by the act of one of the indemnified companies.[16] Where, in an action against connecting carriers for damages to a shipment of horses, the evidence was sufficient to sustain a judgment against the delivering carrier for all the damages, it can not be heard to complain on appeal that the judgment was against it for only one-half of the

10. Prerequisites to recovery of damages.—Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107.

11. Time for making claim.—Old Dominion Steamship Co. *v.* Flanary & Co., 111 Va. 816, 69 S. E. 1107.

12. Limiting liability.—Southern Pac. Co. *v.* Meadors & Co. (Tex. Civ. App.), 129 S. W. 170; Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73; Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900; Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; International, etc., R. Co. *v.* Wilbourne (Tex. Civ. App.), 115 S. W. 111.

13. International, etc., R. Co. *v.* Wilbourne (Tex. Civ. App.), 115 S. W. 111.

The Carmack amendment to the Interstate Commerce Act (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1167]), making the initial carrier of an interstate shipment liable for loss or injury to the shipment caused by it or any connecting carrier, renders void a stipulation in a contract for an interstate shipment limiting the liability of the initial carrier to loss occurring on its own line. Old Dominion Steamship Co. *v.* Flanary & Co., 69 S. E. 1107, 111 Va. 816.

14. Recovery over against other carrier.—Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73. See Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900; Galveston, etc., R. Co. *v.* Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; International, etc., R. Co. *v.* Wilbourne (Tex. Civ. App.), 115 S. W. 111.

15. Carlton Produce Co. *v.* Velasco, etc., R. Co. (Tex. Civ. App.), 131 S. W. 1187.

16. Carlton Produce Co. *v.* Velasco, etc., R. Co. (Tex. Civ. App.), 131 S. W. 1187.

damages, and the receiving carrier can not complain of a division of the damages as the interstate commerce act makes any common carrier receiving property for transportation from a point in one state to a point in another state liable for any damage to such property caused by it or any other common carrier to which the property is delivered.[17] Where the damage from delay in transportation is loss of a market, and not deterioration in the goods shipped, it is error to charge that, if a verdict is found against any of the connecting carriers, the damages should be apportioned among them according to the degree of negligence of which either was guilty.[18]

§§ 4058-4149. Rates and Charges—§ 4058. In General.—The Interstate Commerce Act provides that all charges made for services rendered or to be rendered in the transportation of passengers or property, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful,[19] whether it be because too high or too low.[20]

Power of Congress.—Congress, in the exercise of its power over commerce, could enact the provisions of which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.[21] There is no vested right in the shipper or in the carrier to have an agreement for free or reduced transportation or for rebates consummated by the payment of the rebate arranged for, or the performance of the stipulated service at the free or reduced rate. In other words, the power of congress to regulate commerce is not hampered by any

17. St. Louis, etc., R. Co. *v.* Fenley (Tex. Civ. App.), 118 S. W. 845.

18. Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900.

19. **Rates and charges.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Covington, etc., Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 S. Ct. 198; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Cutting *v.* Florida R., etc., Co., 30 Fed. 663.

20. **Either too high or too low.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

21. **Power of congress.**—The constitutional liberty of the citizen to make contracts was not infringed by the enactment by congress, in the exercise of its power over commerce, of the provisions of Act June 29, 1906, c. 3591, § 6, 34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1163), which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages. Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671, reversing decree, 118 S. W. 982, 133 Ky. 652.

The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the constitution never intended any such state of things to exist. Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671.

Contracts for rebates.—And this is true, with respect to contracts for rebates, even though the property was transported before the act went into effect. The fact that the contract has been carried out to that extent confers no vested right upon the shipper to have it completed by the payment of the rebate agreed upon. New York, etc., R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

obligation to preserve existing agreements intact or to deprive the parties thereto of the right to carry the same into execution only upon the payment of compensation for the rights thus injured or destroyed, but all such contracts must be considered as having been entered into subject to the power of congress at some future time to render the same illegal and impossible of performance through the enactment of statutes in the exercise of its power to regulate commerce. Were it otherwise, the extent to which the power of congress could be restricted would be measured only by the skill and foresight which designing parties could bring to bear in framing their agreements.[22]

Compliance with Statute.—The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced.[23]

Estoppel to Collect Rate.—A railroad can not estop itself from right to collect the rate for carriage which, by the Interstate Commerce Act, it is required to charge.[24] As the published rates prevail over those agreed upon by the parties, the carrier is not estopped to collect the full amount prescribed by the rates published under the statute where such amount is in excess of that which the carrier by contract with the shipper has agreed to accept for a given shipment.[25]

Common Law Does Not Apply.—In an action for damages for charging unreasonable rates for transportation from one state to another, shipments made before the adoption of the interstate commerce act are governed by the common law, and those made after the adoption of that act by the common law as modified by the act.[26] The common-law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, though the contract of carriage is made in a state where that rule prevails, since such commerce is governed solely by the laws of the United States, and the United States have never adopted the common law.[27]

Anti-Trust Act Does Not Apply.—The Sherman anti-trust law [28] does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers, such relief being provided for by the Interstate Commerce Act.[29]

§ 4059. Just and Reasonable.—The act requires that all charges made for transportation shall be reasonable.[30] When relief by way of damages is sought under the provisions of the interstate commerce act, upon the averment that a shipper has been charged an unreasonable rate for goods transported by a railway company, the plaintiff, in order to be entitled to recover, must show that the rate charged is unreasonable according to the provisions of that act.[31]

22. New York, etc., R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671, reversing 133 Ky. 652, 118 S. W. 982.

23. **Compliance with statute.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

24. **Estoppel to collect rate.**—Louisiana R., etc., Co. *v.* Holly, 127 La. 615, 53 So. 882.

25. Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

26. **Common law does not apply.**—Murray *v.* Chicago, etc., R. Co., 62 Fed. 24.

27. Swift *v.* Philadelphia, etc., R. Co., 58 Fed. 858.

28. **Anti-Trust Act does not apply.**—(Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

29. Meeker *v.* Lehigh Valley R. Co., 162 Fed. 354.

30. **Just and reasonable.**—Atchison, etc., R. Co. *v.* United States, 203 Fed. 56.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], requires that all charges made for the transportation of property shall be reasonable. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

31. Van Patten *v.* Chicago, etc., R. Co., 81 Fed. 545.

Re-Enactment of Common Law.—The interstate commerce act which prohibits carriers from the imposition of unjust or unreasonable rates, is an express adoption by the national legislature of the principle of the common law on this topic.[32]

Opposite Directions between Same Points.—It has often been recognized by the commission that the mere fact that a rate is higher one way between the same points than it is the other does not prove that the higher rate is unreasonable.[33] And this is particularly true where there is a preponderance of empty cars moving in the one direction, of where there is here some suggestion. There is also some evidence that the rates westward from Mobile to New Orleans are lower than they should be, all of which goes to show that there is practically nothing to be made out of this contention.[34]

Competition.—Rates to a noncompetitive point can not be held unjust and unreasonable in themselves, and therefore unlawful, under the first section of the act, where they are made up of the rates charged to the nearest competitive point through which the shipments pass, which are low rates, forced by severe competition, combined with the local rates fixed by the state railroad commission between such point and the point of destination, thus giving the noncompetitive point the full benefit of whatever reduction in rates competition has effected on the line of the shipment, and where the total rates so charged are relatively just, as compared with those to other points in the state, on other lines of road, and similarly situated.[35]

Charge for Reconsignment.—An additional charge by a carrier of two cents per hundredweight for the privilege of reconsigning hay at East St. Louis, originating in northwestern territory and shipped into southeastern territory, is excessive, within § 1 of the Act of Feb. 4, 1887, prohibiting excessive rates, and thereby produced an unjust discrimination, in violation of §§ 2 and 3 of the act.[36]

Charge for Icing.—An icing charge made by a carrier in transporting interstate commerce is not prima facie unreasonable solely because it exceeds the actual cost of the ice alone; the carrier being entitled to charge a reasonable profit on the service.[37]

Terminal Charges.—A separate and fixed terminal charge of two dollars per car on live stock consigned to or from Chicago, made by the railroads entering that city, in addition to the charge for transportation over their own lines, to cover the cost of transferring such cars from their lines to the Union Stock Yards, which constitute the live stock market of the city, over the tracks owned by the stock yards company, and which is shown to be approximately the average cost of such service, when adopted and published as a part of their rates in accordance with the requirements of the interstate commerce law, does not render

32. **Re-enactment of common law.**—Tift *v.* Southern R. Co., 123 Fed. 789.

33. **Opposite directions between same points.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541; Duncan *v.* Atch., Topeka & Santa Fe, 6 Interst. Com. Comm. R. 85, 103; McLoon *v.* Boston & Maine R. R., 9 Interst. Com. Comm. R. 642; Weil *v.* Pennsylvania R. R., 11 Interst. Com. Comm. R. 627.

34. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

35. **Competition.**—Interstate Commerce Comm. *v.* Western, etc., R. Co., 35 C. C. A. 217, 93 Fed. 83; Interstate Commerce Comm. *v.* Nashville, etc., R. Co., 57 C. C. A. 224, 120 Fed. 934.

36. **Charge for reconsignment.**—Judgment, St. Louis, etc., Grain Co. *v.* Southern R. Co., 149 Fed. 609, affirmed in 82 C. C. A. 614, 153 Fed. 728.

37. **Charge for icing.**—Geraty *v.* Atlantic, etc., R. Co., 211 Fed. 227.

An order of the interstate commerce commission fixing a charge of $7.50 per car for services rendered in shipments of citrus fruits from California to the East, which, being pre-cooled, required no reicing, will not be disturbed on the ground that the carriers were required to haul the ice without reasonable compensation, where the revenue from the car is greater than that derived from a car of standard refrigeration, without corresponding increase in cost. Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

such rates unreasonable and unjust, although the roads themselves furnish no terminal facilities at Chicago for handling stock, and the Union Stock Yards were originally established, and have ever since been used, as the general depot for live stock by all the roads.[38]

A combination rate made by adding to a competitive through rate charged between a point of shipment and a basing point a noncompetitive local rate charged between such basing point and a local station beyond is not violative of the Interstate Commerce Act.[39]

Penalty for Overcharge.—A violation of Interstate Commerce Act providing that, if a carrier willfully violates any provisions of the act, it shall be liable for penalty, is not made out by proof of an overcharge due to accident or mistake, but is only established by evidence of a willful act or omission.[40]

§ 4060. Established by Carrier.—Carriers have the right in the first instance to fix their own rates, subject to the supervisory power of the commission under the interstate commerce law.[41] It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager.[42] Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.[43] "Section 13 authorizes any person complaining to apply to the commission, which shall in-

38. Terminal charges.—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 43 C. C. A. 209, 103 Fed. 249, affirmed in 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

The imposition by railroad companies, in addition to the terminal charge embraced in the through rates to Chicago, of a terminal charge of $2 per car for delivering live stock to the Union Stock Yards in Chicago, although not justified by an additional average charge of $1 per car for trackage by the Union Stock Yards Company, can not be said to be unjust and unreasonable, where the through rates to Chicago have since been reduced from $10 to $15 per car, both the terminal charges and the through rates as reduced being in themselves just and reasonable when separately considered as distinct charges. Decree in 43 C. C. A. 209, 103 Fed. 249, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 22 S. Ct. 824, 186 U. S. 320, 46 L. Ed. 1182.

39. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 69 Fed. 227.

40. Penalty for overcharge.—United States *v.* Texas, etc., R. Co., 185 Fed. 820.

41. Established by carrier.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 76 Fed. 183, question certified and determined in 167 U. S. 479, 493, 42 L. Ed. 243, 17 S. Ct. 896.

Railway companies may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided in the interstate commerce act. Judgment, 141 Fed. 1003, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

42. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

43. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45, quoting from the opinion in 21 C. C. A. 51, 74 Fed. 715.

stitute an investigation. Section 15 authorizes the commission to pass upon the complaint. Section 16 authorizes it to make an award of damages, and provides a method by which the circuit court of the United States may enforce the payment of the damages; or, if the order is for anything other than the payment of money, may enforce obedience to it by injunction or other proper process. These provisions indicate that the intention of congress is that the carrier shall have the right to fix its rates in the first place; that the Interstate Commerce Commission may, upon investigation, determine them to be unreasonable; and that the circuit court of the United States may then, either at law or in equity enforce the orders of the commission. In this way a uniform system can be maintained, and inconsistent rulings as to reasonableness between courts and the commission, or between different courts, avoided."[44]

Operation and Effect.—The rates provided and published by carriers under and pursuant to the Interstate Commerce Act control over the rates agreed upon between the carrier and shipper whenever there is a conflict between the two.[45] A voluntary rate, established to meet competition, is not to be taken as the measure of what is reasonable.[46]

Where Not Unjust, Unreasonable nor Discriminatory.—Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Interstate Commerce Act leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.[47]

§§ 4061-4065. Established by Commission—§ 4061. Under Original Act.—Under the original act it was held that congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum or absolute.[48] The power to pass upon the reason-

44. Wickwire Steel Co. *v.* New York, etc., R. Co., 181 Fed. 316.

45. Operation and effect.—Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

46. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541, citing Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565; Frederich *v.* N. Y., N. H. & H. R. R., 18 Interst. Com. Comm. R. 481, 484; Breese-Trenton Mining Co. *v.* Wabash R. Co., 19 Interst. Com. Comm. R. 598, 600.

47. Where not unjust, unreasonable nor discriminatory.—Delaware, etc., R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315, citing Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 21 C. C. A. 51, 74 Fed. 715; S. C., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

48. Established by commission.—Interstate Commerce Comm. *v.* Lake Shore, etc., R. Co., 202 U. S. 613, 50 L. Ed. 1171, 26 S. Ct. 766; Southern Pac. Co. *v.* Colorado Fuel, etc., Co., 42 C. C. A. 12, 101 Fed. 779; Interstate Commerce Comm. *v.* Northeastern R. Co., 27 C. C. A. 631, 83 Fed. 611; Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107; Farmers' Loan, etc., Co. *v.* Northern Pac. R. Co., 83 Fed. 249; Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 505, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Commission *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Express Cases, 117 U. S. 1, 29 L. Ed.

ableness of existing rates does not imply a right to prescribe rates. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.[49]

Legislative and Judicial Acts.—The power to prescribe rates is legislative. It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act, and beyond its powers.[50] The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative.[51]

By Application to Court for Mandamus.—The Interstate Commerce Commission has not the right to prescribe rates which shall control in the future, by their application to the court for a mandamus to compel the companies to comply with their decision, that is, to abide by their legislative determination as to the maximum rates to be observed in the future.[52]

Joint Rates.—Modern commerce is largely carried on over railways owned and operated by different companies; that congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several states.[53] It is competent for the commission or the courts to consider the through rate, however composed, or however between different railroads so as to make a given charge, the reasonableness of which is attacked, a mere division of a through rate. Whether the disputed advance is made over one road or the other, or in the rates over all, can make no difference.[54]

§ 4062. Under Amendment of 1906.—It has been suggested that the traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances, than the courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal.[55] It may be added that whether the members

791, 6 S. Ct. 542, 628; Thacker Coal, etc., Co. *v.* Norfolk, etc., R. Co., 67 W. Va. 448, 68 S. E. 107, 28 L. R. A., N. S., 108.

In territories.—The Interstate Commerce Commission, prior to the amendment of the Act of August 28, 1906 (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] as amended by Act Cong. Aug. 28, 1906, c. 3591, 34 Stat. 584), had no jurisdiction to fix freight rates on shipments wholly within a territory. Ft. Smith, etc., R. Co. *v.* Chandler Cotton Oil Co., 25 Okla. 82, 106 Pac. 10.

49. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

50. Legislative and judicial acts.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

51. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

52. By application to court for mandamus.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

53. Joint rates.—Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

54. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223.

55. Under amendment of 1906.—East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 39 C. C. A. 413, 99 Fed. 52; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

of the commission be in fact expert or otherwise is not open to question, for they are, by the act, required to execute and enforce its provisions regulating commerce.[56] The power to prescribe rates is conferred on the commission by the amendment of June 29, 1906. Under the amended act therefore, rates may not only be investigated and be pronounced unjust or unreasonable or discriminatory, but other rates may be prescribed.[57]

Exclusive Power of Commission.—Exclusive right to fix rates for interstate commerce being vested in the Interstate Commerce Commission, the shippers and the courts are required to treat charges made as reasonable so long as they are acquiesced in by the commission.[58] What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making matters committed to the commission. It may determine what shall be the difference in rate between carload and less than carload lots. It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the commission unless it is made plainly to appear that those ordered are void.[59]

Absolute or Arbitrary Power.—The authority granted to the Interstate Commerce Commission by § 15 of the Interstate Commerce Act to prescribe just and reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable, is not an absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier, but its orders must be based on transportation considerations, and, while it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.[60]

Restrictions on Power of Commission.—The provision which authorizes and empowers the Interstate Commerce Commission whenever, after full hearing upon a complaint, it shall be of the opinion that the prescribed conditions exist, to determine and prescribe maximum rates to be charged by a carrier, places no restrictions on the commission in respect to the matters which it may take into consideration, or the weight it shall give to every of such matters in informing itself what

56. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

57. (Act of June 29, 1906, chap. 3591, § 4, 34 Stat. at L. 589, U. S. Comp. Stat. Supp. 1909, p. 1158); Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Southern Pac. R. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 34 L. Ed. 608, 30 S. Ct. 417; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493; Lipman *v.* Atlantic, etc., R. Co., 90 S. C. 517, 73 S. E. 1026.

58. Exclusive power of commission.—Geraty *v.* Atlantic, etc., R. Co., 211 Fed. 227.

59. Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291; Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

60. Absolute or arbitrary power.—Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 190 Fed. 591.

opinion it ought to give, except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case, or give a judgment not fairly within its power.[61]

For Period of Two Years.—If a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate to be operative for a period of two years.[62]

Joint Rates.—The authority of the commission to establish through routes and joint rates is conditioned by the proviso that "no reasonable or satisfactory through route exists." This condition is not addressed solely to the opinion of the commission, but may be re-examined by the courts as a jurisdictional fact.[63]

As to One of Several Connecting Carriers.—The Interstate Commerce Commission acting on complaint of a shipper of unreasonable through charges made up of the separate charges over connecting lines has power to revise the rate on one line only as applied to the through transportation.[64]

Fixing Rate Zones.—The act does not confer power on the Interstate Commerce Commission to lower through rates between certain points, as between Atlantic seaboard points and Missouri River points, and between Mississippi River points and Denver, without changing the rates to intermediate points, or finding that existing rates are unjust or unreasonable, or otherwise in violation of the act; the sole purpose and effect being to arbitrarily create zones of trade, tributary to given trade and manufacturing centers, and counteract the commercial advantages possessed by certain cities by reason of their geographical position or otherwise, by giving Atlantic Coast and Missouri River cities an artificial advantage over intermediate points in shipments to the Missouri River and westward to points east of Denver, and the east Mississippi cities, and Denver an advantage over Missouri River cities to points west of Denver.[65]

Fixing Through to Equal Local Rates.—On complaint made by shippers in New Orleans to the complainant railroad company that certain through rates on certain classes of goods were unreasonably high and amounted to more than the sum of the local rates, which had been in force for twenty years, and asking for a reduction, the complainant changed its schedule by raising the local rates so that their sum should equal the through rates which it had been charging. Thereafter the New Orleans board of trade filed a complaint with the Interstate Commerce Commission, which, after notice to the complainant and a full hearing, found that the rates charged were unjust and unreasonable and entered an order requiring a reduction of the local rates to the old schedule, and the reduction of the through rates to the sum of the locals so reduced. The complainant then brought suit to

61. **Restrictions on power of commission.**—Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

The interstate commerce act (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), conferring power on the interstate commerce commission to determine and prescribe "just and reasonable maximum rates," does not intend to prescribe any closer definition of the quality of an act done by the commission which will defeat its validity than that it is prohibited by the Constitution, or by legislation clearly or by necessary implication forbidding it. Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

62. **For period of two years.**—Southern Pac. R. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

63. **Joint rates.**—Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Southern Pac. R. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

64. **As to one of several connecting carriers.**—Baer Bros. Mercantile Co. *v.* Denver, etc., R. Co., 200 Fed. 614.

65. **Fixing rate zones.**—Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 171 Fed. 680.

enjoin the enforcement of such order. There was no claim that the rates fixed thereby were confiscatory or unremunerative. On the facts appearing the order was within the scope of the powers of the commission, and that there was no ground upon which the court was authorized to interfere with its enforcement.[66]

Fixing Relative Rate.—"The point of the complainants' contention is that the commission, having found that the rates so complained of by the milling company were discriminatory, was bound to prescribe the maximum rate to be charged in the future for the services, but that it failed to do so, and exceeded its powers by prescribing relative rates. If the power conferred upon the commission were simply and alone to prescribe maximum rates, there would be much force in the complainants' contention. There is a marked distinction between that power and the power to fix minimum or absolute rates. There is still greater distinction between it and the power to fix relative rates; for, strictly speaking, power to prescribe the relations which shall exist between charges is not power to fix them at all. It is necessary to look further than to the power to prescribe maximum rates to find authority for the order in question. This order attempted to remove the discrimination against the milling company. It prescribed, in substance, that the charges against it should be the same as those charged other shippers for services similar in their nature. It did not prescribe how the charges should be equalized. Raising the rate to the Western shipper would have complied with the order as well as lowering the rate to the milling company. The end to be attained was the removal of the discrimination. Now, the removal of discriminations is one of the primary purposes of the act to regulate commerce, its supplements, and amendments. Many provisions are directed to that end. Consequently it is not to the specific power to prescribe maximum rates, but to the broad powers, applicable in the case of violations of the act by unjust discriminations, conferred by § 12, 'to execute and enforce the provisions of this act,' and, by § 15, 'to make an order that the carrier shall cease and desist from such violation to the extent to which the commission find the same to exist,' that resort must be had." [67]

Where Other Schedules Deranged.—It is no objection to the validity of an order of the Interstate Commerce Commission determining and prescribing rates to be charged by a carrier that it would derange the schedule of rates on other routes.[68]

Power to Protect Industries and Interests.—The order of the interstate commerce commission reducing the blanket rate charged by railroad companies for the carriage of lemons from Pacific Coast points to points east of the Rocky Mountains, is void as beyond the powers of the commission, because based primarily on the assumed authority to protect the lemon industry against foreign competition, and not on traffic considerations.[69] An order of the Interstate Commerce Commission setting aside new rates on lumber between certain points, and restoring substantially the old rates, is void as beyond its powers, where, from the record and the opinion of the commission, and from the express exclusion of one of the points from the benefit of the reduced rate, and the reasons assigned for such exclusion, it is clear that the commission was not exercising its authority to condemn unjust and unreasonable rates and fix reasonable ones, but was acting upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, for the purpose of encouraging the industry, to a higher rate which is not in itself unjust or unreasonable.[70] But the Interstate

66. **Fixing through to equal local rates.**—Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

67. **Power to fix relative rate.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

68. **Where other schedules deranged.**—Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

69. **Power to protect industries and interests.**—Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 190 Fed. 591.

70. Southern Pac. R. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288, reversing decree, 177 Fed. 963.

Commerce Commission can not be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory power to condemn unjust and unreasonable rates and fix reasonable ones.[71]

§ 4063. Prerequisites to Establishing.—By the express provisions of the statute, before going on to prescribe future rates, the commission must reach the conclusion that the existing rates established by the carrier are unjust and unreasonable.[72] It is only where after due notice and a full hearing, whether on complaint of a shipper or upon investigation by the commission of its own motion, it is made to appear that the rate is unjust and unreasonable that the commission is empowered to fix another.[73]

§ 4064. Form and Requisites of Order.—The Interstate Commerce Commission has no power to annul or change a rate, regulation, or practice established by a railroad company by its filed and published schedules, except by a formal order made in conformity to the Act of June 29, 1906.[74] Where the commission does not state in its order how long it should remain in force, nevertheless this inaction on the part of the commission does not invalidate the order. The act itself prescribes the maximum time an order can remain in force. The commission may prescribe a shorter time, but, in the absence of such limitation, an order remains in force the maximum time of two years. The law reads the limitation into it. But, while the absence of an express limitation in an order does not render it void, there is no reason why the direction implied in the statute that the time be prescribed in the order should not be complied with. There is no merit whatever in the contention of the commission, that there is a distinction with respect to the application of the two-year limitation between affirmative and negative orders.[75]

§ 4065. Review of Courts.—Questions of Law.—Enforcement of an order of the Interstate Commerce Commission, reducing gathering rates for citrus fruits and vegetables from production points in Florida to a basing point in the same state, will be enjoined where rendered without any evidence to support it; this being a question of law, which it is the duty of the courts to decide.[76]

Affirmative Order.—An order of the Interstate Commerce Commission which, amending a prior order refusing to compel certain trunk line railroads to establish or re-establish through routes and joint rates to certain tap lines, and which required the trunk line to desist from making allowances to the tap lines, is affirmative in character and reviewable in the commerce court.[77]

71. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

72. **Prerequisites to establishing.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

73. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

74. **Form and requisites of order.**—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 207 Fed. 733.

75. Under the provision of § 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), that "all orders of the commission, except for the payment of money, shall take effect within such reasonable time, not less than thirty days, and continue in force for such period, not exceeding two years, as shall be prescribed in the order of the commission" unless suspended or set aside, etc., an order relating to rates is not invalid because it fails to prescribe the time it shall remain in force, but in such case the order remains in force for two years, the maximum time prescribed by the statute; but the commission should comply with the implied requirement of the statute and fix the time. New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

76. **Review of courts.**—Florida, etc., R. Co. *v.* United States, 234 U. S. 167, 34 S. Ct. 867.

77. **Affirmative order.**—United States *v.* Louisiana, etc., R. Co., 234 U. S. 1, 34 S. Ct. 741, Ann. Cas. 1913D, 880.

§ 4066. Established by Court.—Where an interstate carrier charged plaintiff the regular posted tariff rates, plaintiff could not maintain an action at law either under the Anti-Trust Act,[78] or the Interstate Commerce Act,[79] for a readjustment of such rates on the ground that the same were unreasonable or unlawful, its remedy being by application to the Interstate Commerce Commission to have the schedule of tariffs adjusted on a reasonable and lawful basis.[80] It is not within the legitimate province of a court of equity, in a controversy between interstate carriers and shippers, to interpose and fix a maximum freight rate, either upon an independent consideration of what is a reasonable charge or by relation to some other rate then or therefore in force, and thereupon enjoin the carrier from demanding more than the rate so established, inasmuch as such an order effectually deprives an interstate carrier of the right to fix its rate in the first instance, and to change the same, which power, as it seems, is conceded to the carrier by the Interstate Commerce Act.[81]

§§ 4067-4074. Determination of Reasonableness of Rate.—§ 4067. In General.—The commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them, and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered, and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem.[82] The power to determine the reasonableness of interstate joint tariff rates is conferred by the Interstate Commerce Act.[83] The Interstate Commerce Commission has original and exclusive jurisdiction to determine the question of the reasonableness of an established rate for the interstate transportation of freight, and when a schedule of rates has been duly filed and has gone into effect the rates thereby prescribed are the only lawful rates until changed by the commission, and a court has no power to enjoin their enforcement.[84] The final determination of the reasonableness of interstate freight rates is within the jurisdiction of the Interstate Commerce Commission and not with the courts.[85] While a court below rightly refuses to enforce an order of the Interstate Commerce Commission, by which it is found that an alleged terminal charge, made by a carrier, for the delivery of live stock to the stockyards of a city, is unjust and unreasonable, and hence violative of the

78. Established by court.—Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

79. Interstate Commerce Act, Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154].

80. "There is no right of action either under the Anti-Trust Act or the Interstate Commerce Act for a readjustment of tariff rates filed and posted other than through the Interstate Commerce Commission. A shipper can not maintain an action at law for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Clement *v.* Louisville, etc., R. Co., 153 Fed. 979." American Union Coal Co. *v.* Pennsylvania R. Co., 159 Fed. 278.

81. Southern Pac. Co. *v.* Colorado Fuel, etc., Co., 42 C. C. A. 12, 101 Fed. 779.

82. Determination of reasonableness of rate.—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651.

It is no longer open to question that the Interstate Commerce Commission is an expert tribunal charged by law with the determination of the reasonable or unreasonable character of the rate charged for transportation in interstate commerce. Decree, Tift *v.* Southern R. Co., 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536.

83. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

84. Great Northern R. Co. *v.* Kalispell Lumber Co., 165 Fed. 25.

85. Arlington Heights Fruit Co. *v.* Southern Pac. Co., 175 Fed. 141.

act to regulate commerce, nothing in the decree refusing to execute the order of the commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to in the opinion, if any such there be, does not apply.[86] The power given the Interstate Commerce Commission by the Act of June 18, 1910, to authorize a carrier to charge less for a long than for a short haul, does not extend to the making of an order determining the relation between long and short haul rates, irrespective of absolute rates.[87]

It is the exclusive power of the Interstate Commerce Commission, in the first instance, to pass on the fairness of rates contained in the schedule of rates fixed by an interstate carrier on articles transported in interstate commerce.[88]

Power of Court.—Courts are without jurisdiction to determine the reasonableness of a tariff published and filed with the Interstate Commerce Commission, as required by the Act of June 29, 1906, unless redress be invoked primarily through the commission.[89]

Power of Secretary of Interior.—The authority of the secretary of the interior to review railway rates in Alaska, conferred on him by the Act of May 14, 1898, was superseded by the amendment of June 29, 1906, to the Interstate Commerce Act giving the Interstate Commerce Commission power to prescribe rates.[90]

§ 4068. Judicial Act.—The inquiry by the Interstate Commerce Commission whether rates which have been charged and collected are reasonable, is a judicial act.[91]

Determined on Evidence.—The hearing which is so provided for is not a perfunctory one. The carrier is entitled to know and to rely on the evidence adduced at it, either for or against the existing rate, and the commission is not authorized to disregard it and reach a conclusion not at all justified by it. If the rate attacked is shown to be unjust, it may be abrogated and a new one established. But, if that is not the outcome of the hearing, and, on the contrary, it is clearly shown that the rate is not unjust, the evidence as to this can not be put aside, and if it is, and the commission without reference to its proceeds to condemn the rate and to fix another, its action is invalid.[92] Tested by these principles, an order must be held invalid as exceeding the delegated powers of the commission, where there is no substantial evidence to sustain it. It is not merely that the evidence preponderates in favor of the reasonableness of the rates which have been cut down. Concededly, that would not be enough to challenge the action of the commission. Not only is the commission vested with a discretion which can not be disturbed, and which courts intend unqualifiedly to respect, but it is entitled to select the testimony which it will believe and rely upon, according as it addresses itself to the discriminating judgment of the commission. But it is not within the authority of the commission to reduce the rates

86. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

87. Act June 18, 1910, c. 309, § 8, 36 Stat. 547; Atchison, etc., R. Co. *v.* United States, 191 Fed. 856.

88. Thacker Coal, etc., Co. *v.* Norfolk, etc., R. Co., 67 W. Va. 448, 68 S. E. 107, 28 L. R. A., N. S., 108.

89. **Power of court.**—Starks Co. *v.* Grand Rapids, etc., R. Co., 165 Mich. 642, 131 N. W. 143.

90. **Power of secretary of interior.**—Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556, affirming judgment, 37 App. D. C. 266.

91. **Judicial act.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

92. **Determined on evidence.**—"This construction of the commission's authority and the conditions which limit its exercise appear to us clearly and definitely settled by the recent decision in Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108." Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

not merely against the weight of the evidence produced to sustain them, but without anything substantial to warrant the conclusion reached or the reasons assigned therefor.[93]

§ 4069. Question of Fact.—The question of reasonableness of a rate is one of fact.[94] The question whether there is at any point an additional service performed in the receipt and delivery on industrial spur tracks within the switching limits in a city of car load freight in interstate commerce, justifying an extra charge in addition to the line-haul rate to or from such city, or whether there is a substituted service like that included in the line-haul rate, is a question of fact on which the Interstate Commerce Commission can pass.[95]

§ 4070. Facts Considered.—From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. Therefore, the outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country, and if the problems which are presented to it are complex and difficult, the means of solving them are as great and adequate as can be provided.[96] The interests of both the public and the owner of the property are to be considered,[97] and those of the carrying company as well.[98] In determining whether the rates charged by a carrier to and from a city are unjust and unreasonable in themselves, the greatest weight should be given to the following considerations: The opinions of ex-

93. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541, citing Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

94. **Question of fact.**—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 493, 42 L. Ed. 243, 17 S. Ct. 896.

95. Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 234 U. S. 294, 34 S. Ct. 814; Interstate Commerce Comm. *v.* Southern Pac. Co., 234 U. S. 315, 34 S. Ct. 820.

96. **Facts considered.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

97. It was declared by the federal supreme court in Covington, etc., Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 S. Ct. 198, that in determining the question of reasonableness "its duty is to take into consideration the interests both of the public and of the owner of the property." Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 511, 42 L. Ed. 243, 17 S. Ct. 896.

98. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

In rate making, the welfare and advantage of the great body of the citizens who constitute the producers, shippers, and consumers should be considered, and also the welfare and advantage of the various localities and of the common carriers. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

In passing on the question of unreasonable preference under the Interstate Commerce Act, the court should consider, not only the difference in the charges, but also the convenience of the public, the interest of the carrier, the relative volume of the traffic involved, the cost and profit, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

pert witnesses, the effect of the rates charged on the growth and prosperity of the city, the cost of transportation as compared with the rates charged and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at such city.[99]

Improvements and Equipment.—In determining the reasonableness of a rate, the cost of permanent improvements and equipment ought not to be charged to operating expenses. Expenditures for additions to construction and equipment, as expenditures for original construction and equipments, should be reimbursed by all of the traffic they accommodate during the period of their duration, and improvements that will last many years should not be charged wholly against the revenue of a single year.[1]

Where Interests Dependent upon Old Rates.—If the rates are old, interests will have probably become attached to them, and it may be that such interest will be disturbed or disordered if the rates be changed. Such circumstance is, of course, proper to be considered, and constitutes an element in the problem of regulation but it does not take jurisdiction away to entertain and attempt to solve the problem.[2] On the other hand, the order of the commission is void, where it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate.[3]

Costs to Carriers.—Maximum rates prescribed by the Interstate Commerce Commission, to be just and reasonable within the constitutional limitation, must have reasonable regard for the cost to the carrier of the service rendered and the value of the property employed therein, and also reasonable regard for the value of the service to the public; and where the cost to the carrier is not kept within reasonable limits, or for any reason its business can not reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier.[4]

Fixing of an interstate freight rate at a sum not exceeding the out-of-pocket expense of the service would be invalid, in the absence of extraordinary circumstances and conditions justifying such action.[5] Where a freight rate fixed by the Interstate Commerce Commission not only was sufficient to cover the costs of the service, the operating costs fairly apportionable to the particular traffic, and to contribute to some extent to interest, charges, and dividends, it was not arbitrary or unreasonable.[6]

Remuneration to Particular Carrier.—While it is true that a carrier has

99. Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741, judgment affirmed in 122 Fed. 800, 60 C. C. A. 540.

1. **Permanent improvements and equipment.**—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700, distinguishing Union Pac. R. Co. *v.* United States, 99 U. S. 402, 25 L. Ed. 274, 14 Ct. Cl. 587.

Expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

2. **Industries dependent upon rates.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651.

3. Southern Pac. R. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

4. **Costs to carrier.**—Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

5. Atchison, etc., R. Co. *v.* United States, 203 Fed. 56.

6. Atchison, etc., R. Co. *v.* United States, 203 Fed. 56.

Profit in addition to operating expenses.—A freight rate on a particular commodity fixed by the Interstate Commerce Commission is not necessarily objectionable as confiscatory on the theory that it was insufficient to pay its proportionate share of the carrier's entire operating expenses and a profit in addition. Atchison, etc., R. Co. *v.* United States, 203 Fed. 56.

the right to exact a fair return for the public utilities it affords, the public is entitled to exact that no more be required of it for the use of such utilities than the services rendered are reasonably worth, and where there is a plain and irreconcilable conflict between the interest of the public and the interest of the carrier the former must prevail.[7] In determining the reasonableness of a freight rate between specified points, the interstate commerce commission is not limited to the requirements of a particular carrier or to the question whether a lesser rate would be remunerative to a particular carrier, but should, in addition, consider the rates in the particular territory to be affected by a change of a rate or rates in question.[8]

Dividends.—The public can not properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it, and one which the constitution does not require to be remedied by imposing unjust burdens upon the public.[9]

Injury to Certain Shippers.—That advances in rates on certain goods would be severely felt by certain shippers is not a sufficient reason for holding that they were not properly made.[10]

Personal Interests of Traveling Public.—If a reasonable and satisfactory through route and joint rates exist, the commission can not establish a second such route and rates partly over the same road and partly over different and competing roads, merely because the public would prefer such second route, where the result of this establishment would be to place the competing lines on an equal footing with the other company as to the use of a portion of its route and at the same time divert from its route a large portion of its existing patronage.[11]

Extent of Single Person's Shipment.—The fact that there is a large amount of a commodity in the hands of a few persons under almost one control, which is offered for shipment as stated periods in fixed quantities, may be considered in rate making.[12]

Competition.—Competition may be a controlling factor in determining the reasonableness of freight rates.[13] Among the circumstances and conditions to be

7. **Remuneration to particular carrier.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

8. Hooker *v.* Interstate Commerce Comm., 188 Fed. 242; Eagle White Lead Co. *v.* Interstate Commerce Comm., 188 Fed. 256.

9. **Dividends.**—Covington, etc., Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 S. Ct. 198; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

10. **Injury to certain shippers.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

11. **Personal interests of traveling public.**—The personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route via the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the Interstate Commerce Commission in the exercise of its power under the Act of June 29, 1906, § 4, to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through rates and joint rates between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle. Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417.

12. **Extent of single person's shipment.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

13. **Competition.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493; Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061, affirmed in 93 Tex. 650, no op.

Where competition genuine.—Railway companies, in fixing their rates, may take into account competition with other carriers, provided that such competition is genuine. Judgment, 141 Fed. 1003, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, and fair interests of the carrier companies, and the welfare of the community, which is to receive and consume the commodities, are to be considered.[14] Where there is a competition between carriers at a given point, so as to result in a reduction of rates for certain descriptions of property, the fact that the competition had originated with defendant carriers can not be considered in determining whether the rates are unreasonable.[15] That in fixing rates on lumber from Willamette Valley points in Oregon to San Francisco and bay points the Interstate Commerce Commission made a classification based somewhat on condition and value, and in fixing a lower rate on rough fir lumber and lath than was permitted on better grades took into consideration the fact that without such rate the lower grades could not be slipped at all in competition with the same grades from points having water transportation, did not invalidate the order, where the rate fixed was just and reasonable in itself.[16] But a rate voluntarily established by a railroad company to meet competition is not to be taken as the measure of what is reasonable.[17] The Interstate Commerce Commission itself has in a large number of cases recognized competition, and especially water competition, as influential upon the establishment of reasonable rates.[18] The payment of an elevator charge by a railroad company which is compelled by competition is lawful.[19]

Nature and Size of Goods Shipped.—The weight and bulk of the article to be transported and the convenience to the carrier in transporting it may be considered in rate making.[20]

Value of Services to Shipper.—In determining whether charges for the transportation of property are reasonable, within the Interstate Commerce Act, the value of the services to the shipper, including the value of the goods and the profits which the shipper can make, are to be considered.[21]

14. Interstate Commerce Comm. *v.* Southern R. Co., 105 Fed. 703.

15. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

16. Southern Pac. Co. *v.* United States, 197 Fed. 167.

17. Where competition voluntary. — Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

That defendant railroad companies might, if they chose, bring about as severe a competition in live stock as in its products, is immaterial in determining whether the rates charged were unreasonable within the Interstate Commerce Act. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

But where a competition was going on between different railroads, and each company was striving to get what business it could, and defendant railroad company reduced the rates to get its share of the traffic, the reduction of the rates made was forced upon it by the competition, and the reduction was not voluntary within the meaning of the Interstate Commerce Act. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

18. Louisville, etc., R. Co. *v.* United States, 197 Fed. 58; Commercial Club of Omaha *v.* Chicago R. Co., 7 Interst. Com. R. 404; Raworth *v.* Northern Pacific R. Co., 3 Interst. Com. R. 862; Chattanooga Board of Trade *v.* Southern R. Co., 10 Interst. Com. R. 133; E. Sondheimer Co. *v.* Illinois Cent. R. Co., 17 Interst. Com. Com'n R. 60; Bulte Milling Co. *v.* Chicago, etc., R. R., 15 Interst. Com. Com'n R. 351; Monroe Progressive League *v.* St. L., etc., Ry., 15 Interst. Com. Com'n R. 534; Indianapolis Freight Bureau *v.* P. R. Co., 15 Interst. Com. Com'n R. 567; Columbia Grocery Co. *v.* L. & N. R., 18 Interst. Com. Com'n R. 502.

19. Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22, and Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

20. Nature and size of goods shipped. —Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

21. Value of services to shipper.—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

Necessary to Sustain Other Rate.—An unreasonably high rate on the traffic and between the points to which an order of the Interstate Commerce Commission relates, which reduced such rate, can not be justified on the ground that it is necessary to sustain some other rate.[22]

Comparison in General.—The question whether rates are just and reasonable in themselves is in some measure a relative one, and may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service.[23] The rates from a certain point, not being alleged to be unjust or unreasonable in themselves, could not become so by comparison with other joint rates from an opposite direction, and from a different and competing point on a different line of road.[24] In rate cases, the Interstate Commerce Commission may receive evidence of comparison without proof of similarity of conditions.[25]

Comparison of Local and Joint Rates.—A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discrimination between nonlocal shipments of the same origin and destination.[26] The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipments over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that such rates are discriminative.[27] Where two carriers owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither carrier is bound to adjust its own local tariff to suit the other, nor compelled to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two carriers by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is deter-

22. **Necessary to sustain other rate.**—Norfolk, etc., R. Co. *v.* United States, 195 Fed. 953.

23. **Comparison in general.**—Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

24. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

The rate charged on first-class goods in less than car-load lots from Cincinnati to Atlanta, in 1879, was $1.39 per 100 pounds. Afterwards it was $1.10, and subsequently $1.07, except for a short time, when it was $1.01. The only testimony heard by the commission as to the reasonableness of the rate was that of an officer of a railway company, that he considered a rate of $1.01 unreasonable. Upon that testimony, and upon the fact that the rate from Cincinnati to Birmingham is 89 cents, as compared with $1.07 to Atlanta, the distances being substantially the same, the commission ordered that the defendants should not charge more than $1 from Cincinnati to Atlanta. In this court, a number of railroad experts testified that the present rate of $1.07 is reasonable. As to the rate to Birmingham, there was evidence before the court which was not before the commission, viz. that the rate from Cincinnati to Birmingham, which was previously $1.08, was forced down to 89 cents by the building of a new road known as the Kansas City, Memphis & Birmingham Railroad. Held, that the existence of a lower rate from Cincinnati to Birmingham furnished no sufficient reason to determine that the rate from Cincinnati to Atlanta is unreasonable, when such lower rate is caused by conditions at Birmingham which do not exist at Atlanta. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

25. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

26. **Comparison of local and joint rates.**—Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614; Parsons *v.* Chicago, etc., R. Co., 11 C. C. A. 489, 63 Fed. 903.

"The rates on through business do not prove that the local rate is unreasonable; and, on the other hand, the local rate can throw no light on the justice or injustice of discriminations between shipments of northwestern hay of the same origin and destination The local rate has nothing to do with the case as we view it. The comparison is between the through rate without the reconsigning privilege and the through rate with the reconsigning privilege." Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

27. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

mined.[28] The fact that the cost of carriage of all coal upon an entire railroad system, from all points of shipment to all destinations, is a certain per cent of the gross receipts from all coal, is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts of that particular line or part.[29] But the fact that a local rate is made part of a through rate does not render the through rate illegal, provided neither the local nor the through rate be unjust or unreasonable, and provided neither of them unjustly discriminates, or gives an undue preference or disadvantage to persons or traffic similarly situated.[30]

Comparison to Rates Affecting Another City.—In determining the effect of the rates charged upon the growth and prosperity of the city, as affecting the question of the reasonableness of such rates, comparison can not be made alone with another city, where competition has produced unusually low rates, but should be made with other cities where the circumstances and conditions are similar.[31]

Main Line and Extension.—The oversea extension of the Florida East Coast Railway from Homestead to Key West can not properly be considered a part of the main line, for the purpose of determining whether rates established by the Interstate Commerce Commission from points east of Homestead are remunerative or confiscatory.[32]

Different Rate for Shipment in Opposite Direction.—The fact that a rate over a road or line in one direction is materially higher than the rate on the same road or line, and between the same points, in the opposite direction, does not, as in the case of a haul over the same line in the same direction, establish prima facie the unreasonableness of the higher rate.[33]

Mode of Shipment.—An initial carrier of an interstate shipment, which furnishes two small cars in lieu of a larger car ordered by the shipper, is, under a rule of the interstate commerce commission, limited to the rate applicable to the larger car.[34]

28. Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas. 18; Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

29. Interstate Commerce Comm. *v.* Lehigh Valley R. Co., 74 Fed. 784.

30. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 21 C. C. A. 51, 74 Fed. 715.

31. **Comparison to rates affecting another city.**—"A low freight rate is an important factor in the prosperity of cities. But the prosperity enjoyed by Lynchburg as a result of low rates can not properly be used as a basis of comparison. Before it can be said absolutely that Danville has not prospered as it should have done, it must appear that comparisons are made, not with points where competition has produced unusually low rates, but with cities where the circumstances are similar to those existing at Danville. The evidence is that one or more industries were deterred from moving to Danville because of the high rates. But here again we are confronted with the same difficulty. Did not the proposing manufacturers contrast the Danville rates with those prevailing at some place or places where competition has brought about very low rates? If this is true—and the impression left on my mind that it is—this evidence can not be treated as of much weight. It is a further fact that the very low rates given Lynchburg have enabled her merchants to drive the Danville merchants out of territory nearer to Danville than to Lynchburg. But does this fact enable us to say that the Danville rates are inherently unreasonable? If I correctly understand the purport of the supreme court decisions, the rates given Lynchburg—being the result of substantial competition, and affording the defendant some profit—are not unlawfully low. Therefore the necessary consequence of the disparity in the rates respectively given Lynchburg and Danville can not be conclusive of the question before us." Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741.

32. **Main line and extension.**—Florida, etc., R. Co. *v.* United States, 200 Fed. 797.

33. **Different rate for shipment in opposite direction.**—Duncan *v.* Railroad Co., 6 Interst. Com. R. 103; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613; Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

34. **Mode of shipment.**—Yorke Furniture Co. *v.* Southern R. Co., 162 N. C. 138, 78 S. E. 67.

§ 4071. Mode of Determination.—Zones.—A reduction in that part of the through rates on Atlantic seaboard shipments to Missouri river cities which applies to the haul between the Mississippi and Missouri rivers is not beyond the power of the interstate commerce commission, as introducing a new system of rate making by artificially apportioning the country into zones tributary to given trade centers, in order to build up or protect certain distributing centers at the expense of others where the commission, by its order, intended only to correct through rates which it found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates.[35]

Distances.—Fixing rates under substantially similar traffic conditions so as to allow a higher rate for a shorter route is not so palpably unjust and unreasonable to the carriers as to be beyond the substance, if not beyond the form, of the power of the interstate commerce commission, where the commission was simply maintaining the same ratio of difference as that made by the carriers themselves.[36]

The cost of service to the carrier is not a practical theory for rate making, as such cost can not be reached accurately enough to make the factor controlling.[37]

Income and Dividends.—If the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.[38]

§ 4072. Burden of Proof.—The mere fact that a carrier increases its rates raises no presumption of unreasonableness, and persons complaining thereof have the burden of proof of unreasonableness.[39]

§ 4073. Evidence.—Comparisons are very commonly made in the investigation of rate cases, and they may often be quite persuasive. The competency of such evidence is not questioned nor the right of the commission to give it due weight. Neither is it doubted that the commission may receive evidence of this kind, giving to the facts so shown their proper value, without proof of similarity of conditions.[40] A finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves, and in violation of Interstate Commerce Act, can not properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.[41]

35. **Mode of determination.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; S. C., 218 U. S. 113, 54 L. Ed. 959, 30 S. Ct. 660, reversing decrees Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 171 Fed. 680.

36. **Distances.**—When the commission maintained the same ratio of difference between Omaha and St. Paul as that made by the carriers themselves, it can not be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form, of its power. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

37. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

38. **Income and dividends.**—Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

39. **Burden of proof.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541, citing Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

40. **Evidence.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

41. Interstate Commerce Comm. *v.* Nashville, etc., R. Co., 57 C. C. A. 224, 120 Fed. 934.

"But what we do hold is that the comparisons made by the commission in its report in this case, taking into account all the facts and circumstances disclosed at the hearing, had no evidentiary bearing upon the reasonableness of the rates in dispute, and therefore furnish no appreciable support of the commission's conclusion." Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

"Having regard to the evidence, the

§ 4074. Review of Determination.—The action of the carriers, in fixing and adjusting the rates, where a substantial dissimilarity of circumstances and conditions has been made to appear, is subject to revision by the commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable.[42] A finding by the Interstate Commerce Commission as to the reasonableness or otherwise of a rate charged by a carrier in interstate commerce is in administrative function, properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive.[43]

In Independent Action for Damages.—A finding by the Interstate Commerce Commission, on the hearing of a petition for reparation, that a given rate charged the complainant is unreasonable, while pertinent to the issue in a subsequent suit by such complaint to recover damages, in that it establishes a violation of the act, is not decisive of the question of liability for damages, either prima facie or otherwise, but its evidential value on that issue is for the determination of the court and jury. In such an action, a finding made by the commission that plaintiff was charged an unreasonable rate as a shipper by defendant, and an order of the commission awarding plaintiff damages in a sum representing the difference between the amounts paid by him under such rate and what he would have paid under a rate found to be reasonable do not constitute evidence making a prima facie case, since others than plaintiff as the shipper may have sustained the actual pecuniary loss from the overcharge, and the statute authorizes the recovery only of actual damages sustained by the plaintiff, and not of a penalty. The statute although making the findings of fact of the commission prima facie evidence of the facts found, does not make such facts prima facie evidence of anything; but their pertinency and evidential weight and value are for the determination of the court and jury as in other civil cases.[44]

§§ 4075-4096. Discrimination and Preference—§ 4075. In General.—The Interstate Commerce Act provides that if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.[45] Rates pre-

only tangible ground upon which it will be found to rest is the fact that there had been an advance in the rates to Pensacola and Mobile, and that the Montgomery rate exceeded the sum of the rates through these points as they stood prior to this increase, making the increase in these intermediate rates the only proof of unreasonableness, not only as to Pensacola and Mobile, but Montgomery also. It is conceded by counsel for the government that, if this were true as to the rates to Montgomery, the order of the commission would be invalid, because it would not be based on the reasonableness or unreasonableness of these rates independently considered." Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

42. Review of determination.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45. See post, "Review," §§ 4183-4189.

43. Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785.

44. In independent action for damages.—On the trial of such an action for damages, in which plaintiff has been permitted to introduce the report of the commission, it is the duty of the court to instruct the jury as to what are and what are not findings of fact therein which are made prima facie evidence by the statute. Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785.

45. Discrimination.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Texas, etc., R. Co. *v.* In-

scribed by the interstate commerce commission under the statute are not only required to be just and reasonable within the constitutional guaranty, but they must also not be unjustly discriminatory nor unduly preferential.[46]

Power of Congress.—There can be no question as to the power of congress to regulate interstate commerce to prevent favoritism and to secure equal rights to all engaged in interstate trade, and to this end congress had the constitutional power to adopt a policy looking to the equality of rates to shippers over interstate carriers, and to prescribe appropriate means to give it effect.[47]

Object of Statute.—The objects of the Elkins law are to prevent favoritism and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted so as to be open to public inspection and accessible to all alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences and all acts of undue discrimination; and this without regard to whether persons or places be the sufferers.[48] The wrong prohibited is a discrimination between shippers. It is designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.[49] The act prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices thereof.[50]

Construction of Statute.—There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow.[51] The pro-

terstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Commission *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

English statute adopted.—It is modeled upon § 90 of the English "Railway Clauses Consolidation Act," of 1845, known as the "Equality Clause." Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

46. Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

47. Power of congress.—Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671; New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

48. Object of statute.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304; New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

49. Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

50. Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

51. Construction of statute.—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the "equality clause." Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666. Certain also is it that, at the time of the passage of the act to regulate commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the

hibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the interstate commerce commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute.[52]

Section 3 of the Interstate Commerce Act, which declares it to be unlawful for a carrier to give "an undue or unreasonable preference" to any person, firm, corporation, or locality, or to subject any person, to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever," does not refer solely to facilities afforded to shippers, but applies also to discrimination in rates.[53]

Actual Discrimination.—Actual discrimination in rates charged is necessary to constitute a violation of the Interstate Commerce Act; and the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged a higher rate.[54]

Different Charges in Different Territory.—Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than carload lots in a new classification adopted to govern in official classification territory at twenty per centum less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than carload lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.[55]

Direct or Indirect.—The power of congress over interstate transportation embraces all manner of carriage, whether gratuitous or otherwise; and except as to the express exceptions made by the act itself, it must be held to have been the

person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226; Evershed *v.* London & N. W. R. Co., L. R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351, and Denaby Main Colliery Co. *v.* Manchester, S. & L. R. Co., L. R. 11 App. Cas. 97; Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392.

The section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback or other device" to charge, demand, collect or receive from any person or persons a greater or less compensation, etc. And § 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

52. Decree 128 Fed. 59, modified in New York, etc., R. Co. *v.* Interstate Commerce Comm., 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

53. United States *v.* Tozer, 39 Fed. 904.

54. Actual discrimination.—"I still think that a mere paper rate, which is never carried into effect, and is therefore simply a proposition to carry for a specified sum, is not such a violation of the Interstate Commerce Act as to prevent the carrier from recovering freight from other than the theoretically favored shippers. It is discrimination in fact, and not a mere intention to discriminate, that is punishable; and in the case before the court there was no evidence that a pound of coal had been carried to be sold in the market by any other shipper than the defendants. Hence no rival of the defendants was benefited by the unaccepted rate, and no harm was done to their business." Lehigh Valley R. Co. *v.* Rainey, 112 Fed. 487.

55. Different charges in different territory. — Decree, Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 146 Fed. 559, affirmed in 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

intention of congress to prevent a departure from the published rates and schedules in any manner whatsoever. The all embracing prohibition against either directly or indirectly charging was that the published rates show that the purpose of the statute was to make the prohibition applicable to every method of dealing by which the forbidden result could be brought about. If this were not so, a wide door would be open to favoritism in the carriage of property free, or partially free, of charge.[56] The prohibition in the Interstate Commerce Act against directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by carrier by which the forbidden result could be brought about. The public purpose for which the statute was intended was to compel the carrier as public agent to give equal treatment to all. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.[57] In view of the provision that no departure from the published rates shall be made directly or indirectly, the carrier can not take itself out of the statute, by electing to be a dealer and transport a commodity in that character. If a carrier has a right to disregard published rates by resorting to a particular form of dealing there is no obligation on the part of the carrier.[58]

Unjust and Unreasonable.—It is not all discriminations and preferences that are forbidden, only such as are unjust or unreasonable.[59]

§ 4076. Like and Contemporaneous Service.—In order to constitute an unjust discrimination the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.[60] The evident meaning of the federal statute is that the discrimination condemned must have the effect of unduly favoring some individual, class, or place at the expense and to the prejudice and disadvantage of some other shipper or place, where the services rendered were "like and contemporaneous," and where the transportation was effected under "substantially similar circumstances and conditions."[61] The act implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were like and contemporaneous, whether the kinds of traffic were like, whether the transportation was affected under substantially similar circumstances and conditions. To answer such questions, in any case coming before the commission, requires an investigation into the facts; and we think that congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not unjust. Some charges

56. Direct or indirect.—American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315; United States *v.* New York, etc., R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 S. Ct. 313; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671; New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

57. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

58. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

59. Unjust and unreasonable.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

60. Like and contemporaneous service.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518, 25 S. Ct. 276; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

61. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the commission.[62] When substantially dissimilar circumstances and conditions exist, the carriers have a large discretion in fixing the rates accordingly, but subject to the supervisory control of the interstate commerce commission under the Interstate Commerce Act.[63]

What Constitutes Like Service.—To come within the inhibition of the statute the differences must be made under like conditions, that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions.[64]

What Constitutes Contemporaneous Service.—Services rendered to a complaining and a favored shipper are contemporaneous as long as the discriminating rates remain in force, and for the purpose of comparison they need not be rendered on the same day, nor during the same week or month.[65]

Like Kind of Traffic.—Classification of railway crossties in a different class from lumber generally, imposing on them a higher rate, constitutes unjust discrimination.[66]

Similar Circumstances and Conditions.—The similarity of circumstances and conditions under which a service of carriage is rendered, which, under the interstate commerce act, requires an equality of rate, relates to the circumstances and conditions which affect the service only, and, where different coal mining localities are grouped into a district for rate-making purposes, a carrier is not justified in making a different rate for the same or substantially similar service from a particular locality in such district, or on the product of a particular mine or vein, from that charged others because the difference in the product from such locality mine or vein and that from other mines in the district is such that it can pay a higher rate and still compete in the market.[67]

Contract for Continuous Shipment.—In the provision in the Interstate Commerce Act prohibiting discrimination between shippers under "substantially similar circumstances and conditions," such phrase relates to the circumstances and conditions of carriage only, and does not include matters affecting individual shippers; and a railroad may not charge one shipper of coal a lower rate than is charged another shipper between the same terminals, because the former is ship-

62. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

63. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516; Interstate Commerce Comm. *v.* Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729, 21 S. Ct. 512; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

64. **What constitutes like services.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

65. **What constitutes contemporaneous service.**—"The defendant also argues that in computing the damages 'contemporaneous service' must be confined to shipments made for the plaintiff and for the favored shippers at the same, or practically the same, moment of time; and that shipments a week apart, or certainly a month apart, would therefore be too remote. No doubt 'contemporaneous' means 'at the same time,' but at the same time with what? A term is evidently implied which must be looked for in the context and in the subject matter of the statute. In my opinion the well-known evil aimed at in § 2 requires the court to hold that the implied term in the comparison is the offending rates, making the word to mean, 'at the same time with the offending rates,' and that, as long as these rates remain in force, the services rendered to a complaining and to a favored shipper are 'contemporaneous' within the meaning of the statute. As far as I am aware, there is no decision upon this subject, but Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822, furnishes, I think, some inferential support to the construction just given." Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403.

66. **Like kind of traffic.**—American, etc., Timber Co. *v.* Kansas, etc., R. Co., 175 Fed. 28.

67. **Similar circumstances and conditions.**—Philadelphia, etc., R. Co. *v.* Interstate Commerce Comm., 174 Fed. 687.

ping under contracts extending over a term of years, based on lower rates which were in force when such contracts were made, while the other shipper has no such contracts.[68] An official classification, providing that car load rates shall apply to cars loaded with different packages intended for different consignees only when the consignor or consignee is the actual owner of the property, and a rule declaring that shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, when the property will be waybilled as separate shipments and freight charged accordingly, are reasonable and valid, and are not violative of Interstate Commerce Act prohibiting discrimination, and requiring equal charges to all for the same or like and contemporaneous service; there being a substantial dissimilarity of conditions relating to the matter of carriage of car load freight assembled by forwarding agents and the transportation of car load freight, though made up of shipments to various consignees, where the consignor or consignee is the owner of the property.[69]

Coal Shippers.—Where a railroad company engaged in the interstate carriage of coal from the mines in its schedule of rates filed and published has grouped all points within a given territory together as a single initial point of shipment from which it makes the same rates, whether such points are on its own or connecting lines, the service rendered to all shippers from any of such points in the contemporaneous transportation of coal to the same terminal point, or to points within the same terminal group, is under substantially similar circumstances and conditions within the meaning of the act, and a discrimination in favor of any such shipper over others is unlawful under said section.[70]

To Persons Similarly Situated.—The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business. This last sentence does not declare that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers, but means only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimiliarity of circumstances and conditions than courts of commissions.[71] The Interstate Commerce Act allows differential and discriminative rates so long as they are not unjust or do not operate unfairly, and the essence of the act is that whatever the rate is it shall be the same to all persons similarly situated.[72]

Similar Points of Shipment and Destination.—That carriers transport coal of other shippers from practically the same territory at the same rates to the same territory and at the same time refuse to carry petitioners' coal shows unjust discrimination.[73]

In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination.[74]

68. Contract for continuous shipment.—Pennsylvania R. Co. *v.* International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1.

69. Delaware, etc., R. Co. *v.* Interstate Commerce Comm., 166 Fed. 498.

70. Coal shippers.—Langdon *v.* Pennsylvania R. Co., 194 Fed. 486.

71. To persons similarly situated.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

72. Pittsburgh, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

73. Similar points of shipment and destination.—Stony Fork Coal Co. *v.* Louisville, etc., R. Co., 195 Fed. 88.

74. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

The ownership or nonownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of Act Feb. 4, 1887, prohibiting inequality and discrimination in rates. A carrier may not, therefore, under the Act make the ownership of goods tendered to it for carriage the criterion by which its charge for such carriage is to be measured.[75]

Facilities for Delivery.—Differences with respect to competition between coal intended for railway consumption and other coal, and with respect to the manner of delivery, depending upon a difference in the facilities possessed by the railroads and other consignees, do not make the interstate traffic therein dissimilar in circumstances and conditions, within the meaning of the Act of February 4, 1887, so as to justify the giving of a power rate for the transportation of railway fuel coal than is given to shippers of other coal between the same points.[76] In its most abstract form the simple statement of the controversy is whether the companies may charge a different rate for the transportation of fuel coal to a given point than for the transportation of a commercial coal to the same point. The commission insisted upon the simplicity of the problem and contended that there was nothing in the conditions of the traffic which dispensed with the clear legal duty of the companies under the Interstate Commerce Act to carry for all shippers alike. The fuel and commercial coal went to the same point, and were delivered at the same point. There was, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees, and it was urged that the shipment of the fuel coal to a particular railroad "for the use of that railroad" makes special the traffic. And, further, that "a railroad is not a person," but is "rather in the nature of a geographical division and extends through long distances." The court held that it could not accept the likeness nor the distinctions which were said to establish it, and that the railroad company could not be put out of view as a favored shipper.[77]

Facilities.—Differences as to competition between coal intended for railway consumption and other coal, depending on difference in facilities possessed by the different parties, do not make interstate commerce therein dissimilar so as to justify the giving of a lower rate for transportation of railway coal.[78]

Shipment in Carloads.—A railroad company is not required by the Interstate Commerce Act to give the same carload rates on interstate shipments to forwarding agents who solicit property for shipment from different owners, each having less than a car load, and combine it into carload lots, that it makes on carload shipments by a single owner; the charges in such case not being for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," so as to render the difference in the rates made an unlawful discrimination.[79]

Shipments over Competitive Lines.—The phrase "under substantially similar circumstances and conditions," as used in the second section of the act refers to the matter of carriage, and does not include competition between rival routes, is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act, because, as the purposes of the several sections are different, the phrase in question must be read, in the

75. Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392, reversing decree in 160 Fed. 499.

76. **Facilities for delivery.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

77. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

78. **Facilities.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

79 **Shipment in carloads.**—Lundquist *v.* Grand Trunk Western R. Co., 121 Fed. 915.

second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but in the other sections, it covers the entire tract of interstate and foreign commerce, and a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which is found the fact of competition when it affects rates.[80]

§ 4077. Persons Discriminated against.—The provision of the act prohibiting unjust discriminations in charges has reference to the service rendered, and not to the person of the consignor or consignee.[81] Because a carrier has the power to prescribe rates, it does not follow that it can discriminate as to those who shall be entitled to avail themselves of them.[82]

Forwarding Agents.—A forwarding agent is a person within the meaning of the Act of February 4, 1887, forbidding preferences and discriminations in rates. Therefore a carrier may not forbid the aggregation of the shipments of various owners for the purpose of carload rating in official classification territory, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations forbidden by the Act will result from the carrier's action.[83] The proposition that, as the wide range of carload rates and the extent of the facility for combining articles for the purpose of obtaining such rates allowed in official classification territory are the result of the voluntary act of the railroads, therefore the power existed in the railroads to restrict and limit the enjoyment of such rate, as was done by the assailed rules, rests upon the fallacious assumption that because a carrier has the authority to fix rates, it has the right to discriminate as to those who shall be entitled to avail themselves of them.[84]

Shipper Who Has Accepted Bonus.—An undue advantage and unlawful discrimination forbidden by the act is accorded by a contract between a packing house firm and a stockyard company, by which the company paid a bonus to the packers if they would erect their new plant adjacent to the stockyard instead of in another city as proposed, and operate the plant, and buy only such stock as moved through such stockyards, and pay regular charges on live stock not so bought as if the same had moved to the stockyards.[85]

Shippers Estopped by Contract.—Shippers subjected to discriminatory charges for delivery and receipt on industrial spur tracks within the switching limits in a city of car load freight in interstate commerce are not estopped to bring the matter before the Interstate Commerce Commission, because, when making the contracts under which the spur tracks were constructed, the shippers consented to a special charge when freight should be received and delivered thereon.[86]

§§ 4078-4083. Determining Discrimination and Preference—§ 4078. Competition.—The interstate commerce commission, in considering the question whether there has been an unjust discrimination against one locality, or an undue preference to another locality, in the rates fixed by a railroad company for the transportation of passengers or freight to such localities, is bound to take into

80. Shipments over competitive lines.—Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

81. Persons discriminated against.—United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

82. Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392.

83. Forwarding agents.—Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392, reversing 166 Fed. 499.

84. Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392.

85. Shipper who has accepted bonus.—United States *v.* Union Stockyard, etc., Co., 226 U. S. 286, 33 S. Ct. 83, modifying judgment Attorney General *v.* Union Stockyard, etc., Co., 192 Fed. 330.

86. Shippers estopped by contract.—Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 234 U. S. 294, 34 S. Ct. 814; Interstate Commerce Comm. *v.* Southern Pac. Co., 234 U. S. 315, 34 S. Ct. 820.

consideration the existence of competition with such railroad company in one of such localities, to accept evidence thereof, and to investigate and decide thereon; and its failure to do so, if the existence of such competition is put in issue by the parties, renders its action erroneous.[87] The making of a lesser rate to a more distant and competitive point than is charged to a nearer noncompetitive point is not an unjust discrimination against the nearer point, nor does it give an undue preference to the more distant point, in violation of the Interstate Commerce Act, where such rate is induced by real and substantial competition.[88]

After Purchase of Competing Line.—The fact that a railroad company has acquired the ownership of the only road which previously competed with its own for business at a certain point can not affect the question whether its rates unjustly discriminate against such point in favor of another point where competition exists, where it affirmatively appears that the rates to the noncompetitive point have not been increased since the purchase of the competing road.[89]

Statute Not Intended to Prevent Competition.—The complainant's bill alleged that it was a wholesale dealer in merchandise, located at Portland; that the defendants, owners of connecting railroad lines, had established a schedule of joint-freight traffic between Portland and points in Idaho on the second line; that such second road, in connection with a third, had also established a schedule of joint rates on freight from San Francisco to the same points, under which the charge from San Francisco was the same as from Portland, although the distance was greater; and that, under the divisions made between the respective roads, the second road received a smaller rate, relative to the length of the haul over its line, under the latter than under the former schedule, in which the haul was from the opposite direction. The bill charged that such facts constituted an undue preference in favor of San Francisco and its merchants over Portland and its merchants, in violation of § 3 of the Interstate Commerce Law, and that therefore the rates charged from Portland were unjust and unreasonable, under § 1 of such law. The bill stated no grounds for relief under either section, for the reason that it is not the purpose of the third section of the act to prevent competition in rates between different points on different lines of road.[90]

§ 4079. Quantity of Goods Shipped.—Prior to the enactment of the Interstate Commerce Act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers, based solely on the ground of the quantity of freight shipped, without reference to any conditions tending to decrease the cost of transportation, were contrary to sound public policy, and inconsistent with the obligations of such carriers to the public.[91] It might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shipper to enlarge his business operations; and thus the discrimination might be profitable to the carrier. The English courts, in cases arising under the English Traffic Act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic to one carrier which otherwise would go to another carrier, are unlawful, and can not be justified on the ground of profit to the carrier allowing them. If they were to justify a discrim-

87. **Determining discrimination.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 73 Fed. 409.

88. Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741, judgment affirmed in 60 C. C. A. 540, 122 Fed. 800.

89. **After purchase of competing line.**—Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741, judgment affirmed in 60 C. C. A. 540, 122 Fed. 800.

90. **Statute not intended to prevent competition.**—Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

91. **Quantity of goods shipped.**—Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187, citing Hays & Co. *v.* Pennsylvania Co., 12 Fed. 309, 4 Ky. L. Rep. 87; Burlington, etc., Co. *v.* Northwestern Fuel Co., 31 Fed. 652.

ination upon such reasons, a railway company might in any case grant a preference to one person over another, provided it acted bona fide in the belief that such a course would be to its advantage. A railway company can not, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for the reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some equivalent or other services are rendered to them by such individuals in relation to such traffic.[92] The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation.[93]

§ 4080. Long and Short Haul.—In determining the question whether a difference in rates between points of shipment involves an unjust discrimination or an undue preference by a railroad company, it is error for the interstate commerce commission to reach its conclusion solely by contrasting the distance of such places, respectively, from the starting point, or upon a mileage basis, without taking into account the existence of competitive rates to one of such places.[94]

Where Long and Short Haul Clause Not Violated.—Where a lower rate for a long than for an included short haul is justified by dissimilar circumstances and conditions, and does not violate § 4 of the interstate commerce law, prohibiting a greater charge for a shorter than for a longer distance, it can not be held an undue preference, within the meaning of § 3.[95]

§ 4081. Disparity between Through and Local Rates.—The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the circuit court of appeals in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.[96] A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discrimination between nonlocal shipments of the same origin and destination.[97]

Question for Jury.—Whether the difference between a local rate and a through rate is an undue and unreasonable preference or advantage over the local shipper, within the meaning of the Interstate Commerce Act, is a question for the jury.[98]

92. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187, citing Harris *v.* Cockermouth & Worthington R. Co. (Eng.), 3 C. B., N. S., 693; Evershed *v.* London & Northwestern R. Co. (Eng.), 2 Q. B. Div. 254.

93. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187.

94. **Long and short haul.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 73 Fed. 409.

95. **Where long and short haul clause not violated.** — Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

96. **Disparity between through and local rates.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

97. Judgment, St. Louis, etc., Grain Co. *v.* Southern R. Co., 149 Fed. 609, affirmed in 82 C. C. A. 614, 153 Fed. 728.

Congress did not intend to leave carriers the power to grant undue preferences, or to subject persons or places to undue disadvantages, by any devices, or by any adjustment of joint through rates with relation to local rates. When two carriers establish a joint through rate, the proportion thereof that one carrier receives for carriage of property between two points on its line may be compared with its local rates between the same points, for the purpose of establishing that an unreasonable preference has been given, or that a shipper has been subjected to an undue disadvantage. United States *v.* Tozer, 39 Fed. 904.

98. **Question for jury.**—United States *v.* Tozer, 39 Fed. 369; S. C., 39 Fed. 904.

§ 4082. Disparity in Rates between Different Localities.—The complainant's bill alleged that it was a wholesale dealer in merchandise, located in Portland; that the defendants, owners of connecting lines of railroad, had established a schedule of joint freight tariffs between Portland and points in Idaho and Utah, on the second line of road, which were unreasonable and excessive, both as a whole and the proportion thereof received by each company. But the injury complained of did not arise from the fact that such rates were unreasonable in themselves, but that they were excessive as compared with other rates charged to the same points on shipments from the opposite direction under a joint tariff between the second company and a third, which gave San Francisco merchants the same rate to such points as complainant, by reason of which fact complainant was unable to compete with the San Francisco merchants at such points. The relief prayed for was that the second company be enjoined from charging, under any joint rate with its codefendant from Portland, any greater rate per ton or fraction thereof per mile for carriage over its road than it charged for the carriage of like property per ton or fraction thereof per mile under its joint rate from San Francisco. The bill stated no grounds for relief under the interstate commerce law; its gravamen being, not the excessive rates, but the equality of rates between San Francisco and Portland.[99]

Rates Reasonable in Themselves.—Though the preference given to one locality or the disadvantage to which the other is subjected is not due to the voluntary act of the carrier, and although the interstate rates in force may be reasonable in themselves, the interstate commerce commission can correct the discrimination by requiring a just equalization in rates between the two localities.[1]

Power of Commission to Determine.—Section 15 of the Interstate Commerce Act of Feb. 4, 1887, as amended by Act June 29, 1906, confers on the interstate commerce commission ample power, in a hearing under § 13, to determine whether rates put in force by carriers are unjustly discriminatory as between two cities, to extend the scope of its examination far enough to arrive at the true situation.[2]

Court Can Not Determine.—The question whether an undue preference to any locality forbidden by the Interstate Commerce Act arose from the operation of the intrastate rate as compared with an interstate rate, or whether any locality was unreasonably prejudiced, would be for the determination of the interstate commerce commission and not for the courts.[3]

§ 4083. Division of Freight by Connecting Carriers.—The proportion in which freight earned by two connecting railroads under a joint-tariff schedule is divided between them is a matter for their consideration alone, and can not be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust or discriminative rate, under the interstate commerce law.[4]

§ 4084. Special Rates.—A railway contract, whereby a shipper of lumber is allowed a special rate, which gives such shipper a preference of from one to two cents a pound over other shippers of lumber, is in violation of the interstate

99. **Disparity in rates between different localities.**—Allen *v.* Oregon R., etc., Co., 106 Fed. 265.

1. **Rates reasonable in themselves.**—Texas, etc., R. Co. *v.* United States, 205 Fed. 380.

2. **Power of commission to determine.**—Findings by the interstate commerce commission that rates put in force by Southern railroads between Norfolk and points in the southeastern territory, and between Newport News and the same points, were unjustly discriminatory against Newport News, and an order requiring the same rates to be maintained with respect to each city held within the power of the commission. Southern R. Co. *v.* United States, 204 Fed. 465.

3. **Court can not determine.**—Simpson *v.* Shepard, 33 S. Ct. 729, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A., N. S., 1151, modifying decree Shepard *v.* Northern Pac. R. Co., 184 Fed. 765.

4. **Connecting carriers.**—Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

commerce law, so that it can not be enforced as relating to interstate shipments.[5] Where an interstate carrier had not provided a special rate for expedited shipments of cattle to market, an oral agreement to expedite a shipment transported under regular rates was void as discriminatory in violation of the act.[6]

§ 4085. Free Transportation.—Free Cartage from Station.—An allowance made to a shipper by a railroad company for cartage from its depot, and the refusal to make a similar allowance to another shipper, the railroad service proper and the rate being the same to each, is an unjust discrimination in violation of the Interstate Commerce Act notwithstanding such allowance was made to induce the favored shipper to transfer his transportation from a competing line with which he had a siding connection.[7]

Free Pass.—An agreement by an interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to the act was made unenforceable by the prohibition of the act against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates.[8]

Pass Granted Prior to Act June 29, 1906.—The performance of a contract by which a railroad company, in consideration of the conveyance of land to it, agrees to give annual passes to the grantors during their lifetime, made prior to Commerce Act June 29, 1906, is forbidden by § 6 of that act, providing that no carrier shall charge or receive a greater or less or different compensation for the transportation of passengers than the rates specified in the tariff filed as required by the act.[9]

5. **Special rates.**—Kizer *v.* Texarkana, etc., R. Co., 66 Ark. 348, 50 S. W. 871.

6. Clegg *v.* St. Louis, etc., R. Co., 203 Fed. 971.

7. **Free transportation.** — Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

8. **Free pass.**—Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671, reversing decree, 118 S. W. 982, 133 Ky. 652.

Interstate Commerce Act, as amended by the Hepburn Act, invalidated an agreement by a railroad company to issue an annual pass in consideration of a right of way grant, so that he could not compel specific performance thereof. Louisville, etc., R. Co. *v.* Crowe, 160 S. W. 759, 156 Ky. 27, 49 L. R. A., N. S., 848.

9. **Pass granted prior to act.**—Cowley *v.* Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A., N. S., 559. But see Louisville, etc., R. Co. *v.* Mottley, 133 Ky. 652, 118 S. W. 982.

"The act of congress to which reference has been made forbade the further performance of the contract by the defendant. Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671." Cowley *v.* Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A., N. S., 559.

"In Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A., N. S., 671, it said: 'After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of congress could be enforced in any court.' And again, Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A., N. S., 671, it said: 'We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it can not now be enforced against the railroad company, even though valid when made.'" Cowley *v.* Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A., N. S., 559.

The fact that a pass is issued under an established contract, valid when made, does not exempt the parties from the operation of Interstate Commerce Act Feb. 4, 1887, as amended June 29, 1906. Gill *v.* Erie R. Co., 135 N. Y. S. 355, 151 App. Div. 131, reargument and appeal to court of appeals denied in 136 N. Y. S. 1135.

Decision contra.—Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibits any common carrier from giving any passenger interstate free transportation. Section 2 prohibits carriers from charging any different compensation for carrying passengers between points named in its tariff, as filed, than the fare specified therein, or from refunding any part of the fares. Held, that the statute is not retrospective, and does not apply to a contract made in 1871, by which a carrier agreed to issue an annual pass to one in-

Pass Issued for Consideration.—The Interstate Commerce Act does not prohibit the issuance of railway passes upon a valuable consideration, but only prohibits free transportation.[10] Annual passes, issued pursuant to a contract by which a carrier agreed to issue an annual pass for life to one injured by it in settlement of his claim for damages, are not "free passes" within the meaning of § 1 of the Act of June 29, 1906, prohibiting any common carrier from directly or indirectly giving any interstate free pass or ticket for passengers except to employees, nor did the contract violate § 2 prohibiting carriers from charging any different compensation between points named in its tariff than the fare specified therein, or from extending to any person any privileges except as specified in its tariff; it not appearing that the contract discriminated in favor of the person injured.[11]

Interchange of Passes.—The provision in the Act of June 29, 1906, following language appertaining solely to the carriage of passengers, that its provisions shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families, or to prohibit any carrier from carrying passengers free in certain cases, does not embrace free transportation by express companies, although, by the terms of that act, express companies are deemed common carriers.[12] In view of the interpretation thus given to the act it can not be doubted that the gratuitous transportation of property, upon franks issued by express companies, is within the terms of the act, and that express companies are prohibited from giving free transportation of personal packages to their officers and employees and members of their families, and to the officers of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies, by the provision which forbids all transportation of property at less than the published rates.[13]

Exceptions.—Congress may in prohibiting interstate carriers from issuing free transportation except such persons from the operation of the general prohibition as it may see fit.[14] Section 22 of the Interstate Commerce Act as

jured, in settlement of his claim for damages, though annual passes were issued under the contract after the statute was enacted. Louisville, etc., R. Co. *v.* Mottley, 133 Ky. 652, 118 S. W. 982.

10. **Pass issued for consideration.**—Curry *v.* Kansas, etc., R. Co., 58 Kan. 6, 48 Pac. 579.

11. Louisville, etc., R. Co. *v.* Mottley, 133 Ky. 652, 118 S. W. 982.

Act Cong. June 29, 1906, §§ 2, 6, 34 Stat. 584, c. 3591, prohibiting interstate carriers from issuing free transportation or receiving different compensation for transportation of passengers or property between points named in published tariffs than the rates, fares, and charges specified in the tariffs, etc., did not invalidate a contract made October 2, 1871, by which an interstate carrier, in consideration of a release of damages for injuries to complainants, contracted to issue free passes over its lines to complainants during their natural lives, nor did such act authorize the carrier to refuse longer to issue passes good beyond the boundaries of the state. Mottley *v.* Louisville, etc., R. Co., 150 Fed. 406.

12. **Interchange of passes.**—Elkins Act of Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584, 587 [U. S. Comp. St. Supp. 1907, pp. 892, 898]); American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315.

13. American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315, affirming United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

Without considering §§ 2, 3 of the Interstate Commerce Act of February 4, 1889, c. 104, 24 Stat. 379, prohibiting express companies from giving free transportation of personal packages to officers and employees and members of their families and to officers of other transportation companies and members of their families in exchange for passes issued by the latter to the officers of the express companies, it is held that such practice is forbidden by § 1 of Elkins law as amended by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584-587, and that an injunction to restrain the giving of such free transportation is authorized under § 3 of the Elkins law. American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315.

14. **Exceptions.**—Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458, rehearing denied in 37 Utah 612, 109 Pac. 1025.

amended by the Act of March 2, 1889, provides: "That nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldier's and Sailor's Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, that no pending litigation shall in any way be affected by this act."[15] In order for a free transportation to be lawful it must come within one of the exceptions in the act.[16] Manifestly, from the face of the commerce act itself, congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes, and free transportation. It solved the question when, without making any exceptions of existing contracts, it forbade by broad, explicit words any carrier to charge, demand, collect, or receive a greater or less or different compensation for any services in connection with the transportation of passengers or property than was specified in its published schedules of rates; and the courts can not add exceptions based on equitable grounds when congress forbore to make such exceptions.[17] The exception allowed in favor of officers and employees of the road does not include the families of such persons.[18]

Railway Mail Service Employees.—The Act of June 29, 1906, providing that no carrier subject to the provisions of the act shall issue in interstate commerce free transportation, except to railway mail service employees, can not be construed to prohibit the issuance of a free pass to an employee of the railway mail service for transportation of such employee while not in the actual discharge of his official duties.[19]

The issuing of franks by an express company to officers, agents, attorneys, or employees of itself or other express companies or railroad companies, or to the families of such persons, upon which property is transported from one state to another free of charge, relates to interstate commerce, which it is within the constitutional power of congress to regulate, and is within the prohibitions of the interstate commerce act and its amendments against discrimination, undue preference, and departure from the published schedule of rates, and is unlawful. Such gratuitous carriage is not within the exceptions made in Interstate Commerce Act, which by its terms are restricted to certain classes of passengers car-

15. 25 Stat. at L. 862; 24 Stat. at L. 387. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

16. "If it is lawful, in view of the provisions of the Interstate Commerce Act, to issue franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act." American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315.

17. Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671, citing Yturbide *v.* United States (U. S.), 22 How. 290, 16 L. Ed. 342.

18. Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446.

19. **Railway mail service employees.** —Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458.

ried by railroads and property carried for certain classes of shippers and for stated purposes.[20]

Pass Issued to Wife of Employee.—A pass issued by a railroad for interstate transportation to the wife of an employee under the Act of June 29, 1906, must be deemed gratuitous, in view of prohibition against charging a greater or different compensation for transportation of passengers from that scheduled in the published rates.[21]

The word "family," in Interstate Commerce Act, prohibiting the issuance of any pass except to employees and their families, means a collective body of persons living in one house under one head, and does not include the father of an adult employee not living with him nor dependent on him.[22]

Liability of Officers and Agents.—An officer of a railroad company engaged in interstate commerce, who, as a personal favor, issues to a person not within any of the exceptions contained in Interstate Commerce Act, a free pass for transportation from one state to another, is guilty of unjust discrimination, in violation of the provision of the act, making the charging of a less rate to one person than to another, for the same services, unjust discrimination.[23]

Liability of Passenger.—Under the provision which makes it a misdemeanor for any common carrier subject to its provisions to issue any free ticket, free pass, or free transportation for passengers, except to persons therein excepted, and further provides that any person other than the persons excepted in this provision who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty, one who, having in his possession an interstate free pass, sells it to another, knowing that he is not the person named therein, and is not entitled to ride thereon, with intent that he shall so use it, which he does by riding on an interstate journey, is guilty of using the ticket in violation of the statute.[24]

§ 4086. Reduced Rates.—For Purposes Not Prohibited.—Unjust discrimination and undue or unreasonable preference or advantage are made unlawful by the act and the declaration in another section that the act shall not prevent the giving of reduced rates for the purposes and to the classes of persons therein named does not exclude the idea that reduced rates for other purposes or to other classes may not be reasonable and just, and therefore lawful.[25]

Who May Complain.—A railroad company is not guilty of an unlawful discrimination or preference by receiving cotton from a shipper, shipping it to a compress, having it compressed there at the company's expense, and reshipped to other points for a rate equal to its published through rate, where such an arrangement is in compliance with a recognized custom, of which all other shippers, including the petitioner, could or did avail themselves, and where it does not appear that the petitioner desired to ship any cotton to such points, or that he was compelled to pay a higher rate under similar circumstances.[26]

Reduced from Schedule Rate.—Deliveries of coal by an interstate carrier

20. Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3170). United States *v.* Wells, Fargo Exp. Co., 161 Fed. 606.

21. **Pass issued to wife of employee.**—Charleston, etc., R. Co. *v.* Thompson, 234 U. S. 576, 34 S. Ct. 964.

22. Wentz *v.* Chicago, etc., R. Co. (Mo.), 168 S. W. 1166.

23. **Liability of officers and agents.**—In re Charge to Grand Jury, 66 Fed. 146.

24. **Liability of passenger.**—United States *v.* Martin, 176 Fed. 110.

Where a common carrier issued an interstate free pass to an employee, and said employee delivered the pass to a person not authorized by statute to receive or use it, and the said party used the same on an interstate journey, he violated Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892], and the employee delivering to said person such pass is guilty of aiding and abetting in said violation. United States *v.* Williams, 159 Fed. 310.

25. **Reduced rates.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844, affirming 43 Fed. 37.

26. **Who may complain.**—Cowan *v.* Bond, 39 Fed. 54.

not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination, whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.[27]

Necessity for Injury to Shipper.—The court is not warranted in finding that a mere disparity between the through and local rates, which is considerable, is, of itself, sufficient to constitute an undue discrimination, where there is no person, firm or corporation complaining that he or they are aggrieved by the disparity.[28]

In Shipments to Same Person.—Where several shipments are made to the same person it can not be said that any preference or discrimination within the meaning of the act is granted.[29]

In Payment for Construction Work.—A lumber company which was a shipper of railroad ties, made a contract with a railroad company by which it agreed to build a tie hoist for loading ties at a station, and the railroad company agreed to haul its ties to a designated point for a reduced rate per car, and to return to the lumber company ten per centum of the freights so received to apply on the cost of the hoist until entirely paid for, when it was to become the property of the railroad company. In the meantime, however, it could be used only by the lumber company. The rate given was materially less than the published rate, which was charged other shippers. Such contract was one designed to give the lumber company an undue preference or advantage over other shippers, in violation of Interstate Commerce Act, and was illegal and not enforceable in any part.[30]

In Payment for Use of Cars.—To an application for a mandamus to compel a carrier to transport relators' stock in the cars of a certain live stock transportation company, the respondent set forth that it had entered into a contract with another transportation company, by which that company was to furnish respondent a certain number of cars per year; that such cars were available to all shippers of stock; that they were much more useful to defendant than other live

27. **Reduced from schedule rate.**—Decree, 128 Fed. 59, modified in New York, etc., R. Co. *v.* Interstate Commerce Comm., 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

28. **Necessity for injury to shipper.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

29. **In shipments to same person.**—A grocery company of Hannibal, Mo., ordered a broker in Chicago to ship two barrels of sugar to a customer in Hepler, Kan. This order was executed by shipping the sugar over the C., B. & Q. R. Co. A through bill of lading was taken in the name of the broker, with the customer indicated as consignee, which reserved to the C., B. & Q. Co. the right to forward the property from Hannibal, Mo., over the line of any connecting carrier. At the latter place the sugar was unloaded, placed in the warehouse of the Mo. Pac. Ry. Co., and thence loaded on its cars, and carried to Hepler, where the total freight charges, at the rate of 51 cents per hundred, were paid by the consignee. Of this rate 34 cents per hundred only were retained for the Mo. Pac. Ry. Co. The Mo. Pac. Ry. and the C., B. & Q. Co. had a standing arrangement by which rates were fixed from Chicago to points on the road of the Mo. Pac., by adding an arbitrary sum—five cents—to the rate from Hannibal to such points. On the same day, the grocery company sold to the same customer one barrel of sugar, and shipped it over the road of the Mo. Pac. from Hannibal to Hepler, and paid the freight charges in advance, which were at the rate of 46 cents per hundred. Held, that the two services were not rendered for one and the same party in such sense that there could be no undue discrimination, within the meaning of the interstate commerce act. United States *v.* Tozer, 39 Fed. 369; S. C., 39 Fed. 904.

30. **In payment for construction work.**—Chesapeake, etc., R. Co. *v.* Standard Lumber Co., 174 Fed. 107, 98 C. C. A. 81, decided under Act of Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155).

stock cars, in that they could be converted into coal cars when not used for live stock; and that defendant paid mileage for the use of the cars. The refusal to transport relators' stock in the cars offered at the same rates charged for stock in the other cars was not an "unjust discrimination" in favor of the transportation company, whose cars respondent was using, within the meaning of the interstate commerce act, as the circumstances and conditions were not substantially similar.[31]

Sale of Tickets Through Broker.—A contract with a ticket broker, whereby he is enabled to sell railroad tickets to points in another state, over the company's line, for less than the regular fare, violates the provision of the act, prohibiting discriminations by common carriers.[32]

Party-Rate Tickets.—See post, "Party-Rate Tickets," § 4113.

Shipment on Through Bills of Lading.—The giving of a much lower rate on goods shipped on through bills of lading than on goods shipped on local bills may constitute an unjust discrimination.[33]

Because of Competition.—A genuine competition which results in a reduction of freight rates negatives any unlawful intent on the part of the carrier, and leaves open only the question as to whether the rates, as established, work an undue preference or discrimination.[34] But a carrier can not because of competition reduce its charges on through bills of lading to about half the amount charged on local bills for shipments through the same points.[35]

Because of Reduced Valuation of Goods.—Where a consignee of goods shipped from another state sues the common carrier for the value of goods lost in transit, his right to recover their value can not be limited by the contract of

31. In payment for use of cars.—United States *v.* Delaware, etc., R. Co., 40 Fed. 101.

32. Sale of tickets through broker.—Raleigh, etc., R. Co. *v.* Swanson, 102 Ga. 754, 28 S. E. 601, 39 L. R. A. 275.

33. Shipment on through bills of lading.—Freight rates from London and Liverpool to San Francisco are fixed by the competition of the water and rail route via the Isthmus of Panama and the water route around Cape Horn. A carrier by rail from New Orleans to San Francisco gave a much lower rate on goods shipped from London and Liverpool to San Francisco on through bills of lading than from New York, Chicago, and other points to San Francisco (in some cases less than half the latter rate). The rate complained of was slightly remunerative to the carrier, and it would lose the traffic unless it carried at such low rate. Held, that under §§ 2 and 3 of the Interstate Commerce Act (24 Stat. 379, 380) the giving of such low rate is an unjust discrimination, and a charging of one person more than another for a like service under substantially similar circumstances and conditions, and an order of the commissioners prohibiting it will be enforced. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187.

34. Because of competition.—Judgment, 141 Fed. 1003, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

No undue prejudice to an intermediate point, in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), can be predicated merely on the fact that a rail carrier charges a less rate to a terminal point on the Pacific Coast, where such rate is forced by competition. Atchison, etc., R. Co. *v.* United States, 191 Fed. 856.

The discrimination in favor of competitive points on account of competition which compels a reduction of rates to those points below the rate charged for shorter distances is not an undue or unjust discrimination prohibited by § 3 of the act to regulate commerce. Decree, 99 Fed. 52, 39 C. C. A. 413, reversed in East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719.

35. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187.

Under Interstate Commerce Law (24 Stat. 379, 380) §§ 2, 3, the fact of the existence of ocean competition will not justify a railroad company's rates for carrying merchandise from New Orleans to San Francisco which comes to New Orleans from domestic points, which rates are treble, and some cases four times, the rates charged for carriage of like kinds of merchandise from New Orleans to San Francisco which reach New Orleans from foreign ports, although such lower rates constitute the only condition on which the carrier can obtain any part in such foreign traffic. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 57 Fed. 948, 6 C. C. A. 653, affirming 52 Fed. 187.

shipment, which provides that in consideration of reduced rates the valuation of the property shipped should not exceed a certain amount, and the carrier's liability should not exceed that amount, since such contract violates the provision forbidding special rates.[36]

§§ 4087-4090. Rebates—§ 4087. In General.—The word "rate" means the net amount the carrier receives from the shipper and retains, and any device by which such amount is reduced below the rate given in the published schedule is one for the giving of a rebate.[37] The word "rebate," as used in the Interstate Commerce Act and its amendments, refers only to such a discount, deduction, or drawback as creates a discrimination in favor of a particular shipper and against other shippers in like situation.[38] The purpose of Congress in the enactment of Act of Feb. 19, 1903, known as the "Elkins Law," was to secure uniform freight rates to all shippers, and its provisions are violated by the giving or receiving of any rebate or concession whereby any property shall be transported at a less rate by any interstate carrier than that named in the tariffs published and filed by such carrier, whether by direct agreement between shipper and carrier or indirectly by "any device whatever."[39] The meaning of the clause, "by any device whatever" in the Act of Feb. 19, 1903, prohibiting rebates, is directly or indirectly in anyway whatever.[40] Section 10 of the Interstate Commerce Act as amended by the Act of June 18, 1910, making it unlawful to offer, grant, give, solicit, accept, or receive a rebate from a carrier for the transportation of goods in interstate commerce, was not impliedly repealed by Hepburn Act, June 29, 1906, making it an offense to receive transportation for less than posted rates by false billing, false classification, etc.[41]

Agreement of Parties Immaterial.—A claim against a carrier for rebates may be resisted as against public policy or contrary to state or federal regulations, notwithstanding any agreement of the parties.[42]

Carriers Subject to Act.—A private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, is within the provision of the act forbidding rebates and the giving by such a car company of any rebate or allowance to a shipper using its cars, whereby he secures the transportation of his property at a less rate than that named in the published tariff of the carrier for transportation of such property in its own cars, although from its own funds and without the connivance or knowledge of the carrier, is a violation of the statute. Such a car company is therefore subject to the jurisdiction of the Interstate Commerce Commission, charged with the duty of enforcing the statute and having power to inquire into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates.[43]

Who May Complain of Rebate.—A coal shipper, which, with others, was given rebates by a railroad company in violation of law, can not maintain an action against the company to recover damages for discrimination because others were granted larger rebates.[44]

36. **Because of reduced valuation of goods.**—Ward *v.* Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28.

37. **Rebates.**—United States *v.* Chicago, etc., R. Co., 148 Fed. 646. See post, "Receiving Rebates," § 4240.

38. American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 207 Fed. 733, reversing judgment, 200 Fed. 652.

39. United States *v.* Standard Oil Co., 148 Fed. 719.

40. **Direct or indirect.**—Armour Packing Co. *v.* United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A., N. S., 400.

41. Nichols, etc., Lumber Co. *v.* United States, 212 Fed. 588.

42. **Agreement of parties immaterial.**—First Trust, etc., Bank *v.* Southern Indiana R. Co., 195 Fed. 330.

43. **Carriers subject to act.**—Interstate Commerce Comm. *v.* Reichmann, 145 Fed. 235.

44. **Who may complain of rebate.**—Pennsylvania R. Co. *v.* International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1.

§ 4088. What Amounts to Rebate.—Necessity for Refusing Rate Paid.—The offense of giving rebates in violation of the Act of February 19, 1903, is not complete nor the offense committed until the carrier, to whom the shipper has paid the full legal rate, has refunded to the shipper, upon a claim presented by him, a part of the legal rate already paid.[45] It follows, therefore, that the act applies and that a prosecution thereon may be sustained where the agreement for the rebate was made and the property transported pursuant thereto before the act went into effect, notwithstanding the actual refunding of a part of the legal rate was not made until after the law went into effect.[46]

In Absence of Discrimination.—If there is no unjust discrimination, an agreement by a railroad company that it will carry goods at a certain rate, and repay the shipper a part thereof as a rebate after the shipment, is not illegal, and the rebate may be recovered by the shipper in a proper case.[47] So long as there is no unjust discrimination, and no stipulation in the contract forbidding the carrier extending similar rates to all other shippers similarly situated, there is no express provision of law, and no sound reason arising out of public policy, which prohibits a carrier entering into a fair and equitable milling in transit arrangement with any of the numerous industries now operating under such plans.[48] But a lumber company, using a railroad owned by stockholders of a rival lumber company that operated as a separate corporation, would be given a rebate contrary to the Interstate Commerce Act if a nondiscriminatory agreement between the two lumber companies were construed to entitle the former company to the same proportion of the interstate freight rates on its shipments which the railway company receives on the interstate shipments by the other lumber company.[49]

Where Legal Rate Higher than Rebated Rate.—A shipper is not entitled to recover damages from a railroad company for discrimination in rates because of rebates paid to a shipper from another district; the rate from such district with the rebates deducted being higher than that paid by plaintiff.[50]

Allowance for Services of Shipper.—The published tariff schedules of an interstate carrier by rail gave its rate on packing house products from a certain point, including the rate charged by a belt line company for carriage between such point and a connection with the carrier's road. The carrier charged and received such rate from a packing company, paid the charge of the belt line company, and afterward paid back to the packing company the sum of one dollar upon each car so shipped. Such repayment constitutes the granting of a rebate, and can not be justified as lawful on the ground that it was an allowance to the packing company for the use of its own private track in moving the cars from its shipping building to a connection with the belt line tracks.[51]

Refunding for Use of Private Track.—Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of one dollar per car to such packing

45. **Necessity for refunding rate paid.**—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304, affirming 146 Fed. 298; S. C., 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

46. New York, etc., R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

47. **In absence of discrimination.**—Elliot on Railroads, § 1565; Rorer on Railroads, § 1375. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

48. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

49. Fourche River Lumber Co. *v.* Bryant Lumber Co., 33 S. Ct. 887, 230 U. S. 316, 57 L. Ed. 1498, reversing judgment, 135 S. W. 796, 97 Ark. 623.

50. **Where legal rate higher than rebated rate.**—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403.

51. **Allowance for services of shipper.**—United States *v.* Chicago, etc., R. Co., 148 Fed. 646.

company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged one dollar per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of § 1 of the Act February 19, 1903.[52]

Refunding Cartage Charges.—Where a railroad company, in order to obtain shipments from one so located as to require no cartage when he ships by another road, makes him a rebate to cover the cost of cartage, but makes no such rebate to other shippers who require cartage by whichever road they may ship, it is guilty of unjust discrimination.[53]

Refunding Elevator Charges.—Where an interstate carrier returned to a shipper of grain after payment of the freight an amount equal to elevator charges at the point of shipment, and the carrier had not published or filed any schedule showing that it had absorbed such elevator charge as a part of its rate between the points in question, the carrier was guilty of granting rebates prohibited by the act.[54] A railroad company whose published schedule rate for the carriage of oats in interstate shipment from Minneapolis to Duluth or Superior was five cents per one hundred pounds, and which received payment from a shipper at such rate, but, on shipments intended for through transportation over the lakes, later refunded to the shipper the elevator charges for transferring the grain from its cars to vessels after the termination of its own carriage amounting to one-half cent per bushel, was guilty of granting a rebate or concession from the published schedule rate, in violation of the Act of Feb. 19, 1903, and it was no defense to a prosecution therefor that competing roads granted a like concession, and that it was compelled to do the same in order to secure its fair share of the business, or that it treated all shippers alike, or that the concession was made by its officers in good faith and in the honest belief that it was lawful.[55]

Agreed Valuation for Injury to Goods.—When an interstate shipment was made under a contract, providing that if the stock shipped was injured the shipper should obtain no compensation beyond an agreed valuation, a decision that the agreement as to valuation was invalid does not give the shipper rebate, but only compensation for loss suffered, which is not a lower rate than he is entitled to.[56]

Rebate from Joint Rate.—The Act of Feb. 19, 1903, makes it unlawful for a carrier to grant a rebate from a joint tariff which it has filed with the interstate commerce commission or published, or in which it participates when filed or published by another carrier. When a carrier unites with one or more

52. Refunding for use of private track.—Judgment, United States *v.* Chicago, etc., R. Co., 148 Fed. 646, affirmed in 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A., N. S., 551.

53. Refunding cartage charges.—Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

54. Refunding elevator charges.—Elkins Act, § 1 (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]); Wisconsin Cent. R. Co. *v.* United States, 169 Fed. 76, 94 C. C. A. 444.

A grain company made certain shipments of grain over defendant's road from Minneapolis to Milwaukee to the grain company's brokers, who received the consignments, paid the freight, and afterwards sold the grain for the shipper's account. Thereafter the grain company presented to defendant the receipted freight bills paid by the consignees with other papers, on which defendant, according to a pre-existing agreement, refunded elevator charges to the grain company. Held, that defendant at the time it paid such rebate had actual knowledge that the freight had been paid by the consignees acting for the grain company, and that such facts therefore sustained an indictment charging the railroad company with paying a rebate to the grain company from freight charges before then "received from the grain company:" Wisconsin Cent. R. Co. *v.* United States, 169 Fed. 76, 94 C. C. A. 444.

55. Judgment, United States *v.* Chicago, etc., R. Co., 151 Fed. 84, affirmed in 162 Fed. 835.

56. Agreed valuation for injury to goods.—Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the Interstate Commerce Act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage, constitutes assent to such common arrangement, and makes the carrier a party to the contract, within the meaning of the act.[57] Where the defendant railroad was a party to a joint rate for the shipment of coal for a certain price to the point of junction with a connecting carrier, and an increased amount for shipment to other points on the defendant's line, of which sum the defendant received a part, the defendant is not subject to prosecution for receiving a rebate, where coal was shipped for the defendant's own use to its yards, although within the city limits of the connecting point, where the joint agreement also provided that, where the point of destination of shipment is between any two points named in the schedule, the rate should be the same as to the next more distant point named.[58]

Trackage Charges Paid by Railroad to Stockyard Company.—The certificate of incorporation of a union stockyards company authorized it to hold shares of stock in a transit company, which owned stockyards, and a belt line which connected all the railroads entering the city. The transit company, most of whose stock was owned by the stockyards company, depended on the permanent market for cattle created by the presence of slaughtering and packing establishments. Some of the packers, known as "nonassociate," contemplated a removal from the vicinity of the stockyards. Other of the packers, known as "associate," purchased a large tract of land at a distance from the city, and made preparations to remove their plants and establish stockyards of their own. The stockyards company entered into a contract with the associate packers, by which it was to give them a large amount of interest bearing income bonds in consideration of a conveyance of the land purchased, and an agreement not to remove their plants, etc. On a bill to restrain the execution of the contract, it was held that trackage charges paid by the railroad companies to the stockyards company for the use of the latter's tracks were not repaid by the packers to the railroads, and that the agreement was not intended as a device to pay a rebate to the associate packers, in violation of the interstate commerce law, prohibiting discrimination in railroad rates.[59]

Shipment to Points Beyond Carrier's Line.—Where a railroad company has published and filed a schedule of rates on interstate shipments to points beyond its own line said section applies to such rates equally with those between points on its own road.[60]

57. **Rebate from joint rate.**—United States *v.* Wood, 145 Fed. 405.

58. **Sharing joint rate of shipper of carrier's own goods.**—Defendant operated a line of railroad from Montpelier to Wells River, in Vermont, a distance of 39 miles. By a joint tariff, to which it was a party, the rate on coal from a point in Pennsylvania to Montpelier was fixed at $3.55 per ton, and to all other points on its line at $3.80, of which it received 75 cents as its share. The published rules also provided that, where the point of destination of a shipment was between any two points named in the schedules, the rate should be the same as to the next more distant point named. Held, that the tariff rate to Montpelier should be construed as applying to the station in that city, and that where defendant received coal for its own use, which it received at such station and hauled over its own line to a chute between that and the next station, although within the limits of the city, the fact that it had the coal billed at the $3.80 rate and took its divisional share thereof did not render it subject to prosecution for receiving a rebate, in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3160), as amended by Act Feb. 19, 1902, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138). Montpelier, etc., Railroad *v.* United States, 187 Fed. 271, 109 C. C. A. 532.

59. **Trackage charges paid by railroad to stockyard company.**—Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 25 Atl. 277.

60. **Shipment to points beyond carrier's line.**—United States *v.* Standard Oil Co., 148 Fed. 719.

Milling in Transit Agreement.—A "milling in transit" agreement, by which the railroad contracts to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory, is not violative of this section.[61] It is no longer open to question that milling in transit arrangements by which a railroad contracts to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory are recognized as valid agreements, which may be lawfully entered into between shippers and carriers.[62] It is well understood that at the present time this principle is applied to the movement of many commodities. Generally, in its application, the raw material pays the local rate into the point of manufacture. When afterwards the manufactured product goes forward, it is transported upon a rate which would be applicable to the product, had it originated in its manufactured state at the point where the raw material was received for transportation, whatever has been paid into the mill being accounted for in this final adjustment. Under this or some equivalent arrangement at the present time, grain of all kind is milled and otherwise treated in transit; flour is blended; cotton is compressed; lumber is dressed, and perhaps otherwise manufactured; live stock is stopped off to test the market.[63] It may be urged with much force that the act to regulate commerce does not sanction arrangements of this kind, and the commission, early in its history, intimated that such might finally be its conclusion.[64] Such practice were, however, in use to a considerable extent at the time of the passage of the act, and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value, by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that, when the product goes forward to the point of consumption, it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation, and probably of manufacture.[65]

Manner of Calculating Rate.—Whether the raw material pays the local rate into the point of manufacture, and afterwards the manufactured product pays a lower rate, calculated from point of original shipment, or whether the raw material pays the local rates, and this is credited in whole or in part upon the transportation of the manufactured products subsequently shipped, result is the same in principle; the one being, in the language of the interstate commerce commission, "an equivalent arrangement" of the other, and neither contravening the mandate of the law devised to protect shippers from unjust discrimination, whether the same arises from extortion or from unlawful rebates granted to a favored few.[66]

Validity Dependent upon Circumstances of Particular Case.—The legality of the principle of milling in transit arrangements being recognized, whether each special agreement will be upheld depends upon the varying circumstances attendant upon its making; but it can not be affirmed that such an agreement as is here under consideration can be declared to be, by its very terms, violative of the laws prohibiting unlawful rebates.[67]

61. Milling in transit agreement.—Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

62. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

63. Central Yellow Pine Ass'n *v.* V. S. & P. R. Co., 1 Inters. Commerce Com. Rep. 703.

64. Crews *v.* Richmond & D. R. Co., 1 Inters. Commerce Com. R. 401.

65. Central Yellow Pine Ass'n *v.* V. S. & P. R. Co., 1 Inters. Commerce Com. Rep. 703; Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

66. Manner of calculating rate.—Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

67. Validity dependent upon circumstances of particular case.—Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

Particular Instances.—It is unlawful for a corporation organized to control the interstate transportation of a brewing company to demand and receive as a consideration for the routing of the brewing company's products over certain lines of railroad a concession equal to one-eighth or one-tenth of the published freight rates.[68] But where a refrigerator company was incorporated to own and operate a private car line, and to have charge of all the interstate transportation of the products of a brewing company. A majority of the brewing company's stock, however, was owned by persons who had no interest in the refrigerator company, and the stock of the latter was bought and paid for by the holders with their own money and in their own interest; none of it being held in trust for the brewing company, though the majority of it was owned by persons who also owned brewing company stock. The brewing company paid its freights in full and received no rebates, nor was it a party to contracts between the refrigerator company and the railroad companies by which the refrigerator company received a rebate of from one-eighth to one-tenth of all freight moneys on all interstate traffic it controlled. Such facts were insufficient to establish that the brewing company had received rebates.[69]

§ 4089. Effect of Granting Rebate.—The granting of a rebate contrary to the provision of the interstate commerce law does not render the bill of lading void, so that no action can be maintained against the carrier for loss of the goods by negligence.[70]

Contract Made before Act Took Effect.—The act applies to an agreement for a rebate made and the goods transported before the act took effect, and notwithstanding the actual refunding of the part of the rate was not made until after the act took effect.[71] The payment of a rebate after the passage of the act, but upon shipments of property transported prior to that enactment, is comprehended by its provisions that it shall be unlawful to offer, grant, or give, or to solicit, accept, or receive any rebate in respect to property in interstate commerce transportation, whereby any such property shall be transported at less than the published rates.[72] A contract by which a railroad company, before the passage of the interstate commerce act, discriminates by agreeing to allow a certain shipper a rebate on freight charges, is not valid and enforceable at common law, and is not such a contract as could be impaired by the interstate commerce act prohibiting such discrimination.[73]

Rebate of Part of Rate.—A rebate or concession from a part of a single rate whereby property is transported thereunder at a less rate than the established rate is a concession from the entire rate, and renders all transportation thereunder illegal.[74]

§ 4090. Criminal Liability.—See elsewhere.[75]

68. Particular instances.—United States *v.* Milwaukee, etc., Trans. Co., 145 Fed. 1007.

69. United States *v.* Milwaukee, etc., Trans. Co., 145 Fed. 1007.

Lease of premises to shipper.—A contract by which a railroad company leased premises to a shipper for less than their rental value, as a means of granting to the lessee a rebate or concession from its published rates, held invalid, under Interstate Commerce Act, § 3, and Elkins Act, § 1, and also under 1 Gen. Code Ohio, § 505 et seq. Cleveland, etc., R. Co. *v.* Hirsch, 204 Fed. 849, 123 C. C. A. 145.

70. Effect of granting rebate.—Merchants', etc., Storage Co. *v.* Insurance Co., 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming Insurance Co. *v.* Delaware Mut. Safety Ins. Co., 91 Tenn. 537, 19 S. W. 755.

71. Contract made before act took effect.—New York, etc., R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

72. Judgment, United States *v.* New York, etc., R. Co., 146 Fed. 298, affirmed in 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309.

73. Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

74. Rebate of part of rate.—Armour Packing Co. *v.* United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A., N. S., 400.

75. Criminal liability.—See post, "Rebates," § 4222.

§ 4091. Payment of Charges.—A common carrier can under the common law demand the prepayment of charges for freight of one and give credit to another, and such right is not made unlawful by the Interstate Commerce Act.[76] But a railroad company practices discrimination in respect to transportation, in violation of the Interstate Commerce Act, by systematically extending credit for freight charges to one interstate shipper, while exacting and collecting such charges from other shippers under substantially similar circumstances and conditions.[77] Plaintiff, a corporation, was engaged in the general produce business with offices in different places in two states. Defendant had stations at the towns in those states and in adjoining states. It was defendant's custom for the terminal carrier to advance charges of connecting lines upon freight consigned to parties at those stations, and to deliver the freight to consignees, and to receive freight and deliver it to consignees, and to hold the bills until the correctness of the charges had been adjusted. From a bad motive defendant, after notice, refused to advance charges to connecting lines and transport freight consigned to plaintiff unless the charges were prepaid, while it gave credit to other consignees similarly situated. The plaintiff is subjected to undue or unreasonable prejudice or disadvantage within the Interstate Commerce Act.[78]

Payment in Advertising.—The acceptance of advertising by a carrier, in lieu of money in payment of interstate transportation furnished to the publisher, his employees and the immediate members of his and their families, violates the provisions of the Interstate Commerce Act as amended prohibiting the furnishing of interstate transportation for a less or different compensation than that specified in the carrier's published rates.[79]

§ 4092. Demurrage Charges.—A demurrage or car service charge, made by an interstate railroad company for the time during which cars loaded with hay are left standing on its tracks at a suburban station in a city after the expiration of the time given for unloading, is not discriminative, because at another station which is the terminal of the road in the city, a hay shed is provided into which hay is unloaded at the request of a consignee to the extent of its capacity, and where it is stored at a somewhat less rate, the charge being the same at the two places where hay is left in the car.[80] The provisions of the Interstate Commerce Act, requiring rates for the transportation and for the "receiving, delivering, storage or handling" of property by an interstate carrier to be reasonable, and prohibiting discrimination, are sufficiently broad to cover demurrage charges.[81]

76. **Payment of charges.**—Gamble-Robinson Comm. Co. *v.* Chicago, etc., R. Co., 168 Fed. 161.

An interstate carrier does not subject a consignee to an unreasonable disadvantage under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) § 3, by exacting after due notice the prepayment of charges while it does not require such charges to be paid in advance on freight consigned to others similarly situated. Gamble-Robinson Comm. Co. *v.* Chicago, etc., R. Co., 168 Fed. 161.

77. United States *v.* Hocking Valley R. Co., 194 Fed. 234.

Giving of credit for freight charges pursuant to contract antedating the shipments to one shipper, while others under similar circumstances were denied such privilege, held a concession or discrimination in respect to transportation within the Elkins Act as amended by Act June 29, 1906. Hocking Valley R. Co. *v.* United States, 210 Fed. 735; Sunday Creek Co. *v.* United States, 210 Fed. 747.

Extension to one shipper of credit for freight charges not given to others under similar circumstances held unlawful under Elkins Act as amended by Act June 29, 1906, though the other shippers, not knowing of the discrimination, had not demanded equal treatment. Hocking Valley R. Co. *v.* United States, 210 Fed. 735.

78. Gamble-Robinson Comm. Co. *v.* Chicago, etc., R. Co., 168 Fed. 161.

79. **Payment in advertising.**—Illinois Cent. R. Co. *v.* Holman (Miss.), 64 So. 7.

80. **Demurrage charges.**—Michie *v.* New York, etc., R. Co., 151 Fed. 694.

81. Act Feb. 4, 1887, c. 104, §§ 1, 3, 24 Stat. 379, 380 [U. S. Comp. St. 1901, pp. 3154, 3155]; Michie *v.* New York, etc., R. Co., 151 Fed. 694.

§ 4093. Purchase and Sale of Goods.—An interstate carrier, not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal, violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.[82]

§ 4094. Justified Discrimination.—An unlawful discrimination in rates is not justified because the rate charged is the statutory local rate, and the transportation is over a railroad wholly within the state nor by the fact that the railroad is a small and weak road, whose business is unimportant as compared with other roads.[83]

To Safeguard Public.—It is settled law relative to questions of this kind that discriminations or preferences in rates may be justified to safeguard the interest of the public. It follows that the contrary proposition is true—that they may not be justified when they injure the interest of the public.[84]

To Overcome Natural Advantage of Particular Locality.—Under the Interstate Commerce Act, forbidding carriers to give any unreasonable preference or advantage to any shipper or locality, a carrier cannot lawfully make rates so as to overcome the natural advantage of one locality over another, or so as to build up one place at the expense of another.[85]

To Promote Carrier's Own Interest.—Conceding that a railroad company may, to a reasonable extent, so adjust its rates as to promote its own interest by favoring and building up a seaport on its own line at the expense of another on a rival road, it can not, with that purpose, adopt rates unreasonable in themselves, nor which are unduly preferential to its own port and unduly prejudicial to the other or to the public; and rates upon products shipped from points on its line where there is no competition, which are so grossly discriminating as to be prohibitory of shipments to the latter place, which affords the better market, adopted for the purpose of compelling the shipment of such products in the opposite direction to its own port, are unlawful, not only as unduly discriminating between

82. **Purchase and sale of goods.**—Decree, 128 Fed. 59, modified in New York, etc., R. Co. *v.* Interstate Commerce Comm., 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

83. **Justified discrimination.**—The A. Railway connected at T. with the C. Railway and the W. Railway. Both the A. and C. Railways were engaged in interstate commerce, reaching by their own lines and connections the same regions. By the W. Railway, they both made connections with other important railways, and with routes of water transportation. For a considerable time, the W. Railway charged the same rate for transportation over its line of freight received from or destined to either of the other railways; but in December, 1895, it withdrew these rates as to the A. Railway, and thereafter charged for transportation, over its line, of freight received from or destined to the A. Railway, the full local rate of freight allowed by statute, which was considerably higher than the rate previously charged to both railways, and still charged to the C. Railway. There had been no change of conditions, and the service rendered to both railways continued to be substantially the same. Held, that the charge of such increased rate was an unlawful discrimination, not justified because the rate charged was the statutory local rate, and the transportation over the W. Railway was wholly within the state, nor by the facts that the A. Railway was a small and weak road, whose business was unimportant as compared with that of the C. Railway, or that there was no direct connection between the tracks of the A. and W. roads, the tracks of the C. Railway being used for switching, it not appearing that the C. Railway objected to such use of its tracks; and, accordingly, that the W. Railway should be enjoined from exacting more from the A. Railway than from the C. Railway, for similar services. Augusta, etc., R. Co. *v.* Wrightsville, etc., R. Co., 74 Fed. 522.

84. **To safeguard public.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

85. **To overcome natural advantage of particular locality.**—State *v.* Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A., N. S., 93, rehearing denied in 85 N. E. 966.

the two cities, but as making a discrimination injurious to the public.[86]

By Length of Time.—The length of time a discriminating rate has been maintained can not justify it. It was because time had not corrected abuses of discrimination that the interstate commerce act was passed.[87]

By Competition.—See elsewhere.[88]

§ 4095. Effect of Discrimination.—Effect on Contract of Shipment.—There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of an allowance, special rates, rebates, or drawbacks, if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.[89] Such a construction of the act would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void, and could not be enforced; but the shipper could nevertheless recover for loss of his freight through the carrier's negligence and, incidentally, of carrier's insurance.[90]

On Action for Damages for Delay.—If a contract for the shipment of stock was void as discriminating in favor of the shipper by giving him a rate which was too low in violation of Interstate Commerce Act, so that the carrier would be entitled to collect the correct rate, it would not prevent the shipper from recovering damages for delay in shipment where he had no actual knowledge that the rate was unlawful.[91]

§ 4096. Remedies.—When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another.[92] That the act to regulate commerce was intended to afford an

86. **To promote carrier's own interest.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

87. **By length of time.**—East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 39 C. C. A. 413, 99 Fed. 52, reversed on another point in 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516.

88. **By competition.**—See ante, "Competition," § 4078; "Reduced Rates," § 4086.

89. **Effect of discrimination.**—The principles laid down in Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844, fall far short of establishing that the alleged allowance of rebate to Jones Brothers & Company would render the railroad company's bills of lading invalid and defeat the right of the marine insurance companies, who had paid the losses, to subrogation against the railroad company on bills of lading issued to the owners or consignees of the cotton, who are not shown to have known of, or consented to, the railroad company's agent giving such rebates. Merchants', etc., Storage Co. *v.* Insurance Co., 151 U. S. 368, 38 L. Ed. 195, 14 S. Ct. 367.

"The Interstate Commerce Act made the agreement as to the special rates, rebates, or drawbacks void, but did not otherwise invalidate the contract of affreightment." Kirby *v.* Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252.

90. Merchants', etc., Storage Co. *v.* Insurance Co., 151 U. S. 368, 38 L. Ed. 195, 14 S. Ct. 367.

91. **On action for damages for delay.**—Kirby *v.* Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252.

"It seems clear to us that the shipper entered into this contract in good faith and without actual knowledge of its claimed unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the company may be permitted to collect the proper rate, still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned. This view finds support in the case of Merchants', etc., Storage Co. *v.* Insurance Co., 151 U. S. 368, 38 L. Ed. 195, 14 S. Ct. 367." Kirby *v.* Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252.

92. **Remedies.**—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075, citing Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act.[93] And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.[94] A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the interstate commerce commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.[95] An order of the interstate commerce commission requiring to desist from giving flour milled in transit at interior points a lower rate for export than was imposed upon grain brought from interior points by a milling company to a seaport, and there ground into flour and other grain products and exported, is within the powers of the commission and valid on a motion for a preliminary injunction to restrain its enforcement.[96]

Power of Commission as to Intrastate Rates.—The authority of the interstate commerce commission to remove discriminations against interstate traffic includes power to control intrastate rates by a carrier under state authority, necessary to remove resulting unjust discrimination against interstate commerce, notwithstanding the proviso in § 1 of the Act of Feb. 4, 1887, that its provisions shall not apply to purely intrastate traffic.[97]

Necessity for Payment of Freight.—To entitle a shipper to maintain an action to recover damages for being unjustly discriminated against in rates, it is not necessary that he should have paid the freight charged under protest.[98] A shipper may maintain an action at law under the Interstate Commerce Act to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper by permitting him to keep cars on its terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff.[99]

By Prescribing Different Rate.—One of the primary purposes of the interstate commerce law is to remove discriminations, and under the broad powers given the interstate commerce commission to execute and enforce the provisions of this act and to make an order that the carrier shall cease and desist from such violation to the extent to which the commission find the same to exist[1] where it has found that discrimination exists against a shipper or commodity, it may prescribe a relative rate, as that the charge shall be the same as that for a similar service to other shippers or on another similar commodity, instead of fixing maximum rate, which would enable the carrier to continue the discrimination by reducing the rate to other shippers or on the other commodity.[2]

93. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

94. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; S. C., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

95. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

96. New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

97. Power of commission as to intrastate rates.—Houston, etc., R. Co. *v.* United States, 234 U. S. 342, 34 S. Ct. 833.

98. Necessity for payment of freight.—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403; Pennsylvania R. Co. *v.* International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1.

99. Lyne *v.* Delaware, etc., R. Co., 170 Fed. 847.

1. By prescribing different rate.—(Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3162], and § 15, as amended by Hepburn Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]).

2. New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

Sufficiency of Petition.—A petition to recover under § 2 of the interstate commerce act is sufficient if it states facts which show the circumstances and conditions under which the defendant had charged plaintiff a given rate for transportation of freight, and alleges, in the language of the act, that for like services, under substantially similar circumstances and conditions, the defendant had charged another a less given rate, without alleging facts which show that the services were alike, or rendered under substantially similar circumstances and conditions, or that plaintiff was charged more than the schedule rate.[3] The schedule of rates required to be established, published, and filed with the commissioners by a common carrier, by the interstate commerce act, is, prima facie, the criterion in determining whether or not a given charge is unreasonable; and a petition to recover, under § 1 of such act, which fails to allege either that the defendant had no published schedule of rates, or that it charged plaintiff in excess of rates thereby fixed, is insufficient.[4]

Sufficiency of Order.—An order of the interstate commerce commission designed to remove a discrimination in rates is not invalid or inoperative because it does not go as far as it might, and correct other discriminations.[5] The provision of the interstate commerce law that, where the commission finds that a rate or any practices affecting rates are unjustly discriminating, it shall determine and prescribe what will be the just and reasonable rate or rates; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed,[6] does not require the commission, on finding that a certain rate is discriminatory, to prescribe in detail regulations and practices which are not necessary to remove the discrimination, but which may become necessary for the protection of the carrier, and it may properly authorize or permit the carrier to make such regulations if necessary.[7]

Provision in Order for Benefit of Carrier.—The interstate commerce commission in inserting in an order commanding carriers to desist from a discrimination a condition for the carriers' benefit acted within its province, even though the subject-matter of the condition be regarded as something subsequent to transportation.[8]

Damages.—In an action to recover damages for discrimination in rates, plaintiff is entitled only to recover for such discrimination as gave his competitor an unfair advantage in the same market.[9] The measure of damages is the difference between the amount paid by plaintiff and the amount it would have paid at the lowest rate charged on any other shipments carried under substantially the same circumstances and conditions during the same time, and not the difference between the rates paid by it and the average rate paid by any other shipper.[10] In an action to recover damages for unlawful discrimination in rates on coal shipped between plaintiff and other shippers, where the statement of claim alleged damages in certain sums per ton on shipments from its different mines, its recovery is limited to such sums.[11]

§§ 4097-4110. Long and Short Haul—§ 4097. Statutory Provision.—Section 4 of the interstate commerce act provides that it shall be unlawful for

3. **Sufficiency of petition.**—Kinnavey *v.* Terminal R. Ass'n, 81 Fed. 802.

4. Kinnavey *v.* Terminal R. Ass'n, 81 Fed. 802.

5. **Sufficiency of order.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

6 Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]).

7. New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

8. **Provision in order for benefit of carrier.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

9. **Damages.**—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403.

10. Pennsylvania R. Co. *v.* International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1.

11. Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403, dismissed for want of jurisdiction 183 Fed. 908.

any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of the act to charge and receive as great compensation for a shorter as for a longer distance.[12] A proviso in this section provides that upon application to the interstate commerce commission, any common carrier subject to the provisions of the act may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and that the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act.[13]

English Traffic Act.—The English traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act.[14]

§ 4098. Similar Circumstances and Conditions.—Substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line.[15] In order to entitle a person discriminated against to recover from a carrier it must appear that the higher rate which he has been charged for the shorter distance was for like services and under similar circumstances.[16] It seems that, where the circumstances and conditions are dissimilar, there is no prohibition; where the circumstances and conditions are similar, the prohibition attaches; and that, where it is difficult to point out clearly the circumstance or condition which produces dissimilarity, the doubt

12. **Long and short haul.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

The imperative enforcement of Act Feb. 4, 1887, § 4, as amended by Act June 18, 1910, §8, forbidding carriers to charge a lesser rate for a longer than for a shorter haul, when the interstate commerce commission has refused an application for relief from such long and short haul clause, does not render the statute repugnant to Const. Amend. 5. United States *v.* Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986; United States *v.* Union Pac. R. Co., 234 U. S. 495, 34 S. Ct 995.

13. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

14. **English Traffic Act.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

15. **Similar circumstances.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666, where it is said that "the same observations (applicable to the second and third sections) are applicable to the fourth section, or the so-called long and short haul provision." Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

16. Junod *v.* Chicago, etc., R. Co., 47 Fed. 290.

should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar.[17]

Meaning of Terms as Used in Other Sections of Act.—The purpose of the second section of the act is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and it was there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes. This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what is held is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which is the fact of competition when it affects rates.[18]

Sufficient Dissimilarity.—Where the circumstances and conditions under which a lower rate is made for a long than for a short haul are substantially dissimilar, § 4 of the interstate commerce law does not apply, and the courts can not enter into the question whether the dissimilarity is sufficient to justify the difference in rates.[19] But § 4 of the interstate commerce law is to be applied upon a scale of comparison between the dissimilarity of conditions and the disparity of rates, and a greater charge for a shorter than for a longer haul may be enjoined, though there may be dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discriminating rate.[20] In an action by a carrier to recover a greater rate for a shorter than for a longer haul, an answer alleging that there existed no reason, by way of the peculiar geographical position, competition, or trade or other conditions why a greater charge should be made for the shorter haul, showed that the rate was illegal and not recoverable.[21]

Question of Fact.—Whether, in particular instances, the circumstances and conditions of the carriage have been substantially similar or otherwise, is a question of fact depending on the matters proved in each case.[22] It has been forcibly argued that, in the present case, the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the circuit court of appeals, and there is nothing in the record to make it the court's duty to draw a different conclusion.[23] The inquiry

17. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 862.

18. **Meaning of terms as used in other sections of act.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822.

19. **Sufficient dissimilarity.**—Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

20. Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

21. Great Northern R. Co. *v.* Loonan Lumber Co., 25 S. Dak. 155, 125 N. W. 644.

22. **Question of fact.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

Whether the "circumstances and conditions" under which a railroad company has charged a greater compensation for a shorter than for a longer haul over the same line were "substantially similar," within the meaning of the fourth section of the interstate commerce law, is a question for the jury. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

23. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223.

being essentially one of fact, the attempt to make competition an inference of law and dominating against the findings of the commission and their affirmance by the circuit court can not prevail.[24]

Admissions by Carrier.—Where a railroad company groups together two cities as stations to which freight rates from eastern cities may properly be made the same, it is a conclusive admission that transportation from the east to the warehouses of the company at the two places is under substantially similar conditions.[25]

Actual Similarity.—Where the carrier fixes an equality of compensation, in the aggregate, for two places some distance apart, on the same line, there must be an equality in fact as well as in form; but equality in form will be accepted as equality in fact, until it is shown to be colorable by him who challenges it.[26]

Determining Similar Circumstances and Conditions.—The omission of the substantially similar circumstances and conditions clause from the long and short haul provisions of § 8 of Act of June 18, 1910, takes from carriers their power to determine whether conditions are substantially dissimilar so as to justify the charge of a lesser rate for a longer than for a shorter haul, and vests in the interstate commerce commission the power to determine, in view of the preference and discrimination clauses of § 2 and 3 of the Act of Feb. 4, 1887, whether a petitioning carrier shall be relieved from the operation of the long and short haul clause.[27]

§ 4099. Competition.—Competition is a factor to be considered in determining whether shipments of freight to different points on the same line of railroad are made under substantially similar circumstances and conditions, so as to come within the long and short haul provision of the fourth section of the act to regulate commerce;[28] and if such competition is real and controlling as to the

24. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

25. Admissions by carrier.—Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 57 Fed. 1005.

26. Actual similarity.—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

27. Determining similar circumstances and conditions.—United States *v.* Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986; United States *v.* Union Pac. R. Co., 234 U. S. 495, 34 S. Ct. 995.

28. Competition.—Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446; Interstate Commerce Comm. *v.* Clyde Steamship Co., 21 S. Ct. 512, 181 U. S. 29, 45 L. Ed. 729, modifying decree 93 Fed. 83, 35 C. C. A. 217; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719, reversing decree, 99 Fed. 52, 39 C. C. A. 413; Louisville, etc., R. Co. *v.* Behlmer, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309; Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186; Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741, judgment affirmed in 122 Fed. 800, 60 C. C. A. 540; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414; Brewer *v.* Central, etc., R. Co., 84 Fed. 258.

In determining what are substantially dissimilar circumstances and conditions, such as will justify a greater charge for a shorter than for a longer haul, under the fourth section, the fact of competition between carriers which affects rates is to be taken into consideration. Judgment, 21 C. C. A. 51, 74 Fed. 715, affirmed in Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414.

A greater charge for a shorter than for a longer haul is not unlawful, when the rate for the shorter distance is not in itself unreasonable, and the more distant point is a commercial center and large distributing point, where strong competition exists both by land and water, none of which conditions are present at the other point. Brewer *v.* Central, etc., R. Co., 84 Fed. 258; Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

Where a lower rate charged for the carriage of freight to a longer-distance point results solely from the controlling influence of competition at such point, which renders the circumstances and conditions substantially dissimilar from those existing at an intermediate point, so as to exclude the application to the case of the fourth section of the act (24 Stat. 379), and such competitive rate is not so low as to be unremunerative to the carrier, it can not afford basis for a claim of undue and unreasonable preference or advantage in favor of the competitive

rate charged to one point, while it does not affect rates to another, it creates substantially different circumstances and conditions, as between the two, and such section has no application.[29] Competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as must have been in the contemplation of congress in the passage of the act to regulate commerce.[30] While a carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be not artificial or merely conjectural, but material and substantial thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.[31]

point, or of unreasonable prejudice or disadvantage against the intermediate point, within the inhibition of the third section. Interstate Commerce Comm. *v.* Western, etc., R. Co., 93 Fed. 83, 35 C. C. A. 217.

"Freight carried to or from a competitive point is always carried under substantially dissimilar circumstances and conditions from that carried to or from noncompetitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made to or from a noncompetitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of a corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust." "Competition may not be the only circumstance that makes the condition under which a long and short haul are performed substantially dissimilar, but certainly it is the most obvious and effective one, and must have been in contemplation of congress in the passage of the act to regulate commerce." Case quoted: Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

"That competition, the life of trade, cuts an important figure in the condition and circumstances attendant upon transportation of passengers and property, can not be well overlooked nor denied. Nor can it be well denied that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions." Case quoted: Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 862. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

29. Interstate Commerce Comm. *v.* Western, etc., R. Co., 35 C. C. A. 217, 93 Fed. 83.

Transportation of hay between Memphis, Tenn., and Charleston, S. C., between which points there is competitive transportation by rail, by water and rail, and by water alone, is not performed under substantially similar conditions with transportation between Memphis and an interior town in South Carolina, which is reached only by one railroad. Behlmer *v.* Louisville, etc., R. Co., 71 Fed. 835.

Los Angeles, Cal., is a competing point in certain kinds of freight, between several transcontinental railway lines, direct, or by water, via Vancouver and San Francisco, also by ocean freights; and a through rate on the same kind of freight, lower than that to San Bernardino, an intermediate noncompetitive point, 60 miles from Los Angeles, on one of the competing rail lines, is not prohibited by the act, since the circumstances and conditions are substantially dissimilar. Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 50 Fed. 295.

30. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516.

31. Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

Must Be Actual and Material.—The mere fact of competition, without regard to its character or extent, does not necessarily relieve the carrier from the provisions of these sections.[32] Competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided for by § 4 of the Interstate Commerce Act, and may justify a lesser charge for the longer than the shorter haul.[33] The substantial dissimilarity of circumstances and conditions provided for by the act to regulate commerce, depends, as has been repeatedly held, upon a real and substantial competition at a particular point affecting rates, not upon the mere possibility of the arising of such competition.[34] What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affects transportation and rates might under the statute be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration.[35]

Under Construction of Act by Commission.—The settled construction of the interstate commerce act allows carriers to charge the lesser rate for the longer than for the shorter distance, if at the further point the lesser rate is justified by a substantial dissimilarity of circumstances and conditions there prevailing, consequent upon real competition.[36]

What Are Competing Carriers.—This rule applies to competition between rival carriers, both subject to the interstate commerce law.[37] Competition between rival railroads, and not merely between rail and water carriers, is a factor to be considered in determining the substantial similarity or dissimilarity of circumstances and conditions under the fourth section of the interstate commerce law.[38] Competition of river lines of transportation is a factor to be considered when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the interstate commerce act.[39] The fact of competition at Nashville by the Cumberland River, in addition to that between railroads, does not justify the making of freight rates to Chattanooga ranging from twenty-five to seventy-four per centum higher on the different classes of freight than those charged on similar classes to Nashville, over the same route, which is one hundred and fifty-one miles beyond Chattanooga. Such rates are both an unlawful discrimination, under § 3, and a violation of § 4; and an order of the

32. Must be actual and material.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

33. Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741, judgment affirmed in 60 C. C. A. 540, 122 Fed. 800.

34. The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the Interstate Commerce Act [U. S. Comp. St. 1901, p. 3154] against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. Decree, Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 108 Fed. 988, 46 C. C. A. 685, affirmed in 23 S. Ct. 687, 190 U. S. 273, 47 L. Ed. 1047.

35. Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

36. Under construction of act by commission.—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

37. What are competing carriers.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

38. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45, followed in Brewer *v.* Central, etc., R. Co., 84 Fed. 258.

39. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

interstate commerce commission, forbidding higher charges to Chattanooga than to Nashville, will be enforced.[40]

Where Charge Unjust or Unreasonable.—The right of a carrier to take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions is subject to the requirement that all rates shall be just and reasonable and that competition shall not be artificial or merely conjectural, but material and substantial.[41] Where a lower rate charged for the carriage of freight to a longer-distance point results solely from the controlling influence of competition at such point, which renders the circumstances and conditions substantially dissimilar from those existing at an intermediate point, so as to exclude the application to the case of the fourth section of the act, and such competitive rate is not so low as to be unremunerative to the carrier, it can not afford basis for a claim of undue and unreasonable preference or advantage in favor of the competitive point, or of unreasonable prejudice or disadvantage against the intermediate point, within the inhibition of the third section.[42]

Where Preference or Discrimination Is Produced.—While a carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition.[43] But where in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the fourth section of the act arises, it may justify a carrier on his own motion in charging a lesser rate for a longer haul to the competitive point than is asked for the shorter haul to the noncompetitive point, although in so doing a preference in favor of the competitive point arises or a discrimination against the noncompetitive point is produced. A preference or discrimination so arising or produced is not an undue preference or unjust discrimination prohibited by the third section.[44]

Where Distant Point Is Commercial Center.—A greater charge for a shorter than for a longer haul is not unlawful, when the rate for the shorter distance is not in itself unreasonable, and the more distant point is a commercial center and large distributing point, where strong competition exists both by land and water, none of which conditions are present at the other point.[45]

Presumptions.—The effect of the competition of rival lines in justifying rates is, in every case, a question of fact, which is not to be settled by any presumptions, either prima facie or conclusive. The question is to be tried in the courts, under the same rules as to presumptions, burden of proof, and the like, whether or not the carrier has applied to the commission, in the first instance, for permission to charge less for a longer than for a shorter haul.[46]

Competition with Foreign Carriers.—The interstate commerce commission holds that where railroads which are subject to the act to regulate commerce

40. Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

41. **Where charge unjust or unreasonable.**—Louisville, etc., R. Co. *v.* Behlmer, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

42. Interstate Commerce Comm. *v.* Western, etc., R. Co., 35 C. C. A. 217, 93 Fed. 83.

43. **Where preference or discrimination is produced.**—Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

44. East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516, holding that a contrary rule is not sustained by the opinions in Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209, followed in Interstate Commerce Comm. *v.* Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729, 21 S. Ct. 512.

45. **Where distant point is commercial center.**—Brewer *v.* Central, etc., R. Co., 84 Fed. 258; Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

46. **Presumptions.**—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

compete with Canadian or other railroads, which are not subject to the act, such competition constitutes dissimilar circumstances and conditions; but that competition between two railroads, both of which are subject to the act, does not constitute dissimilar circumstances and conditions. The commission, however, also holds that it has no authority to raise railroad rates. If a railroad, which is subject to the act, is met with competition from other railroads, which are also subject to the act, and the commission has no authority to require such other railroads to increase their rates, even when the competition is ruinous, there is no practical difference between such a case and the case of competition with railroads not subject to the act. If the general conclusion is correct that competition will constitute dissimilar circumstances and conditions, in the sense of which that term is used in the act, there is no good reason for drawing the line where it has been drawn by the commission. On the contrary, competition of carrier with carrier, both subject to the act, is as much within the terms of § 4 as competition with a carrier not subject to the act.[47]

Competition between Markets.—Competition of market with market may not be so direct in its effect as competition of carrier with carrier; but when it does exist it is influential, and perhaps as effective and controlling, with carriers, as to their rates, as other competition. It may therefore constitute a part of the circumstances and conditions which a carrier can consider in fixing rates for the transportation of goods.[48]

§ 4100. Shipments over Same Line.—There was a clear distinction between the term "railroad," as used in the other parts of the act, and the term "line," as used in the fourth section. The use of the word "line" is significant. Two carriers may use the same "road," but each has its separate "line." One railroad company may lease trackage rights to another, but the joint use of the same track does not create the same "line" so as to compel either company to graduate its tariff by that of the other.[49] There must be a common arrangement between connecting carriers, such as the making of a joint tariff, before a new "line" can be formed; and the "line" so formed under the joint tariff of connecting companies is one which is separate and independent from that of either of the connecting carriers.[50] No power exists at common law, and none is given by the

47. **Competition with foreign carriers.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

48. **Competition between markets.**—The fact that the rate from Cincinnati to Social Circle is greater than the joint tariff rate from Cincinnati to Augusta, constitutes no "undue or unreasonable prejudice or disadvantage" against Social Circle, and no "undue or unreasonable preference or advantage" in favor of Augusta. Railway companies are only bound to give the same terms, to all persons alike, under the same conditions and circumstances; and any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge. Augusta and Social Circle are not "under the same conditions and circumstances." Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

49. **Shipments over same line.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925; Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas. 18.

50. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

There is no "common arrangement" or "joint tariff" between the Georgia Railroad Company and its connections as to traffic to its local stations. On the contrary, there is an express refusal by that company to make any "common arrangement" whatever in regard to that traffics. The Georgia Railroad Company demands and collects its full local rates on all shipments to its local stations. Whether shipments come from points west of Atlanta, or originate at Atlanta, the rate is precisely the same, and as to the Georgia Railroad the carriage is the same. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company have formed "a new and independent line," by the adoption of a joint through tariff from Cincinnati to Augusta; but such "new line" is distinct and separate from that of either of the railroads named. Case cited: Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas.

act to regulate commerce, to compel connecting railroad companies to unite in a joint tariff, or to enter into a through-rate arrangement for transportation, unless they desire to do so. They can not be compelled to abandon the full control of their separate roads, and neither of them is bound to adjust its own local tariff to suit the other.[51]

§ 4101. Through and Local Rates.—The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipments over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that such rates are discriminative.[52] The portion of a through rate received by one of the companies party thereto may be less than its local rate. All that is necessary is that the total through rate shall be greater than the local rate, so as not to violate in this respect the long and short haul clause.[53] A petition alleging that a rate of tariff between two points on a railroad, established by the company as a part of what purported to be a joint rate on through shipments to certain points on connecting lines, was less than the local rate charged for a shorter distance, does not show an unlawful discrimination, where the entire through rate is not shown, and it is not sufficiently alleged that any shipments were made at the lower rate except such as were billed through under the joint rate.[54] Where two connecting carriers unite in a joint

18. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta. The Georgia Railroad Company charges its full local rate from Atlanta to Social Circle. The rate from Cincinnati to Social Circle is arrived at by adding to the rate from Cincinnati to Atlanta the full local rate of the Georgia Railroad from Atlanta to Social Circle. The rate thus made from Cincinnati to Social Circle is greater than the joint through tariff rate from Cincinnati to Augusta. Held no violation of the "long and short haul" clause of the act to regulate commerce, because the two rates are not made "over the same line," as the rate to Augusta is made by the "line" formed by a "common arrangement" between three companies for a joint tariff between those points; and the rate to Social Circle is made greater than the rate to Augusta by the Georgia Railroad Company demanding its full local rate on its own road, which road is separate and independent from the "line" made by said three companies. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

51. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925. Case quoted: Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas. 18. See also, Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289; Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 559.

52. Through and local rates.—Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

53. Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; United States *v.* Mellen, 53 Fed. 229, following Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas. 18.

The long and short haul clause of the Interstate Commerce Act (§ 4) does not apply to a case where the short haul rate is a combination of the local rates of two connecting lines, and the lower long haul rate is a joint rate made by the two lines acting together. United States *v.* Mellen, 53 Fed. 229, following Chicago, etc., R. Co. *v.* Osborne, 52 Fed. 912, 3 C. C. A. 347, 53 Am. & Eng. R. Cas. 18.

Several independent, connecting railroads, forming a line from Memphis, Tenn., to Charleston, S. C., agreed upon a charge of 19 cents for certain freight between those points, which sum was to be divided between them in certain proportions. Upon the same freight, from Memphis to S., a point in South Carolina, but nearer Memphis, 8 cents was charged, the excess over the through rate all going, however, to the road which performed the transportation in South Carolina, and the other roads receiving only their proportion of the through rate. Held, that such charge was not a violation, on the part of such other roads, of the long and short haul clause of the Interstate Commerce Act. Behlmer *v.* Louisville, etc., R. Co., 71 Fed. 835.

54. A joint tariff rate established by two connecting railroads on through shipments does not constitute a standard by which the reasonableness of local rates on either road are to be determined, nor does the fact that the part of such joint rate received by one of the roads is less than its local rate charged for a shorter distance render it subject to the penalty for violation of the long and short haul

tariff, they form practically a new and independent line, and that the joint rate established over such line may be made less than the sum of the local rates, or even less than the local rate of either company over that part of its road constituting a part of the joint line, without violating the long and short haul clause found in the fourth section of the interstate commerce law.[55] The foregoing proposition is limited by the proviso that, under the first section of the Interstate Commerce Act, all rates, whether local or joint, must be reasonable and unjust. But the contention that a local rate between two points on the same road is necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies, is overruled.[56] The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipments over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that such rates are discriminative.[57]

Rate Fixed by Joint Agreement.—A railroad company can not justify a charge of a greater compensation for a shorter than for a longer haul, under substantially similar conditions, contrary to the interstate commerce law on the ground that the rate is fixed by a joint tariff agreement with other roads.[58]

Rates Are Independent.—Where two railroad companies owing connecting lines of road unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates the act which forbids greater compensation for a shorter than for a longer haul.[59]

Shipment from Foreign Country.—Where a through freight rate included a rate for foreign ocean transportation, the fact that the proportion of the through contract rate allowed for the carriage from the port of entry to destination was less than the rate scheduled for freight originating at such port of entry and carried to the same destination did not render the lesser rate necessarily unlawful as a violation of the Interstate Commerce Act.[60]

clause of § 4 of the Interstate Commerce Act. Judgment, 11 C. C. A. 489, 63 Fed. 903, affirmed in Parsons *v.* Chicago, etc., R. Co., 17 S. Ct. 887, 167 U. S. 447, 42 L. Ed. 231.

55. Parsons *v.* Chicago, etc., R. Co., 11 C. C. A. 489, 63 Fed. 903; Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912, 53 Am. & Eng. R. Cas. 18.

56. Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

57. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

58. Rate fixed by joint agreement.—Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

The interstate commerce law (Act Cong. Feb. 1887) provides (§ 4) that a common carrier shall not charge a greater compensation for the transportation of a like kind of property, under substantially similar circumstances, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance. Held that, in an action for breach of this section, the fact that the rate for the longer distance was established jointly between defendant and connecting railroads does not exempt defendant from liability. Junod *v.* Chicago, etc., R. Co., 47 Fed. 290.

59. Rates are independent.—Chicago etc., R. Co. *v.* Osborne, 52 Fed. 912, 3 C. C. A. 347, 53 Am. & Eng. R. Cas. 18, reversing 48 Fed. 49; Tozer *v.* United States, 52 Fed. 917.

60. Shipment from foreign country.—Fisher *v.* Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.

Defendant carrier published a through rate on canned goods from Stavanger, Norway, to Seattle, of 85 cents per 100. The published schedule also contained a statement that such rates would be protected only when the ocean rate procurable was such as to allow the rail carrier from the Atlantic ports a minimum proportion of 75 cents per 100, and if the difference between the through published rate and the rail line's minimum proportion of 75 cents per 100 was less than the ocean proportion, the through rate would be the ocean proportion plus 75 cents per 100. Defendant made a contract rate for the shipment of canned goods for plaintiff between such ports in accordance with such published rate, but when the shipment was made the best ocean rate

§ 4102. Group Rates.—It is concededly not an infringement of the long and short haul clause for a carrier engaged in interstate commerce, by a so-called "group rate," to charge the same for like kinds of freight to and from different points on its line from and to points outside the state.[61] The railroad companies could consider the competitive rates prevailing at a competitive point and use those rates as a basis for the charges to points within the competitive area in order thereby to give a lower rate to such points than they otherwise would have enjoyed. It was not true that because the competitive rate to the competitive point was not unduly low, therefore any higher charge to an intermediate point, for the shorter distance, was unreasonable.[62] A violation of the long and short haul clause can not be justified because the result comes about by reason of the selection of different points on the line as a basis for computing rates, so as to charge one rate over one part of the road and a different rate over another part.[63]

§ 4103. Cartage Charges.—The fourth section of the interstate commerce law, prohibiting a greater charge for a shorter than for a longer haul over the same line in the same direction, in respect to railroad transportation, applies only to carriage by rail; and when the property has been discharged from the company's cars at the city of their destination, without any greater charge for the longer haul, the obligations of the company under this section are fulfilled, and it is no violation thereof for the company to then furnish free cartage to the stores or business houses of the consignees.[64] But where a railroad company ships goods from without the state to its station in the more distant of two cities, free cartage by the company to the business section of the city, for delivery to the consignees, is a violation of the long and short haul clause of the Interstate Commerce Act, when the same freight rates are charged to the merchants of a nearer city, through which the road passes to reach the city given free cartage, but

procurable was 38.7 cents per 100 on canned goods, which, added to the carrier's minimum, 75 cents per 100, made the total tariff of $1.137, which defendant claimed the right to charge. Held, that, in the absence of proof by defendant that the conditions attending ocean competition did not justify the contract rate stipulated for, thereby rendering it unlawful, such contract rate was not necessarily in violation of the interstate commerce law, and was therefore enforceable. Fisher *v.* Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.

61. Group rates.—Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

62. The railroad companies had a right to take the lower rate prevailing at Atlanta (a competitive point) as a basis for the charge made to places in territory contiguous to Atlanta, and to ask in addition to the low competitive rate the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at LaGrange obtained at the longer distance places lying between LaGrange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

63. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

64. Free cartage.—Judgment, 21 C. C. A. 103, 74 Fed. 803, affirmed in Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

The prohibition of the fourth section is against a greater compensation for the shorter haul, "in the aggregate," which includes, not only the "rates" and "fares" (for transportation on the rails proper), but also the "charges" (for accessorial services, including cartage). And therefore, where the "aggregate" is the same for both the shorter and the longer haul, the section is not violated, in its very terms, although in the case of the longer haul an additional cartage service is furnished, which is not furnished in the case of the shorter haul. Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 74 Fed. 803, 21 C. C. A. 103.

where such merchants are obliged to cart their goods from the railway station to their storehouses at their own expense; and such free cartage is not justified by the fact that competitors of defendant railroad company have stations at the more distant city, in the business center, thus placing it at a disadvantage; nor by the fact that such city is a much larger place than the nearer city, and that the greater amount of business which the company does at the more distant city enables it to do carting cheaper there than at the nearer city.[65]

§ 4104. Shipment Through Foreign Country.—A railroad ticket from Ft. Worth through El Paso to the City of Mexico, purchased at El Paso by a citizen thereof, at a less price than the regular fare from El Paso to the City of Mexico, is not void as being in violation of the United States interstate commerce act, in that it was purchased for less than others could purchase like transportation for, though the purchaser and the ticket agent had knowledge of the facts.[66]

§ 4105. Interest of General Public.—The interest of the public, especially at the place from which traffic moves and the place to which it is to be delivered, as well as of that of the carrier, must be taken into consideration in determining the right of the carrier to charge, of his own motion, a lesser sum for the longer haul.[67]

§ 4106. Destination of Shipment.—The fact that the freight for the longer distance was billed to some point short of the destination of the shorter haul will not bar plaintiff's recovery, when such freight was intended to be, and was in fact, taken to the destination of the shorter haul.[68]

§ 4107. Consent of Commission to Charge.—When the circumstances and conditions are such as to justify it, a railroad company may charge more for the shorter than for the longer haul without first obtaining leave from the commission.[69] It may, on the contrary, establish such rate in the first instance, and when the same is challenged in the courts, or before the commission, may justify itself by showing a substantial dissimilarity of circumstances and conditions, within the meaning of the act.[70] Such charge is lawful if the circumstances and conditions are not in fact substantially similar, and the carrier may determine the question for himself, subject to a liability for violating the act, if, on investigation, the fact be found against him.[71] Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who were subject to the act to regulate commerce, may produce the dissimilarity of circumstances and conditions provided in the fourth section of the act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the commission.[72] Congress did not intend, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the commission shall authorize them so to do; much less

65. Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 57 Fed. 1005.

66. **Shipment through foreign country.**—Mexican Cent. R. Co. *v.* Goodman (Tex. Civ. App.), 43 S. W. 580.

67. **Interest of general public.**—Louisville, etc., R. Co. *v.* Behlmer, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

68. **Destination of shipment.**—Junod *v.* Chicago, etc., R. Co., 47 Fed. 290.

69. **Consent of commission to charge.**—Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

70. Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 74 Fed. 803, 21 C. C. A. 103.

71. Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 50 Fed. 295.

72. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516; Interstate Commerce Comm. *v.* Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729, 21 S. Ct. 512.

was it the intention of congress that the decision of the commission, if applied to, could not be reviewed by the courts. The provisions of § 16 of the act, which authorize the court "to proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.[73] The provision authorizing the interstate commerce commission in special cases, after investigation, to exempt a carrier from the prohibition against charging a lower rate for a long than for a short haul, is to be construed in harmony with the other provisions of the act, and as not giving the commission an unlimited discretion, but imposing upon it, not merely the right, but the duty, to grant such exemption whenever, on investigation, it shall find that no violation of any section of the act would thereby be involved. As so construed, the section is constitutional.[74]

The dissimilarity of circumstance and condition pointed out by the statute, which relieves from the long and short haul clause, arises from the command of the statute, and not from the assent of the commission; the law, and not the discretion of the commission, determining the rights of the parties. It follows that the construction affixed by the commission to the statute upon which its entire action was predicated was wrong.[75]

Where There Is Competition.—Where, in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the fourth section of the act arises, it may justify a carrier on his own motion in charging a lesser rate for a longer haul to the competitive point than is asked for the shorter haul to the non-competitive point, although in so doing a preference in favor of the competitive point arises or a discrimination against the non-competitive point is produced. A preference or discrimination so arising or produced is not an undue preference or unjust discrimination prohibited by the third section.[76]

Revision by Commission.—But it does not mean that the action of the carriers, in fixing and adjusting the rates, where dissimilar circumstances and conditions are shown, is not subject to revision by the commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences.[77] A railroad company being subject, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows that it was within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a

73. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

74. Atchison, etc., R. Co. *v.* United States, 191 Fed. 856.

75. East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516, citing Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

76. Where there is competition.—East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516, holding that a contrary rule is not sustained by the opinions in Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209, followed in Interstate Commerce Comm. *v.* Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729, 21 S. Ct. 512; Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

77. Revision by commission.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between states, under "substantially similar circumstances and conditions."[78]

Where Prohibited by Commission.—It is not unlawful to charge more for a shorter than for a longer haul, when the circumstances and conditions are in fact substantially dissimilar, although the interstate commerce commission has made an order forbidding such charges in the particular case.[79]

§ 4108. Determining Right to Different Charge.—Under the interstate commerce law the power of determining whether a railroad company is relieved from the operation of the long and short haul clause lies solely with the interstate commerce commission; and in an action for damages in a federal court for a violation of that clause, when no authority from the commission is shown, the company can not claim that it was justified in so doing by reason of the existence of a secret cut rate among competing roads, whereby a large part of the traffic naturally tributary to it was diverted.[80]

§ 4109. Establishing Zones.—The authority of the interstate commerce commission on an application by carriers for relief from the long and short haul clause of that section, extends to establishing by percentages the relation to be maintained between the lower rate for longer hauls and the higher rate to intermediate points, and to adopting zones of influence for the purposes of establishing percentages which, as to such zones, vary on the basis of the influence of the competition in such areas.[81]

§ 4110. Remedies.—Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the commission.[82]

Damages.—As the right of action given by the law is one for damages, as for a tort, any railroad company which makes the overcharge is liable for the full amount of the damages, notwithstanding that it has shared the illegal freight with another road under a joint tariff agreement.[83] In an action by a shipper against a railroad company for charging a greater compensation for a shorter than for a longer haul, in violation of the interstate commerce law, the measure of damages is the excess in the rate charged for the shorter haul over that for the longer haul.[84] It is the province of the jury, under the act, to determine whether interest shall be allowed on the amount of the overcharge which they have found.[85]

Enjoining Order of Commission.—The jurisdiction given to the commerce court of suits to enjoin orders of the interstate commerce commission, is not defeated so far as an order on application by carriers for relief against the long and short haul clause of that act is concerned, on the theory that the consequence would be to enjoin a criminal prosecution.[86]

78. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223.

79. **Where prohibited by commission.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45, followed in Brewer *v.* Central, etc., R. Co., 84 Fed. 258.

80. **Determining right to different charge.**—Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49. See ante, "Similar Circumstances and Conditions," § 4098.

81. **Establishing zones.**—United States *v.* Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986; United States *v.* Union Pac. R. Co., 234 U. S. 495, 34 S. Ct. 995.

82. **Remedies.**—Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 862.

83. **Damages.**—Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

84. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

85. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

86. **Enjoining order of commission.**—United States *v.* Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986; United States *v.* Union Pac. R. Co., 234 U. S. 495, 34 S. Ct. 995.

§ 4111. Pooling Freights.—The fifth section of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance is deemed a separate offense.[87] Either a distribution of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon, or a money pool, whereby the aggregate or net proceeds of certain different and competing railroads are divided among them, is prohibited.[88]

Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, is within the prohibition of the interstate commerce act.[89]

Percentage of Rates.—Where the initial carrier which had established a rule by which it reserved the right to route freight to destination beyond its own line, made arrangements with the connecting carriers to give them a certain percentage of its through tariff rates, in order to break up rebating by such connecting carriers, held, that this agreement was valid, and was not a violation of the provision against the pooling of freights.[90]

Main and Branch Lines.—The section of the Interstate Commerce Act prohibiting railroad companies from entering into agreements for pooling freights or dividing their earnings, does not invalidate a contract between two railroad companies, whose lines of road are parallel, by which certain territory is preserved to each, within which it shall prosecute the work of extending its branch lines, though it may prevent certain pooling provisions therein from being operative.[91]

Proportionate Share of Rate.—A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get, over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling or traffic on freights, or division of net proceeds of earnings, within the prohibitions of the interstate commerce law, nor of the act against unlawful restraints and monopolies.[92]

Under Anti-Trust Law.—This provision does not authorize or prohibit an agreement between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, such as the anti-trust law seeks to prevent.[93]

Agreement as to Routing Goods.—The pooling of freights of competing railroads, is not accomplished by the adoption by common carriers, as part of

87. **Pooling freights.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 12 S. Ct. 1125; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

88. In re Pooling Freights, 115 Fed. 588.

89. In re Pooling Freights, 115 Fed. 588.

90. **Percentage of rates.**—"No case is made out of the violation of the pooling provision in the fifth section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carriers out such promises." Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

91. **Main and branch lines.**—Ives *v.* Smith, 55 Hun 606, 8 N. Y. S. 46, 28 N. Y. St. Rep. 917.

92. **Proportionate share of rate.**—Decree 76 Fed. 895, affirmed in United States *v.* Joint Traffic Ass'n, 32 C. C. A. 491, 89 Fed. 1020.

93. **Under anti-trust law.**—United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540.

an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guarantying the through rates to the shipper, even though the initial carrier promises fair treatment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed.[94]

Agreement to Prevent Rebating.—A rule in practice adopted and put in force by an agreement between competing railroads and their connecting lines, by which a through rate on a certain class of traffic is conditioned on a reservation to the initial carrier of absolute and unqualified power to route shipments beyond its own line, for the purpose of enabling such initial carrier to control and maintain the rate, the purpose of which is to prevent rebating, does not constitute a tonnage pool.[95]

Remedies.—The enforcement of an order of the interstate commerce commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a federal circuit court if it finds such rule is, for any reason, in violation of the act, although such reason may not have been the one relied upon by the commission itself to invalidate the rule.[96]

§ 4112. Mileage Tickets.—The Interstate Commerce Act was not designed to prevent competition between different carriers, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling on the same road.[97]

§ 4113. Party-Rate Tickets.—The issuance of party-rate tickets, each good for a party of ten or more persons, at the rate of two cents per mile, while single passengers are charged three cents, is neither an unjust discrimination nor an undue or unreasonable preference or advantage, within the meaning of the Interstate Commerce Act when such tickets are offered to the public generally.[98] There is no merit in the suggestion that such tickets may be used by ticket brokers as a means of evading the law, since, being for ten or more persons, they would hardly be available for that purpose, and, if issued for so small a number of persons as to become available, the courts would have authority to apply the proper remedy.[99] Where a railroad company is charged with violating the interstate commerce act, by the issuance of "party-rate tickets" at less than the rates charged single passengers, the burden of proving that such lower charge constitutes an undue preference is upon the person making the charge.[1]

Although not identical with mileage, excursion or commutation tickets, under the act, the principle is the same as that applicable to commutation

94. Agreement as to routing goods.—Decree, Interstate Commerce Comm. *v.* Southern Pac. Co., 132 Fed. 829, reversed in 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

95. Agreement to prevent rebating.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

96. Remedies.—Decree, Interstate Commerce Comm. *v.* Southern Pac. Co., 132 Fed. 829, reversed 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

97. Mileage tickets.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699, affirming 43 Fed. 37.

98. Party-rate tickets.—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 43 Fed. 37.

99. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844, affirming 43 Fed. 37.

1. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 43 Fed. 37.

tickets.[2] The difference between commutation and party-rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. This is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.[3]

Where Not Sold to General Public.—If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.[4]

United States Soldiers.—The government of the United States, in buying transportation on a railroad for its soldiers, in lots of ten or more, is not entitled to the benefit of a reduced party rate given by the railroad company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo, or tennis clubs, football teams, and other parties of like character." Nor does the refusal to give it the same rates constitute an unjust discrimination against it, or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, where it is shown that the purpose and effect of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time, and are paid for in cash in advance, while those furnished on a requisition, and are only paid for after indefinite delay in the auditing and allowance of the claims by the war and treasury departments. In such case the conditions and circumstances under which the service is rendered are essentially different, and justify the making of different rates.[5]

§ 4114. Excursion Tickets.—The express recognition in the act to regulate commerce of the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets, when considered with the restriction embodied in the act concerning equality of rates, and with the prohibition against preferences, must be regarded as charging the carrier with the duty of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and hence causes the nontransferable clause to be operative and effective against anyone who wrongfully attempts to use such tickets.[6]

§ 4115. Terminal Charges.—The action of railroads entering Chicago in dividing their charges on live stock shipped to that city, which previously included delivery of the stock at the stockyards, so as to make a separate rate for the haul to points on their lines and a terminal charge covering its transfer from

2. But, assuming the weight of evidence in this case to be that the party-rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by § 2 and § 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of § 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

3. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

4. **Where not sold to general public.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844.

5. **United States soldiers.**—United States *v.* Chicago, etc., R. Co., 62 C. C. A. 465, 127 Fed. 785.

6. **Excursion tickets.**—Bitterman *v.* Louisville, etc., R. Co., 207 U. S. 205, 52 L. Ed. 171, 28 S. Ct. 91, 12 Am. & Eng. Ann. Cas. 693.

their own tracks to the stockyards, is not only legal, but desirable, as relieving shippers whose stock does not go to the yards from payment of the terminal charges; hence, where the terminal rate is just and reasonable in itself, it is not unlawful.[7] A terminal charge for delivering car loads of live stock to the Union Stockyards in Chicago, a point beyond the carrier's line, if in itself just and reasonable, and separately stated in the tariff schedules, as required by the act can not be condemned or the carrier required to reduce it, on the ground that it, taken with prior charges for transportation over the lines of the carrier, or of connecting carriers, makes the total charge to the shipper unreasonable.[8] A terminal charge for delivering carloads of live stock to union stock yards in a city, at a point beyond the carrier's line, if in itself just and reasonable, and separately stated in the tariff schedules, as required by the act, can not be condemned or the carrier required to reduce it, on the ground that it, taken with prior charges or transportation over the lines of the carrier, or of connecting carriers, makes a total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule, the carrier must separately state its terminal or other special charge complained of; for, if many matters are lumped in a single charge, it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services.[9] It has been held that although a terminal charge by carriers of live stock of two dollars per car, abstractly considered, would be just and reasonable in view of the trackage charge made against the carriers by a stockyards company to which it delivered live stock, yet, because it was a mere addition to the sum of the terminal charge embraced in the prior through rate, such terminal charge in addition to the compensation included in the through rate was an unreasonable and unjust charge therefor in itself, but because, prior to the order of the commission so adjudging, the rates on live stock from points embraced in the territory covered by this complaint to all western markets including Chicago, had been reduced by from ten to fifteen dollars per car, considering the through rate as so reduced, it is not unreasonable,[10] and the carrier has the right to separate the carriage and termi-

7. **Terminal charges.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 98 Fed. 173.

8. June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1907, p. 895). Decree, Stickney *v.* Interstate Commerce Comm., 164 Fed. 638, affirmed in 30 S. Ct. 66, 215 U. S. 98, 54 L. Ed. 112.

9. Interstate Commerce Comm. *v.* Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 S. Ct. 66.

10. The rate which was unjust and unreasonable solely because of the $1 excess did not continue to be unjust and unreasonable after this rate had been reduced by from ten to fifteen dollars. This was based, not upon a finding of fact—as, of course, it could not have been so based—but rested alone on the ruling by the commission that it could not consider the reduction in the through rate, but must confine its attention to the $2 terminal rate, since that alone was the subject matter of the complaint. But the commission, in considering the terminal rate, and expressly found that it was less than the cost of service, and was therefore intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering "the circumstances of the case;" that is, the through rate and the fact that a terminal charge was included in it, which, when added to the two dollar charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the $2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the commission were well founded. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

"The through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stockyards." Interstate Commerce Comm. *v.*

nal charges.[11]

Reasonableness Determined by Circumstances of Each Case.—Where railroad companies engaged in the transportation of live stock from points in other states to the union stockyards in Chicago have fixed a terminal charge for the moving of each car from the end of their own tracks in Chicago to the stockyards, stating the through rate to the end of their tracks and the terminal charge separately in their schedules, as required by the Interstate Commerce Act, the legality of each charge must be determined by itself, without regard to the other; and where the terminal charge, considered by itself, is reasonable for the service rendered, the interstate commerce commission is without power to reduce it on the ground that, when added to the through rate, the total charge from the point of shipment to the stockyards is excessive.[12]

§ 4116. Industrial Track Service.—Transportation of cars and freight intended for interstate commerce to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier is not the same service which the carrier performs when it delivers freight at its depot or team tracks, the carrier being bound to perform such industrial track service, in the absence of statute, only under an arrangement with the owner of the industrial plant, for which it may charge a reasonable compensation.[13] Where the work of a common carrier as to a proprietary company is merely a plant facility, and the services rendered to such company are merely plant or industrial services as distinguished from transportation services, it is within the powers of the interstate commerce commission to prohibit an allowance for such services in a joint tariff schedule.[14]

As Substitute for Receiving and Delivery Service.—Delivery and receipt on industrial spur tracks within switching limits of car load freight in interstate commerce is not an added service, for which the carrier can make an additional charge to the line-haul rate to or from such city, where that rate embraces a receiving and delivery service at team tracks or at freight sheds within such limits, for which the spur-track service is a substitute.[15]

§ 4117. Demurrage Charges.—Since carriers engaged in interstate commerce are entitled to impose, as a condition to hauling private cars, such terms as have a reasonable relation to the transportation service in which they are employed, and may adopt such rules as will tend to provide a reasonably dependable supply of equipment and prevent the withdrawal of such cars at will, to serve the private purposes of the owners and as will keep them in active and steady use, a rule imposing a reasonable demurrage charge on such cars while standing on private tracks and while returned unloaded until the lading is removed and the cars released, is reasonable and not violative of the owner's rights.[16]

Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824. See, also, Covington Stockyards Co. *v.* Keith, 139 U. S. 128, 35 L. Ed. 73, 11 S. Ct. 461.

11. Separation of terminal and freight charges.—There is no doubt as to the right of a carrier to divide its rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the carrier. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

12. Reasonableness determined by circumstances of each case.—Stickney *v.* Interstate Commerce Comm., 164 Fed. 638.

13. Industrial track service.—Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 188 Fed. 229; Southern Pac. Co. *v.* Interstate Commerce Comm., 188 Fed. 241.

14. Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

15. As substitute for receiving and delivery service. — Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 234 U. S. 294, 34 S. Ct. 814; Interstate Commerce Comm. *v.* Southern Pac. Co., 234 U. S. 315, 34 S. Ct. 820.

16. Demurrage.—Procter, etc., Co. *v.* United States, 188 Fed. 221.

§ 4118. Charges for Reconsignment of Goods.—An additional charge by a carrier of two cents per hundred-weight for the privilege of reconsigning hay at a central point, originating in northwestern territory and shipped into southeastern territory, is excessive, within the Interstate Commerce Act prohibiting excessive rates, and thereby produces an unjust discrimination.[17]

§ 4119. Through Rates.—Under the Interstate Commerce Act it is held that joint through tariff rates are a question of agreement between the companies and under their control, and that an initial carrier could agree upon joint through rates with one or several connecting carriers, or not, as it chose. The rule is that a common carrier need not agree to carry beyond its own road, and could agree upon joint through tariff rates; but where the carrier did take advantages of these rights, it was held that it could make such terms as it pleased, whether or not it agreed to be liable for default of connecting carrier, at least so long as they were reasonable and did not otherwise violate the interstate commerce act.[18] A shipment of freight over connecting carriers which have no contract for joint through rates is not within the Act of March 2, 1889, authorizing, but not requiring, connecting carriers to agree upon joint rates, and providing a penalty for failure of a carrier to enforce such rates when agreed on.[19] Where no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing the combination rate for it is prescribed, the lowest combination of rates applicable over the route is the lawful rate.[20]

Reasonableness.—The fact that a through rate is made up of a through rate to an intermediate point, with the local rate between that and the terminal point added, does not render it unreasonable, where each of the two rates is reasonable in itself.[21]

17. Charges for reconsignment of goods.—Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

Defendant railroad company, on shipments of hay to southeastern points from East St. Louis, made a charge of two cents per 100 pounds above the rates charged from Ohio river points on all hay which was not unloaded into a warehouse at East St. Louis from the cars in which it was there received, whether such hay was consigned to that point or billed through to points of final destination, while on all hay so unloaded into a warehouse the additional charge was four cents. Plaintiff owned warehouses in East St. Louis from which it loaded and shipped hay to southeastern points over defendant's road and was required to pay thereon the four-cent charge. Held, on the evidence, that an additional charge of one cent per 100 pounds for hay loaded from warehouses would cover the difference in the expense to defendant, and the charge made was to the extent of the excess above that unjust and unreasonable, and that plaintiff was entitled to recover the amount of such excess charges paid. St. Louis, etc., Grain Co. *v.* Southern R. Co., 149 Fed. 609, judgment affirmed in 153 Fed. 728, 82 C. C. A. 614.

18. Through rates.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185; Louisville, etc., R. Co. *v.* West Coast Nav. Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 S. Ct. 745.

It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon; at least, so long as they are reasonable and do not otherwise violate the law. Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

19. Gulf, etc., R. Co. *v.* Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732.

20. Pecos, etc., R. Co. *v.* Porter (Tex. Civ. App.), 156 S. W. 267.

21. Reasonableness.—Interstate Commerce Comm. *v.* Western, etc., R. Co., 88 Fed. 186.

Each Railroad Considered Separate.—The making of a through rate on interstate shipments by the joint action of connecting railroads is the act of each, and brings each within the scope of the Interstate Commerce Act, and renders it responsible for such rate, without regard to the proportion thereof received for its own service.[22] The fact that a railroad line operated as a part of a large railway system, considered as a separate road, fails to pay expenses, does not justify the charging of unjust and unreasonable rates nor undue discrimination in rates.[23]

Joint Liability.—The joint through rates established by several carriers must be construed as entireties. It follows, necessarily, that each carrier who is a member of the through line must be regarded as severally as well as jointly responsible, if the rate is unfair and oppressive. While this unfairness may appear to be attributable to the exactions made by one particular carrier only, the other members, by their assent, are joint participants in the wrong.[24] Where there are regularly published rates, in which each of the carriers participate, and their proportionate divisions are brought about by agreement between themselves, this constitutes a common control, management, or arrangement for a continuous carriage or shipment, as defined by § 1, of the act, and therefore each of the participating carriers is within the scope of the act, and to the extent of its authority under the control of the interstate commerce commission.[25]

Shipment Through Foreign Country.—A contract for shipment of goods from a foreign port to an inland point in the United States for a through rate does not necessarily violate the interstate commerce law, though the proportion of the through rate allowed for the carriage from the port of entry to the destination is less than the rate scheduled for freight originating at such port and carried to such destination.[26]

Apportionment of Charges.—Where goods are received in transit under a "conventional division of the charges," there is an apportionment of the charges by agreement of the participating carriers.[27]

§§ 4120-4124. Allowance for Service of Shipper—§ 4120. In General.—The law does not attempt to equalize fortune, opportunities, or abilities.[28] The Interstate Commerce Act contemplates that interstate carriers may use facilities owned by the shipper and make compensation therefor, and by the Act of June 18, 1910, it is provided that if the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided

22. Each railroad considered separate.—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

23. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

24. Joint liability.—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613, citing Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

25. "In this case an injunction will be granted against each and all of the respondent companies, so that the order of the commission may be enforced." Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

26. Shipment through foreign country.—Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061.

27. Apportionment of charges.—Mutual Trans. Co. *v.* United States, 102 C. C. A. 164, 178 Fed. 664.

28. Allowance for service of shipper.—Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22; Penn Refin. Co. *v.* Western, etc., R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268.

for under this section.[29] It thus appears that the statute, while recognizing that the carrier may lawfully make compensation for services rendered or facilities furnished by the shipper, also recognizes that such transactions may be made the cloak for the granting of reduced rates, secret rebates, and other abuses, and carefully provides that such charge and allowance therefor shall be no more than is just and reasonable, and gives the commission power to determine what is such just and reasonable charge.[30] The compensation contemplated by this section for the use of facilities furnished by the shipper is not necessarily unlawful because it works a disadvantage to other shippers of the same commodity who do not own such facilities or who can not use them to advantage. In short, the law does not attempt to equalize fortune, opportunities or abilities.[31] On the other hand, the facility for the use of which compensation is made must be one which the carrier uses in interstate commerce. It is not lawful to make compensation or allowance to the shipper for facilities used merely for the purpose of bringing his products from his factory or mine out to the carrier's road where they may be taken up and started on their interstate journey.[32]

Discrimination between Shippers.—Neither the carriers nor the commission can enforce an arbitrary rule which would authorize the payment of one shipper for transportation service and deprive another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This can not be directly done, nor indirectly by means of regulation. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another, similarly situated, can not avail himself.[33]

29. Act June 18, 1910, ch. 309, § 12, 36 Stat. at L. 553.

30. Penn Refin. Co. *v.* Western, etc., R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268; Chicago, etc., R. Co. *v.* United States, 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A., N. S., 551, affirmed in 212 U. S. 563, 53 L. Ed. 653, 29 S. Ct. 689; Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39; United States *v.* Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75.

31. Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22; Penn Refin. Co. *v.* Western, etc., R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268.

Carriers can not be charged with discriminating against shippers of oil in barrels from the Pennsylvania oil fields to Perth Amboy, New Jersey, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them, the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than the transportation by barrels, and the barrel shippers have made no demand for tank cars, and can not use them economically for shipments to Perth Amboy on account of the lack of facilities for unloading at that point. Judgment, Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 208 U. S. 208, 52 L. Ed. 456, 28 S. Ct. 268.

32. Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company which made and published a schedule of through rates, including the belt line charge, of $1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, constituted the giving of a rebate, in violation of § 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]. Judgment, 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A., N. S., 551, affirmed in Chicago, etc., R. Co. *v.* United States, 212 U. S. 563, 53 L. Ed. 653, 29 S. Ct. 689.

33. Discrimination between shippers.—Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

Where Allowance Amounts to Rebate.—The allowance by a railroad company to certain coal companies shipping over its line of a stated sum per ton ostensibly for the use of trackage owned by such companies and the service of their own locomotives in hauling cars thereon from the rate charged plaintiff, which was also a shipper in the same district under similar circumstances, is an unlawful discrimination in violation of interstate commerce.[34]

Shipper Connected with Transportation.—As used in the act providing that a shipper rendering service "connected with" the transportation may be paid therefor by the carrier, the phrase quoted is a synonym of "a part of it;" it does not mean something in addition to transportation that touches or is attached to transportation.[35]

§ 4121. For Elevation of Grain.—The long-mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the interstate commerce commission was answered by the Act of June 29, 1906, in which congress declared that the term transportation shall include all facilities of shipment, irrespective of ownership, and all services in connection with the elevation and transfer in transit and handling of property transported. Carriers were required to provide and furnish such transportation upon reasonable request therefor. The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation and provides, that if the owner renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, the commission being authorized to determine what is reasonable. In pursuance of the authority thus expressly conferred, the interstate commerce commission, fixed the allowance for elevating grain at three-fourths of a cent per hundred pounds, being actual cost, with no allowance whatever for profit.[36] Its final order prohibiting any payment to the owner who performed this transportation service,[37] was reversed, as being beyond the jurisdiction of the commission, because congress had expressly permitted such payment to be made.[38] An order forbidding the carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain which he ships, unless he refuses to clean, clip, mix, inspect, or grade the wheat while it is passing through the elevator, is beyond the power of the commission.[39]

Where Allowance Amounts to Discrimination.—The interstate commerce commission has decided that the allowance or payment by a railroad company to an elevator company of any compensation for the elevation and transfer in transit of grain which it shipped and owned was unlawful where it derived, or might derive, a commercial advantage from cleaning, clipping, mixing, grading, and inspecting the grain during its elevation, and where there was danger that such a practice might lead the parties to it to violate the prohibition of rebates and of unjust discrimination embodied in the interstate commerce act.[40] A

34. Where allowance amounts to rebate.—Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155); Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 181 Fed. 403, dismissed for want of jurisdiction 183 Fed. 908.

35. Shipper connected with transportation.—New York, etc., R. Co. *v.* General Elect. Co., 146 N. Y. S. 322, 83 Misc. Rep. 529.

36. Owner of elevator.—12 Inters. Com. Rep. (U. S.), 86.

37. 14 Inters. Com. Rep. (U. S.), 315.

38. Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

Order of the commission prohibiting allowance or payment by carriers of compensation to owners and operators of elevators for elevation and transfer in transit are beyond the delegated power of the commission. Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

39. Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

40. Where allowance amounts to discrimination.—In re Allowances to Elevators (U. S.), 12 Interst. Com. R. 85, 88; S. C. (U. S.), 14 Interst. Com. Com'n R. 315, 316.

contract by which an interstate railroad company agreed to pay an elevator company a certain amount a car for grain originating on its line and passing through the elevator, not allowed to all elevators, nor covered by a filed and published rate schedule, is void.[41]

Where Grain Weighed, etc.—A carrier can not refuse the allowance for elevator service on through grain in car loads at terminal points to elevator owners who, through ownership of the grain, derive an incidental advantage by using the opportunity afforded during the process of elevation to weigh, store, inspect, clean, mix, or otherwise treat the grain, in view of the provisions of Act June 29, 1906, recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.[42] The interstate commerce commission can not make the allowance by a carrier to the owner of an elevator of the cost of the elevation in transit of grain in which he has an interest, conditional upon his failure to use the opportunity afforded during the process of elevation to treat, weigh, inspect, or mix the grain, since such allowance can not be deemed an undue preference or discrimination.[43]

Where Car Detained.—A carrier may make its allowance for elevator service on through grain in carloads at terminal points at elevators located on the lines of other carriers, as well as those located along its own tracks, conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, where such car can be unloaded and returned in a much shorter time.[44] But a carrier can not enforce a rule making its allowance for elevator service on through grain in carloads at terminal points conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, so as to defeat the right to compensation for elevator service rendered at elevators located on the lines of other railroads, where the return of the cars to the carrier was made impossible by the rules of a railway association of which the carrier was a member, and over which the elevator owners had no control, no such impossibility existing if the elevator was one of those located along the carrier's tracks.[45]

41. Elwood Grain Co. *v.* St. Joseph, etc., R. Co., 202 Fed. 845, 121 C. C. A. 153.

42. Where grain weighed, etc.—Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39, affirming judgment 178 Fed. 223, 101 C. C. A. 583.

43. Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22, modifying decree Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

44. Where car detained.—Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

Complainants returned, more than 48 hours after their delivery to connecting lines, certain cars, and the Union Pacific Company refused to pay them compensation for elevating the grain out of these cars. The delay in the return of these cars was due to the companies having connecting lines to whom the cars were delivered by the Union Pacific Company by direction of the complainants or consignors to the complainants, and the Union Pacific Company paid no elevation charges to Peavey & Co. on grain unloaded from cars which were not returned to the Union Pacific Company within 48 hours. Held, that there was no unjust discrimination shown, and complainants were not entitled to damages because they received no compensation for elevation services in connection with such cars. Union Pac. R. Co. *v.* Updike Grain Co., 178 Fed. 223, 101 C. C. A. 583.

45. Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

The tariffs of a railroad company offered compensation for elevation of grain in transit on condition that cars delivered by it loaded to elevators or connecting lines should be returned to it empty within forty-eight hours. The regulations provided that foreign cars, cars belonging to the companies which had a direct connection with the switching territory, should be delivered to their owners so that the complainants, who were owners of elevators upon railroad tracks other than those of the railroad company, could not possibly return such cars to that company, while a third person, which had an elevator on the railroad tracks, could deliver such cars immediately after they were unloaded, and the railroad paid it compensation for elevating the grain unloaded from those cars, while it refused to pay complainants any compensation for unloading cars of like character. This created an unjust discrimination against

Elevation in Transit.—The interstate commerce commission decided that all allowances and payments to owners and operators of elevators for elevation in transit were unlawful and must cease.[46] Thereupon it issued orders which forbade the continuance of such allowances and payments.[47] Elevation in transit consists in the unloading of the cars which bring the grain to the elevator and the loading of the grain into those which carry it away.[48]

Reshipment of Goods in Particular Time.—Confining the allowance by a carrier to the owner of an elevator for elevating grain in transit in which he has an interest, to such grain as shall be reshipped within ten days, is within the power of the interstate commerce commission.[49]

Determining Validity.—Whether a railroad company's contract to pay an elevator company so much for each car on grain received by the elevator company and passing through the elevator is contrary to the Interstate Commerce Act should be determined as of the date of the service.[50]

§ 4122. For Construction of Grain Doors for Cars.—Where a carrier receiving grain and produce in bulk failed to furnish cars with grain doors or lumber for so equipping them, the shipper was entitled to recover the cost of lumber used in so equipping them.[51] In an action to recover from the defendant railway company the necessary costs of the labor, lumber, and material used in constructing grain doors for box cars used in transporting grain from Cook, Neb., to Kansas City, Mo., held, that the answer of the defendant company that the interstate commerce commission had made a rule to the effect that the carrier might not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars, unless expressly so provided in its tariff, and that there was no such provision in the tariff of the defendant company at the time the doors were so furnished (though afterwards one was adopted), and therefore that the defendant company was not liable, failed to state any defense.[52]

§ 4123. For Cartage.—The cartage of sugar from a refinery to cars does not constitute transportation, nor a service connected with transportation, within such act, for which the carrier is justified in making such allowance.[53] A carrier may lawfully grant shippers of coal doing their own hauling to the station a reasonable allowance from the published tariff, which, though naming the rate as from the station to the destination, is uniformly construed to include the haul from the mine.[54]

§ 4124. For Lighterage.—The fact that the owner of a terminal is paid as such for handling and lightering his own product, after it had become the property of a purchaser by delivery to the carrier at such terminal, does not constitute the giving of a rebate, in the absence of any evidence that it is a device

complainants which entitled them to recover damages. Union Pac. R. Co. *v.* Updike Grain Co., 101 C. C. A. 583, 178 Fed. 223, affirmed in 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39.

46. Elevation in transit.—Traffic Bureau Merchants' Exch. *v.* Chicago, etc., R. Co. (U. S.), 14 Interst. Com. Com'n R. 317.

47. Union Pac. R. Co. *v.* Updike Grain Co., 178 Fed. 223, 101 C. C. A. 583.

48. Union Pac. R. Co. *v.* Updike Grain Co., 178 Fed. 223, 101 C. C. A. 583.

49. Reshipment of goods in particular time.—Interstate Commerce Comm. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 S. Ct. 22, modifying decree Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

50. Determining validity.—Elwood Grain Co. *v.* St. Joseph, etc., R. Co., 121 C. C. A. 153, 202 Fed. 845.

51. For construction of grain doors for cars.—Loomis *v.* Lehigh Valley R. Co., 208 N. Y. 312, 101 N. E. 907, modifying judgment 132 N. Y. S. 138, 147 App. Div. 195.

52. Hanks *v.* Missouri Pac. R. Co., 92 Neb. 594, 138 N. W. 750.

53. Cartage of sugar from refinery to car.—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 200 Fed. 652.

54. Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472, modifying judgment 183 Fed. 908.

for that purpose; nor does it constitute the giving of an undue and unreasonable preference or advantage, as to another shipper, to shipments outside of the lighterage limits.[55]

Free Lighterage Zone.—Interstate trunk railway companies having their terminals on the New Jersey shore of New York harbor, having established a zone within which they perform lighterage service without additional charge, may pay reasonable compensation on tonnage basis to owners of water front within such zone operating a sugar refinery for maintenance of a public freight terminal station and for lightering, without allowing similar compensation to sugar refiners whose plant is situated some ten miles beyond the free lighterage zone; the compensation made being a proper allowance under Act June 29, 1906, and not an illegal preference within § 3 of the Act of Feb. 4, 1887.[56]

§§ 4125-4145. Printing and Publishing Schedules—§ 4125. In General.—The act declares that every common carrier subject to the act shall file with the interstate commerce commission and print, post, and keep open to public inspection schedules showing rates, fares, and charges for transportation between different points on its own route and points on the route of any other carrier by railroad, etc.[57] That the act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates, whether individual or joint, to be charged for the transportation in interstate commerce of property over their lines, and that the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of the federal supreme court.[58]

What Amounts to Publication.—Freight rates required to be established by carriers, according to the provisions of the interstate commerce law are not established by tariffs naming class rates that do not contain a classification of

55. For lighterage.—Baltimore, etc., R. Co. *v.* United States, 200 Fed. 779.

The fact that the owners of a terminal are paid as such for handling and lightering their own product, after it had become the property of the purchasers by delivery to the carrier at such terminal, did not constitute the giving of a rebate in violation of Interest Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), in the absence of any evidence that it was a device for that purpose; nor did it constitute the giving of an undue and unreasonable preference or advantage over respondent company, within § 3, because petitioners did not pay for the lighterage of respondent's shipments, since they were not in fact made from a point within the lighterage limits, the device of having the lighters stop on the way from Yonkers at a place within such limits, where respondent had no terminal facilities and made no tender of delivery, being a mere subterfuge, which gave it no legal or equitable claim to be a shipper from there. Baltimore, etc., R. Co. *v.* United States, 200 Fed. 779.

56. Free lighterage zone.—Sugar refiners whose plant is situated ten miles beyond the limit of free lighterage zone, established on the river front of Greater New York by interstate trunk railroads, whose freight terminals are at the New Jersey shore of New York harbor, are not entitled to compensation from the railway companies under Act June 29, 1906, for lightering their sugar from the refinery to their terminals. United States *v.* Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75.

57. Printing and publishing schedules.—Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1909, p. 1153).

58. United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323. See Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. 540; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986; Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

freight, but merely refer to a classification published by other parties and subject to change by such parties. A departure by a shipper from such rates does not constitute an offense under the Act Feb. 19, 1903.[59] A carrier filed with the interstate commission a schedule of rates, called "Official Classification," and also a rate sheet, called "Joint East-Bound Interstate Tariff." The former stated specifically the rates under its uniform bill of lading, which limits its common-law liability as a carrier, and further stated that the rates on property not shipped subject to the uniform bill of lading were a specified percentage higher than the rates under said bill. The rate sheet stated that all rates were to be used in connection with, and subject to, the official classification. This was a making and establishing of schedules of rates both under the uniform bill of lading, and also under the full common-law liability.[60]

A railway company operating, as lessee upon the basis of a division of profits, the railroad system owned by a stockyard company for the transportation of cars to and from trunk lines in the course of their transportation from beyond the state, and to points outside of the state, is an interstate carrier within the meaning of the Interstate Commerce Act of February 4, 1887, and as such is obliged to file its tariffs with the interstate commerce commission, as required by that act.[61]

A corporation organized for the purpose of maintaining a stockyard, with the usual facilities of such yards as to loading and unloading and caring for freight, which lawfully owns and operates a railroad system for the transportation of cars to and from trunk lines, in the course of their transportation from beyond the state and to points outside of the state, is an interstate railway carrier, within the meaning of the Interstate Commerce Act of February 4, 1887, and as such is obliged to file its tariffs with the Interstate Commerce Commission, as required by that act.[62]

§ 4126. Statutory Provision.—The Interstate Commerce Act provides that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route.[63]

Constitutionality of Statute.—The mere incidental effect upon exports which may be produced by applying to a shipment from an interior point of the United States to a foreign port the provisions of the Act of Feb. 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to the constitution of the United States, forbidding the levying of export taxes or duties.[64] Preference is not given to the ports of one state over those of another by applying to articles in-

59. **What amounts to publication.**—United States *v.* Standard Oil Co., 170 Fed. 988.

60. Mannheim Ins. Co. *v.* Erie, etc., Transp. Co., 72 Minn. 357, 75 N. W. 602.

61. United States *v.* Union Stockyards, etc., Co., 226 U. S. 286, 33 S. Ct. 83.

62. A stockyard company owning and operating under its charter a railway system for the transportation of cars to and from trunk lines in the course of their transportation from beyond the state and to points outside of the state did not cease to be an interstate railway carrier within the meaning of the Interstate Commerce Act of February 4, 1887, and as such obliged to file its tariffs within the interstate commerce commission, as required by § 6 of that act, by leasing its railway and equipment to another corporation upon the basis of a division of profits, both companies being under a common stock ownership, with its consequent control. United States *v.* Union Stockyards, etc., Co., 226 U. S. 286, 33 S. Ct. 83.

63. **Statutory provision.**—Act Feb. 4, 1887, § 6, as amended by Act Mar. 2, 1889.

64. **Constitutionality of statute.**—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

tended for foreign export the provisions of the Act of Feb. 19, 1903, making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.[65]

Relation to Provision against Discrimination.—There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rate until corrected in accordance with the statute and the prohibitions against preferences and discriminations. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow.[66] That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act.[67] And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.[68]

Construction—"Rates in Force."—"Rates in force," to which the act applies, are not limited to rates under which transportation has actually taken place, but are those which the carrier has established as its present charges, as distinguished from those which are obsolete, tentative, or perhaps only to take effect in the future. They are rates open to public inspection and on which shipments may be made, if offered.[69]

"Between Two Points."—The act declares that it shall be unlawful for any common carrier, party to any joint tariff, to charge or receive a greater or less compensation for the transportation of persons or property or for any services in connection therewith, between any points as to which a joint rate is named thereon than specified in the schedule filed by the commission in force at the time. The words "between two points" do not limit such provision to points on the established route, but the provision prohibits the transportation of property between terminals in different states at a greater or less rate than the established rate, without reference to routes.[70]

§ 4127. Shipment over Connecting Carrier.—The acceptance by an initial carrier of a through shipment to be carried at less than the lawful rates is not rendered lawful by the fact that such carrier had a contract with a connecting carrier whose line formed a part of the through route that the latter would not increase its rate during a certain time and on the faith of such contract made a similar contract with the shipper, where in the meantime the connecting carrier had in fact published and filed with the commission a new schedule increasing

65. **Preference of ports of one state over ports of another.**—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

66. **Relation to provision against discrimination.**—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

67. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

68. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075, citing Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896.

69. **Construction—"Rates in force."**—Judgment United States *v.* New York, etc., R. Co., 153 Fed. 630, reversed in 92 C. C. A. 331, 166 Fed. 267.

70. **"Between two points."**—United States *v.* Pennsylvania R. Co., 153 Fed. 625.

the rate.[71]

Necessity for Contract for Through Carriage.—In the concert of action, in the successive receipt and movement of traffic by connecting carriers under through bills of lading for continuous carriage, is manifested the common arrangement contemplated by the interstate commerce laws, and no previous formal contract is necessary to bring the carriers under the provisions of the law.[72] The sanction of the other roads to schedules of freight rates containing a heading indicating their adoption by a particular road "in connection with" other designated railroads, which are the roads over which a haul, when there is such, from common points to the particular railroad would be made, is not essential to the establishment of such rates in a proceeding involving shipments over such railroad and a connecting line not included among the other roads designated, from a city which is not one of the common points.[73] It was not shown that these schedules were sanctioned by the other railroads designated therein, they being the roads over which the haul to the garnishee's road from the common points was to be made when the shipments were received from connecting lines at those points. Such a showing, however, was not necessary here. The other roads had no interest in the rate as applied to shipments received by the garnishee from the northern line at Kansas City, as were the shipments in question. As applied to them the rate was not joint, but an individual rate of the garnishee. The sanction of the other roads was essential only to its application to the haul from the common points, when there was such.[74] A railroad company which as initial carrier received an interstate shipment to be transported over its own and other lines under a joint through rate established and filed was not authorized to divert the shipment to another road, not a party to the joint rate, because its connecting refused to receive it, and is liable to the shipper for the excess of freight charged resulting from such diversion.[75]

Actual Relation of Carrier Immaterial.—Where a railroad company operating an interstate road treated points on a connecting road which it also operated as within a certain coal district, from all points in which, whether on such line or its own line, it made and published the same rates, such road for freight purposes was a part of its line, and its relations with the owner thereof are immaterial.[76]

Other Carriers Not Specified in Schedule.—Schedules of freight rates of a designated railroad, indicating that they were adopted by it "in connection with" other specified roads over which shipments from the common points, if any, would be made, may be applicable to a shipment over a different railroad from a city which is not a common point, where such schedules do not restrict the rate to shipments received from the roads specified but indicate its applicability to shipments received from any connecting line.[77] When, under the provisions of § 6 of the act, two or more common carriers lawfully contract for the establishment of through routes at or upon joint through rates, they can not be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation.[78]

71. **Shipment over connecting carrier.**—Chicago, etc., R. Co. *v.* United States, 157 Fed. 830, affirmed in 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439.

72. **Necessity for contract for through carriage.**—Chicago, etc., R. Co. *v.* United States, 157 Fed. 830, affirmed in 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439.

73. Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

74. Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

75. Louisville, etc., R. Co. *v.* Dickerson, 191 Fed. 705, affirming judgment, 187 Fed. 874.

76. **Actual relation immaterial.**—Pennsylvania R. Co. *v.* International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1.

77. **Other carriers not specified in schedule.**—Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

78. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

Where No Joint Rate Established.—Shipments over connecting lines, even though moving on through bills of lading, must, under the Interstate Commerce Act, take the lawfully established local rate in force on each line, where there is no established joint through rate.[79] An agreement with a single shipper for shipments over connecting lines having no joint through rate, at less than the established local rates for each road, is void and does not prevent the collecting of the established local rate by such carriers, under the Interstate Commerce Act of February 4, 1887, § 6, as amended by the Act of March 2, 1889, providing the manner for establishing rates, and making it unlawful for a carrier to depart from any rate so established and in force at the time and requiring connecting carriers agreeing on joint through rates to file schedules with the commission, and prohibiting any deviation from an established joint rate while in force.[80]

Shipment from Common Point.—Schedules of freight rates of a designated railroad "in connection with" other specified roads may be made applicable to a shipment over different railroad from a city which is not a common point.[81]

What Amounts to Establishing Rate.—The Missouri Pacific Railway Company received carloads of beer in St. Louis for transportation to Leadville, Colo., issuing receipts therefor showing contents, weight, destination, and consignee, and that the shipment was received subject to its uniform bill of lading, to be delivered to the consignee and routed over the line of the Denver & Rio Grande Railroad Company. At Pueblo, Colo., it turned the cars over the latter company, which moved them to Leadville on a local waybill, showing the consignor and consignee and the rate and charge of each company. The two companies had no established joint rate between St. Louis and Leadville, but they constantly exchanged traffic between such points; each charging its own local rate to and from Pueblo. The total freight was collected by one, either from the consignor or consignee, and daily settlements were made between them. Held, that such course of business was in fact the establishment of a "through route" between the two points, within the meaning of § 6 of the Interstate Commerce Act, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. 1909, p. 1153), which requires the filing of schedules of the "separately established rates" applied by a carrier on through traffic, when there is a through route, but no joint rate, and that such rate established by the Denver Company was within the terms of the act, and as a part of the through charge was subject to regulation by the interstate commerce commission under § 15 of the act as amended.[82]

Necessity for Publication of Rates.—Under the Interstate Commerce Act requiring the filing with the commission of established joint rates by connecting

79. **Where no joint rate established.**—Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

Through shipments of iron pipe were made from points in New Jersey and Pennsylvania to Winnipeg, Canada, part over the Baltimore & Ohio Railroad and part over the Philadelphia & Reading to the Great Lakes; thence by the Mutual Transit Company, a water carrier, to Duluth; and thence by the Great Northern Railway and its connections. There was no through joint rate filed or published, but there was a joint rate of 24½ cents per 100 pounds between the initial points and Duluth published and filed by participating carriers, and one of 25 cents per 100 between Duluth and Winnipeg filed by the Great Northern Railway Company. Held, that the lawful rate for the through carriage was the sum of such two rates, or 49½ cents per 100, and that under the interstate commerce law, as amended by Act March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3156], neither line over which the shipments passed could lawfully charge a greater or less sum than was specified in the filed and published schedule of rates to which it was a party. United States *v.* Wood, 145 Fed. 405.

80. Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

81. **Shipment from common point.**—Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

82. **What amounts to establishing rate.**—Denver, etc., R. Co. *v.* Interstate Commerce Comm., 195 Fed. 968.

carriers, where a receiving carrier files with the commission an established joint rate, failure of the other connecting carriers to give publicity to the rate does not invalidate a contract for the shipment of freight over such connecting lines, as violative of the interstate commerce law, which is otherwise valid.[83]

§ 4128. Shipment Through Foreign Country.—The rates of transportation from places in the United States to ports of transshipment and from ports of entry to places in the United States of property in foreign commerce, carried under through bills of lading, are required to be filed and published.[84]

Inland and Ocean Carriage.—If property is carried under a joint through rate by virtue of a common control or arrangement of inland and ocean carriers, the joint rate is required to be filed and published.[85] Where property is carried under an aggregate through rate, which is the sum of the ocean rate and the rate from or to a place in the United States to or from the port of transshipment or of entry, the latter rate is required to be filed and published.[86]

Shipment to Foreign Country under Local Bill.—Shipments of freight under local bills of lading calling for transportation from interior points in Louisiana to New Orleans, there to be delivered to the shipper's or consignee's order, but intended by the shippers to be exported to foreign countries, and treated accordingly by both shippers and carriers, constitute foreign commerce, and as such are governed as to the intrastate transportation by the tariffs on file with the interstate commerce commission, to the exclusion of the rates established by the state railroad commission.[87]

§§ 4129-4131. Form, Requisites and Validity—§ 4129. In General.—The interstate commerce commission may determine and prescribe the form in which the schedules, required by the act to be kept open to public inspection, are to be prepared and arranged, and may change the form from time to time as shall

83. Necessity for publication of rates.—Virginia, etc., Iron Co. *v.* Louisville, etc., R. Co., 37 S. E. 310, 98 Va. 776.

84. Shipment through foreign country.—Armour Packing Co. *v.* United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A., N. S., 400.

A carrier, which had never published or filed with the Interstate Commerce Commission a through rate to a foreign port, was neither required nor could it make a through rate to such port without violating Hepburn Act June 29, 1906, § 2. Hamlen & Sons Co. *v.* Illinois Cent. R. Co., 212 Fed. 324.

85. Inland and ocean carriage.—Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]; Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

86. Armour Packing Co. *v.* United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A., N. S., 400.

87. Shipment to foreign country under local bill.—Railroad Comm. *v.* Texas, etc., R. Co., 229 U. S. 336, 33 S. Ct. 837.

A shipment of lumber destined by the purchaser for export, made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports—such shipment not being an isolated one, but typical of many others—constitutes foreign commerce, and as such is governed by the tariffs on file with the interstate commerce commission to the exclusion of the rates established by the state railroad commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment. Texas, etc., R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 33 S. Ct. 229.

In Southern Pac. Terminal Co. *v.* Interstate Commerce Comm., 219 U. S. 498, 55 L. Ed. 310, 31 S. Ct. 279; Railroad Comm. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1001, 32 S. Ct. 653, and Texas, etc., R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 33 S. Ct. 229, there was necessarily a local movement of freight, and it necessarily terminated at the seaboard, but it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. Railroad Comm. *v.* Texas, etc., R. Co., 229 U. S. 336, 33 S. Ct. 837.

be found expedient.[88] The purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, and to exact that when the rates were changed the change should be so stated as not to mislead and confuse.[89] Nor does the provision granting power to the commission to prescribe forms of schedules of rates, as provided for in the sixth section, have any such effect.[90]

§ 4130. Printed.—The schedules of rates, fares and charges required to be printed by a common carrier shall be plainly printed in large type.[91]

Terminal Charges.—The terminal charges of a carrier for delivering live stock beyond its own lines to a union stockyard may be stated in a separate item, and not necessarily upon the general freight charges of the carrier.[92]

§ 4131. Validity.—Where a railroad company filed two rates with the interstate commerce commission, the lower providing for an agreed valuation of live stock shipped, which condition was invalid, under the state law, for limiting the railroad company's liability for negligence, a decision that the shipper might recover despite the condition, while giving him all the benefits of the higher rate, is not erroneous in giving the shipper a less rate than required by law, because of the filing of the schedule of rates with the interstate commerce commission, for the validity of the agreement limiting the carrier's liability for negligence can not be assumed to have been approved by the commission, when invalid under the state law.[93]

§ 4132. Contents.—It is provided that the schedules of rates, fares and charges, required to be printed by a common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any way change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges.[94]

Special Charges.—It at least seems to have been recognized by congress that there may properly be rules or regulations which in some wise change, affect, or determine a part or the aggregate of the scheduled rates and charges, and there is nothing in the act clearly indicating that the rate or charge for every service must be included in one specified sum.[95]

88. **Form of schedules.** — Interstate Commerce Act, § 6, as amended March 2, 1889; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

89. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

90. Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

91. **Printed.**—Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887.

92. **Terminal charges.**—Carriers separately state the terminal charges for delivering live stock beyond their own lines to the Union Stockyards in Chicago, as required by Act June 29, 1906, c. 3591, § 2 (U. S. Comp. St. Supp. 1907, p. 895), where their tariff schedules inform shippers that the live stock rates to Chicago apply only to deliveries at the carriers' own yards, and that, for transportation to the Union Stockyards, a stated additional charge will be made, the amount of such charge being entered, not upon the general freight charges of the companies, but as a separate item. Decree, Stickney *v.* Interstate Commerce Comm., 164 Fed. 638, affirmed in 215 U. S. 98, 54 L. Ed. 112, 30 S. Ct. 66.

93. **Validity.**—Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

94. **Contents.** — Interstate Commerce Act, § 6, as amended March 2, 1889; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 S. Ct. 822; Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824; Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358.

95. **Special charges.**—Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

Terminal Charges.—Railroad companies may make a distinct charge for carriage from the point of shipment of live stock to a city, and a separate terminal charge for delivery to stockyards, a point beyond the lines of the respective carriers—especially in view of the sixth section of the act to regulate commerce, providing that schedules of rates to be filed by carriers shall state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges.[96] Carriers who had long delivered live stock to the union stockyards in Chicago without making any distinct terminal charges did not, by giving notice to the public that a terminal charge would be made for delivery at the stockyards, in addition to the entire previous through rate to Chicago, and by filing a memorandum to that effect with their rate sheets with the interstate commerce commission, separate in their schedules the entire terminal charge from the through rate, as required by the sixth section of the act to regulate commerce, but simply added this additional charge to the sum of the terminal charge embraced in the prior through rate.[97] A consignee of a shipment of fruit, which, after the same was delivered to it and with full knowledge of the facts, paid without objection the charges of the carrier, including a charge for icing in transit, in addition to the published tariff rate for carriage, can not thereafter maintain an action to recover back the amount of such icing charge, on the ground that it was illegally exacted.[98]

Charges for Icing.—So far as the accomplishment of the great purposes of the Interstate Commerce Act is concerned, it would not seem to be very material whether charges for icing are fixed at a specified rate per ton of ice furnished and therefore separately stated in the schedules, or measured according to the weight of the commodity subject to refrigeration and the distance of transportation, in which event they might be more easily covered into the transportation rate. The former method would probably result in a closer approximation of charge imposed to value of service performed, and be more adjustable to the variable conditions of the seasons and the demands of the shippers, while the latter might the better conduce to simplicity in the schedules. Which should be adopted would seem to be a question of practice and expediency, rather than one of law.[99] "The interstate commerce commission, not consider-

96. **Terminal charges.**—Decree, 43 C. C. A. 209, 103 Fed. 249, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824.

Under Act to Regulate Commerce, § 6, providing that terminal charges shall be stated in the published schedules, a shipper's charge against a carrier for "spotting" cars on the shipper's tracks in its own yards could not be collected as a terminal charge, where it had never been published as such. New York, etc., R. Co. *v.* General Elect. Co., 146 N. Y. S. 322, 83 Misc. Rep. 529.

97. Decree, 43 C. C. A. 209, 103 Fed. 249, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824; Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

"In Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824, the court upheld the right of the railroads to make a distinct charge from the point of shipment to Chicago, and a separate terminal charge for delivery to the stockyards in that city, which was a point beyond their lines; but, because it did not arise in the case, the court declined to express an opinion upon the question whether the rule would be applicable to terminal services by a carrier upon its own line which it was obliged to perform as a necessary incident to its contract to carry." Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

"In Walker *v.* Keenan, 19 C. C. A. 668, 73 Fed. 755, the court, in discussing the Keith Case, said there was no reason why the compensation of a carrier should not me apportioned if the public convenience were subserved thereby, but that since the passage of the interstate commerce law the apportionment should be specified in the tariff schedules for the information of shippers." Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

98. Knudsen-Ferguson Fruit Co. *v.* Chicago, etc., R. Co., 149 Fed. 973.

99. **Charges for icing.**—Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

ing that the question was foreclosed by any provision of the act of congress, has thus expressed its views: "There are at least three methods which may be adopted by the carrier in imposing such charges. It may charge for the ice actually used at so much per ton; it may charge for the service of refrigeration at so much per car, whatever the quantity of ice consumed may be; or it may charge at a rate by the hundred pounds,when property moves under refrigeration. All these different systems have their advantages and disadvantages. Some witnesses were in favor of one system, some of another. It is not within the province of this commission to prescribe the method which shall be adopted, so long as the price charged the shipper is fair.' " [1]

Cartage.—It is doubtful whether cartage, when furnished without charge by a railroad company, comes within the meaning of the phrase "terminal charges," or can be regarded as "a rule or regulation" which in anywise "changes, affects or determines" any part or the aggregate of the rates, fares and charges.[2] However, it has been said, in a matter of this kind, much should be left to the judgment of the commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the commission's power.[3] Therefore, it has been held that the failure of a railroad company to state in its schedules posted and published at a point on its line, the fact that it furnishes free cartage at such point, is not a violation of § 6 of the interstate commerce act, from the fact that the failure to publish the fact of free cartage in its schedule might result in ignorance by some shippers of the existence of such a privilege.[4]

Privileges and Facilities Granted.—The furnishing of lumber for bulkheads for a grain car was not the furnishing of "privileges of facilities" within the meaning of the Interstate Commerce Act, requiring the schedules filed by a carrier with the interstate commerce commission to state the privileges and facilities granted or allowed by the carrier, and the fact that a carrier's printed schedule did not show that bulkheads were furnished in grain cars would not prevent a shipper, who furnished material for constructing bulkheads in cars furnished him for shipping grain, in order to make the cars available for use, from recovering the expense of such bulkheads from the carrier; the carrier being under a common-law obligation to pay such expense.[5]

Baggage Regulations.—By requiring the baggage regulations, including the excess valuation rate, to be filed and become part of the tariff schedules, the rule of the common law that the carrier becomes an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger is not changed. The effect of such filing is to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage, and to require the passenger whose knowledge of the character and value of his baggage is peculiarly his own to declare its value and pay for the excess amount. There is no question of the reasonableness or propriety of making such regulations, which would be binding upon the passenger if brought to his knowledge in such wise as to make an agreement or what is tantamount thereto.[6]

1. Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.
" 'This was said in a cause pending before the commission involving the very practice now challenged by the plaintiff.' 11 Int. Com. Com'n R. 129, 141." Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

2. **Cartage.** — Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

3. Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

4. Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

5. **Privileges and facilities granted.**—Loomis *v.* Lehigh Valley R. Co., 132 N. Y. S. 138, 147 App. Div. 195.

6. **Baggage regulations.**—Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

§ 4133. Publishing.—Effective railroad regulations under the Interstate Commerce Act must begin with the publicity of rates, and the penalty for failure to publish and file the rates is as severe as the penalty for failure to observe them after filing.[7] The consignee is, on tender of the freight stipulated in the bill of lading, though it is less than the rate approved by the interstate commerce commission, entitled to possession of goods transported by connecting carriers jointly, in the absence of proof of publication of the latter rate as provided by § 6 of the Interstate Commerce Act.[8]

Where Carrier's Line Is Wholly Intrastate.—Under the provision requiring several common carriers operating a through line engaged in interstate commerce to file schedules of rates constituting the basis of a through interstate rate, each carrier, though operating a line wholly within a state, which line is a portion of a through route engaged in interstate commerce through a common arrangement between several connecting carriers, is bound to comply with such act.[9]

Prerequisite for Conviction for Giving Rebate.—It is not essential, however, to the commission of the offense of giving a concession from a through rate over connecting lines of railroad, under the Act of February 19, 1903, that the rate be a joint one established by all of the carriers and published and filed with the interstate commerce commission. If an initial carrier accepts traffic for transportation, and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the commission, the lawful through rate to be charged is the sum of the local and joint rates.[10]

Terminal and Demurrage Charges.—Demurrage charged for the detention of cars in loading or unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of the interstate commerce act which define transportation as including all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported, and require the filing and publishing of schedules showing all the rates, fares, and charges for transportation, stating separately all terminal charges.[11] A carrier subject to the act may furnish free cartage from its depot at one station without publishing the fact, and not do so at another near by, without infringing upon § 4 or § 6, especially when the practice has been long established.[12] Cartage is not in general a terminal expense, and is not in general assumed by the carrier. The transportation as between the carrier and its patrons ends when the freights are received at the warehouse, and the charge made is for a service which ends there.[13] Under the facts the general traffic rate for interstate freight does not include delivery to an industrial plant of the consignee or the transportation of the cars from the industrial plant of the shipper to the carrier's yard or main line over a distance varying from one-fifth of a mile to seven miles, but the carrier performing such service is entitled to exact a reasonable charge therefor.[14]

7. **Publishing.**—United States *v.* Illinois Terminal R. Co., 168 Fed. 546.

8. Atlanta, etc., R. Co. *v.* Horne, 106 Tenn. (22 Pickle) 73, 59 S. W. 134.

9. **Where carrier's line is wholly intrastate.**—United States *v.* New York, etc., R. Co., 153 Fed. 630.

10. **Prerequisite for conviction for giving rebate.**—Chicago, etc., R. Co. *v.* United States, 157 Fed. 830, affirmed in 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439.

11. **Terminal and demurrage charges.**—Lehigh Valley R. Co. *v.* United States, 110 C. C. A. 513, 188 Fed. 879, affirming judgments United States *v.* Philadelphia, etc., R. Co., 184 Fed. 543, and United States *v.* Lehigh Valley R. Co., 184 Fed. 546.

12. Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

13. Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986.

14. Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 188 Fed. 229.

As Prerequisite to Engaging in Transportation.—The act requires every carrier subject to the act to file with the interstate commerce commission, print, and keep open to public instruction, schedules showing all the rates for transportation between different points on its own route, and between points on its own route and that of any other railroad company, when a through route and a joint rate have been established, and also forbids the carrier to engage in the transportation of property between states without filing such rates. It is only the "business" of a common carrier, which could not be exercised without filing rates, and a railroad company was not prohibited from receiving freight for transportation to another state by the fact that no through route and joint rates had been established between the points of shipment and delivery.[15]

§ 4134. Posting.—Copies of the printed schedules, for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such common carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.[16] Where a schedule of rates had been filed with the interstate commerce commission and copies thereof furnished to the freight officers of the railroad company, it was held that such schedule of rates had become legally operative, notwithstanding copies had not been posted in its depots as required by the act to regulate commerce.[17] A carrier, filing its rates with the interstate commerce commission as required by the interstate commerce act is barred from making any agreement for a greater or less rate than that prescribed by the rates filed, though it failed to post and publish the rates as prescribed by the act, but only posted a card to the effect that the rates were in charge of an agent in an office, and kept there for the convenience of the public.[18] But where the evidence showed that the rate as promulgated by the interstate commerce commission had not been posted in the station at the shipping point, and the carrier's agent there was not notified of its existence, but acted on the tariff sheet in his possession, contracting with reference thereto to carry hay

15. As prerequisite to engaging in transportation.—Reid *v.* Southern R. Co., 153 N. C. 490, 69 S. E. 618.

16. Posting.—Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

17. Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Kansas, etc., R. Co. *v.* Albers Comm. Co., 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment 99 Pac. 819, 79 Kan. 59.

That a carrier failed to post its schedules and tariff sheets in a depot, as required by the interstate commerce law, does not affect the validity of the rates promulgated, filed with the interstate commerce commission, and deposited with the station agent. Mires *v.* St. Louis, etc., R. Co., 134 Mo. App. 379, 114 S. W. 1052.

"Like views of the posting clause were expressed in Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358, and upon further consideration we perceive no reason for departing from them. See, also, Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316." United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323.

Where a railroad company seasonably made out and filed its traffic schedules, as required by Interstate Commerce Act, § 6, and forwarded copies to its local agents, the fact that some of its local agents failed to post them did not invalidate the rates established. Louisville, etc., R. Co. *v.* Allen, 153 S. W. 198, 152 Ky. 145, petition for rehearing overruled 154 S. W. 371, 152 Ky. 837.

18. Houseman *v.* Fargo, 124 N. Y. S. 1086.

Erroneous quotation by agent of an interstate carrier of a lower freight rate than that fixed by the published tariff gives no right of action to a shipper who sustains injury by acting on the faith of the quoted rate, though such tariff was not posted in the carrier's local station. Illinois Cent. R. Co. *v.* Henderson Elevator Co., 33 S. Ct. 176, 226 U. S. 441, 57 L. Ed. 290, reversing judgment 127 S. W. 779, 138 Ky. 220.

Where defendant failed to post an established rate at a station from which plaintiff's cattle were shipped, whereby he was compelled to pay a rate higher than if he had shipped under a competitive rate over another road, he was entitled to recover the difference under Interstate Commerce Act, § 8. St. Louis, etc., R. Co. *v.* Lewellen Bros., 192 Fed. 540, 113 C. C. A. 414, writ of certiorari denied in 32 S. Ct. 835, 225 U. S. 701.

for a shipper, the carrier was liable in an action by the shipper for charges in excess of such contract rate collected at the point of destination at the rate specified in the new tariff.[19]

Distinguished from Publication.—Publication and posting in the sense of the act are essentially distinct.[20] From all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form, preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established.[21]

Posting Notice That Copies in Possession of Agent.—The provision relative to a common carrier engaged in interstate commerce over a line owned entirely by it, that it shall post printed copies of its schedules of rates for the use of the public in two public and conspicuous places in every station where freight is received for transportation, in such form that they shall be accessible to the public, and can be conveniently inspected, is not satisfied by the station agent having copies of the schedule, and the posting of a notice of this fact, and that they can be inspected on application, so as to put into effect the further provision of the section that when the carrier shall have established and published its rates in compliance with the provision of the section, it shall be unlawful for the carrier to charge a smaller rate than specified in such published schedules.[22]

Where Copies Torn Down.—The posting of copies of rates at a railroad station, where they are afterwards torn down, is not a compliance with the interstate commerce act, requiring a carrier to keep copies of its schedules of rates posted at its stations, etc.[23]

Prerequisite to Establishing Rates.—Obviously, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates—a result which evidently is not intended by the act, for it provides that rates only lawfully established shall not be changed otherwise than in the mode prescribed.[24] In none of its expressions is there any suggestion that posting is a necessary step in establishing rates; that is, in making them legally operative.[25] Posting, is not essential to make rates legally operative, and is required only as a means of affording special facilities to the public for ascertaining the rates actually in force.[26] But where a railroad

19. Chicago, etc., R. Co. *v.* Gardner (Tex. Civ. App.), 86 S. W. 793.

20. **Distinguished from publication.**—United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323.

21. United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323.

22. **Posting notice that copies in possession of agent.**—Wabash R. Co. *v.* Sloop, 200 Mo. 198, 98 S. W. 607.

23. **Where copies torn down.**—Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

24. **Prerequisite to establishing rates.**—United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323. See, also, Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

The posting of schedules required by the Interstate Commerce Act is solely for the information of the public, and is not necessary to the establishment of the rate; and hence, where a rate is known to the persons operating the railroad as a fixed rate, having a uniform character, and undertaking to treat all shippers alike in proportion to the distances shipped, then such rate is established, within the meaning of the section making discrimination a crime. United States *v.* Howell, 56 Fed. 21.

25. United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323.

26. Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316; Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358.

Interstate freight rates are established when schedules thereof are regularly printed, filed with the interstate commerce commission, and kept open to public inspection by the carrier at its freight offices, although such rates may not be posted in public and conspicuous places,

company failed to post a schedule of tariff rates as required by Interstate Commerce Act for the use of the public in every depot where passengers of freight are received for transportation, and a shipper in ignorance of such schedule, relying upon a schedule previously in force, contracted for shipment of grain, to his damage, he could recover of the railroad company therefor at common law.[27]

Prerequisite for Prosecution for Rebate.—Compliance with the requirements of § 6 of the act to regulate commerce of June 29, 1906, that copies of schedules and tariffs for the use of the public shall be "posted" in two public and conspicuous places in every depot, so as to be readily accessible to the public, is not essential to bring a tariff within the provision of such act making it a misdemeanor for any shipper knowingly to solicit, accept, or receive a rebate or concession whereby property is transported in interstate commerce at a less rate than that named in the tariffs "published and filed" by such carrier, as publication is a step in establishing rates, while posting is a duty arising from the fact that they have been established.[28]

Demurrage Charges.—A charge for demurrage on cars is not invalidated though the rules regarding such demurrage were not posted in two public places in the company's depot as required by the rules of the interstate commerce commission.[29]

§ 4135. Filing with Commission.—Every common carrier subject to the provisions of the Interstate Commerce Act is required to file with the interstate commerce commission copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of the act, and to promptly notify the commission of all changes made in same.[30] In order to establish an interstate freight rate, under the Interstate Commerce Act as it stood in 1908, the carrier is bound to file the schedule with the interstate commerce commission.[31] On action for demurrage, failure to file tariffs or the filing of defective ones with the interstate commerce commission has no legal bearing on the right to recover the ordinary and usual charges.[32] A common carrier is not deprived of its right to make a charge for demurrage though the rules and tariffs are separately filed with the interstate commerce commission.[33]

as required by § 6 of the Interstate Commerce Act of February 4, 1887, as amended by the Act of March 2, 1889, as posting is not essential to make rates legally operative, but is required only as a means of affording special facilities to the public for ascertaining the rates actually in force. Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

Interstate freight rates are established when a schedule thereof is filed by a carrier with the interstate commerce commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted," as required by § 6 of the Act to Regulate Commerce, as amended March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3158], which is not made a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force. Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358.

27. Illinois Cent. R. Co. *v.* Henderson Elevator Co., 138 Ky. 220, 127 S. W. 779.

28. Prerequisite for prosecution for rebate.—United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323.

29. Demurrage charges.—Chicago, etc., R. Co. *v.* Berwind, etc., Min. Co., 171 Ill. App. 302.

30. Filing copies with commission.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896; Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

31. Hunter *v.* St. Louis, etc., R. Co., 167 Mo. App. 624, 150 S. W. 733.

32. Chicago, etc., R. Co. *v.* Berwind, etc., Min. Co., 171 Ill. App. 302.

33. Chicago, etc., R. Co. *v.* Berwind, etc., Min. Co., 171 Ill. App. 302.

Agreements with Other Carriers.—It is also required that every such common carrier shall file with the commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of the act.[34] Such carriers are required to file with the interstate commerce commission copies of their joint tariffs, which shall be made public by the carriers when directed by the commission, in so far as in the judgment of the commission it is deemed practicable, the commission being given power to prescribe the measure of publicity to be given and the places in which the joint tariffs shall be published. There is also a prohibition like the above of any advance of such joint rates except after ten days' notice, or any reduction except after three days' notice.[35] In a prosecution against certain interstate carriers for shipping certain freight at a ten-cent rate, when the published and filed rate was fifteen cents per hundredweight, evidence that the ten-cent rate had been published by defendant's connections and sent "broadcast," though not filed, was inadmissible as a matter of defense, since the charging of a rate less than the filed rate constitutes a concession to the shipper, in violation of the act, as a matter of law.[36]

Effect of Filing.—The mere filing of schedules of rates with the interstate commerce commission raises no interference that the commission agrees to such rates, or all the proposed conditions of shipment.[37] As the filing of schedules of rates raises no inference that the interstate commerce commission agreed to them, or the proposed conditions of shipment, the mere filing of a schedule by a railroad company, in view of the fact that when the schedule was filed the Commission had no authority to fix rates for future shipments, and no power to issue general orders to carriers, and in view of the Interstate Commerce Act providing that the initial carrier shall be liable for the negligence of any connecting carrier despite any contract receipt rule, or regulation to the contrary, will not validate a condition in such a schedule, limiting the carrier's liability for negligence by means of an agreed valuation of the goods shipped, and thus abrogate the provision of a state statute which makes such a contract void.[38] Where a railroad company filed two rates with the interstate commerce commission, the lower providing for an agreed valuation of live stock shipped, which condition was invalid, under the state law, for limiting the railroad company's liability for negligence, a decision that the shipper might recover despite the condition, while giving him all the benefits of the higher rate, is not erroneous in giving the shipper a less rate than required by law, because of the filing of the schedule of rates with the interstate commerce commission, for the validity of the agreement limiting the carrier's liability for negligence can not be assumed to have been approved by the commission, when invalid under the state law.[39]

34. Interstate Commerce Act, § 6, as amended March 2, 1889. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

Agreements with other carriers.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 459, 38 L. Ed. 1047, 14 S. Ct. 1125.

35. Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

36. Published but not filed.—United States *v.* Merchants', etc., Transp. Co., 187 Fed. 363.

37. Effect of filing.—Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

38. Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

39. Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

"We do not understand that the interstate commerce commission approves and adopts all rates and conditions contained in any schedule of rates filed by a common carrier. At the time when the shipment in question was made, the interstate commerce commission had no authority to fix rates for future shipments. It did have power, however, to determine upon the reasonableness of rates, when that question was brought before it. Interstate Commerce Comm. *v.* Alabama Mid. R. Co.,

§ 4136. Distributing in Offices of Agents.—Under the Interstate Commerce Act providing that a carrier, in order to establish an interstate rate, must file the schedule with the interstate commerce commission and publish the same, the carrier, to prove the establishment of an interstate rate for a particular station, is bound to prove that the printed schedule containing such rate had been furnished to that station, or to the agent in charge thereof; and proof that a printed copy of the schedule containing the rate was furnished to the carrier's depot and freight agent at another station, some six miles from the station in question, was insufficient.[40]

§ 4137. Construction of Schedule.—In construing classification sheets the intent of the framers as to the meaning of words used when it can be ascertained should be given effect, regardless of the intent of the shipper or of the local usages relating to the meaning of terms used therein.[41] When the plaintiff applied for cars for the transportation of oak cross ties, one of the defendant carriers had a joint rate to certain points, including the destination of the ties, applying to "lumber, car loads, all kinds." The other defendant carrier had a similar rate on "lumber, all kinds," but neither carrier had a specific rate on cross ties. "Lumber" being generally defined to include "any timber sawed or split for use," whether by maul, wedge, or the use of machinery in a mill, anything manufactured out of a log with saw, ax, maul, wedge, or machine, for building houses, bridges, fences, or railroads, after the product leaves the log for commercial use, it included the cross ties within such joint-rate schedules.[42] Showcases are "furniture" within the ordinary meaning of the word, which governs in the construction of tariff schedules published for the information of the public, and are included in a commodity rate on "furniture (new) all kinds."[43]

Agreement of Parties.—A carrier fixed certain rates for peaches in baskets covered with gauze, and other rates for peaches in baskets with wood covers. A shipper placed his peaches in gauze-covered baskets, and placed a layer of baskets on the floor of a car. He then nailed cross-pieces to the upright posts, and then laid a new floor on the crosspieces, just above the first tier of baskets, and then placed another tier of baskets on the new floor, and so on to the top of the car. It was held that he shipped his peaches in baskets covered with gauze and the carrier was entitled to the higher rate, notwithstanding an agreement with the agent for the lesser rate, on the theory that the peaches were shipped in baskets with wood covers.[44]

168 U. S. 144, 18 S. Ct. 45, 42 L. Ed. 414; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243. But it had no power to issue general orders in relation to carriers. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940." Cramer *v.* Chicago, etc., R. Co., 153 Iowa 103, 133 N. W. 387.

40. Distributing in offices of agents.—Hunter *v.* St. Louis, etc., R. Co., 167 Mo. App. 624, 150 S. W. 733.

In order to establish an interstate freight rate, under the Interstate Commerce Act as it stood in 1908, the carrier is bound to promulgate and distribute the tariff in printed form in the offices of its agents. Hunter *v.* St. Louis, etc., R. Co., 167 Mo. App. 624, 150 S. W. 733.

Under Interstate Commerce Act, § 6, a carrier must file with the Commission its schedule of rates and distribute them that shippers may have access to them and ascertain their terms. Oregon R., etc., Co. *v.* Thisler, 133 Pac. 539, 90 Kan. 5.

The posting of copies of a carrier's schedule of rates at stations is not necessary to render a change in the rates effective, it is necessary that the schedules be distributed among the different stations at which it has effect, and merely filing the schedules with the commission is not sufficient. Virginia-Carolina Peanut Co. *v.* Atlantic, etc., R. Co. (N. C.), 82 S. E. 1.

41. Construction of schedule.—Smith *v.* Great Northern R. Co., 15 N. Dak. 195, 107 N. W. 56.

42. American, etc., Timber Co. *v.* Kansas, etc., R. Co., 175 Fed. 28.

43. Chicago, etc., R. Co. *v.* Feintuch, 191 Fed. 482.

44. Agreement of parties.—Houseman *v.* Fargo, 124 N. Y. S. 1086.

§§ 4138-4145. Operation and Effect of Schedules—§ 4138. In General.—Where a carrier makes its schedules of rates and files them with the interstate commerce commission, which approves and promulgates them as required by the Interstate Commerce Act both the carrier and shipper must observe them, and any known departure therefrom will subject them to a fine.[45] Where a commodity rate is named in a tariff on a commodity and between specified points, the commodity rate is the lawful rate, though a class rate or some combination may make a lower rate.[46] Where a tariff has been established on a commodity for a through interstate shipment, as provided by the act, there can be no departure therefrom unless made according to law.[47]

Shipper's Right Therein.—Under the provisions of the Interstate Commerce Act which require railroad companies to adhere to their filed and published rates, a shipper who delivers property for carriage has a contract right to the rates and all privileges and facilities specified in the schedules then in force.[48]

§§ 4139-4141. As Standard Charge—§ 4139. In General.—It is now the established rule that a carrier can not depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute.[49] Where a common carrier has established and published its rates and charges in compliance with the provisions of the section requiring that the schedule showing such rates shall be posted in every station where freight is received it shall be unlawful for the carrier to charge a greater or less compensation than is specified in such published schedule of rates and charges as may at the time be in force.[50] The Interstate Commerce Act provides for and prescribes a standard by comparison with which it may be deter-

45. Operation and effect of schedules.—Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526, citing Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671; Illinois Cent. R. Co. *v.* Henderson Elevator Co., 138 Ky. 220, 127 S. W. 779; Ford *v.* Chicago, etc., R. Co. (Minn.), 143 N. W. 249; Melody *v.* Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, Ann. Cas. 1912C, 727.

46. Pecos, etc., R. Co. *v.* Porter (Tex. Civ. App.), 156 S. W. 267.

47. United States *v.* Pennsylvania R. Co., 153 Fed. 625.

48. Shipper's right therein.—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 207 Fed. 733, reversing judgment on rehearing 200 Fed. 652.

49. As standard charge.—*United States.*—Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671; Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 896, 13 S. Ct. 970; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Great Northern R. Co. *v.* O'Connor, 232 U. S. 508, 34 S. Ct. 380.

Kansas.—Christl *v.* Missouri Pac. R. Co. (Kan.), 141 Pac. 587.

South Carolina.—Hardaway *v.* Southern R. Co., 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D, 266.

An interstate carrier can charge no more and no less than the rate filed with and approved by the interstate commerce commission and published as the lawful rate, and a greater or less charge can not be justified on the ground of mistake. Aldrich *v.* Southern R. Co., 79 S. E. 316, 95 S. C. 427.

50. Act Cong. Feb. 4, 1887, 24 Stat. 379, c. 104, § 6, as amended by Act March 2, 1889, 25 Stat. 855, c. 382 (Interstate Commerce Act).

The act provides that when any common carrier shall have established and published its rates, fares and charges in compliance with the provisions of said section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force. Interstate Commerce Act, § 6, as amended March 2, 1889. Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

mined whether a given rate is or is not to be deemed unreasonable within the meaning of the act; and that standard is the rate adopted, printed, and kept posted, as required by the statute, by those engaged in the business, and subject to the effects of free competition. Courts and juries can not resort to any other standard.[51] Where the evidence showed that the rate as promulgated by the interstate commerce commission had not been posted in the station at the shipping point, and the carrier's agent there was not notified of its existence, but acted on the tariff sheet in his possession, contracting with reference thereto to carry hay for a shipper, the carrier was liable in an action by the shipper for charges in excess of such contract rate collected at the point of destination at the rate specified in the new tariff.[52]

Where Lesser Rate Contracted for.—If a rate quoted is less than the schedule rate approved by the interstate commerce commission and published, the shipper is liable for the full rate, whether he actually knows that the rate quoted is less than the schedule rate or not.[53] Where a freight rate has been duly fixed by the interstate commerce commission and posted by a railroad company, a lesser rate contracted for between the shipper and a company, whether intentional or through mistake, is not binding, and the company can hold the freight until the legal rate is paid.[54]

Where Rate Not Known to Carrier.—In a prosecution of an interstate carrier for shipping freight at a rate less than that filed with the interstate commerce commission, defendant could not be heard to say that it did not know of the filed rate, which it had established in accordance with the law, as a justification for its departure therefrom.[55]

Hay and Old Hay.—An interstate commerce rate for "hay" prevents a contract for another rate for "old hay."[56]

Under Provision as to Rebates.—Where fruit was being shipped from California to the eastern markets and several railroad companies published a guaranteed through rate on such goods, taking advantage of this rate, the shippers, at the end of the initial carrier's road, made agreements with the connecting carriers, whereby they obtained rebates on routing the goods over the latter roads; but the initial carrier, in order to avoid this, reserved the right to route the goods beyond its own lines, the court committed error in sustaining the action of the interstate commerce commission in ordering the initial carriers to desist from enforcing the new rule, as the payment of rebates was a violation of the commerce act, and there is nothing in § 6 of the Interstate Commerce Act, providing for the filing of through joint tariff rates when agreed upon, to prevent it. This statute should not be construed so as to prohibit a rule to prevent the obtaining of rebates.[57]

Through and Local Rates.—Schedules of joint rates are required to be filed with the commission. And when so filed it is unlawful to charge more or less than is named therein.[58] But this does not prevent the carrier from reserv-

51. Van Patten *v.* Chicago, etc., R. Co., 81 Fed. 545.

52. Chicago, etc., R. Co. *v.* Gardner (Tex. Civ. App.), 86 S. W. 793.

53. Where lesser rate contracted for.—Baldwin, etc., Land Co. *v.* Columbia, etc., R. Co., 58 Ore. 285, 114 Pac. 469.

54. Sutton *v.* St. Louis, etc., R. Co., 159 Mo. App. 685, 140 S. W. 76; Gerber *v.* Wabash R. Co., 63 Mo. App. 145.

Where a carrier in good faith quoted on an interstate shipment of sheep a lower rate than the tariff rate, and then demanded the schedule rate before shipment commenced, which was paid, it was not liable to the shipper for the difference between the rate quoted and the tariff rate. Baldwin, etc., Land Co. *v.* Columbia, etc., R. Co., 58 Ore. 285, 114 Pac. 469.

55. Where rate not known to carrier.—United States *v.* Merchants', etc., Transp. Co., 187 Fed. 363.

56. Hay and old hay.—Missouri, etc., R. Co. *v.* Bowles, 1 Ind. T. 250, 40 S. W. 899.

57. Under provision as to rebates.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

58. Schedule of joint rates.—Interstate Commerce Act, § 6, as amended March 6, 1889. Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Inter-

ing the right to route goods beyond his line, when necessary to break up rebating by connecting carriers.[59] Where it appeared that local freight rates had been filed with the interstate commerce commission, but there was no proof that no through rate had been filed, an agreement by a carrier to transport at a rate less than the local rates was not shown to be illegal, though, if no through rate had been filed, the local rate would control.[60]

Where Goods Reshipped.—All goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, whether the shipment originates there or is delivered from a connecting carrier for reshipment.[61]

Demurrage and Storage Charges.—Where a carrier gave notice of the arrival of freight before it had so placed the cars that the freight could be delivered to the consignees, and thereafter attempted to charge storage while the cars remained in its possession as the carrier, in addition to the freight rates it was authorized to charge under its published tariffs, there was a willful violation of the provisions of the Interstate Commerce Act, providing that no carrier shall charge, demand, or collect different compensation for service than the rates specified in the tariff filed.[62]

Damages for Charge in Excess of Schedule.—A shipper, who is charged by a railroad company on an interstate shipment a rate in excess of that established by the company and filed with the interstate commerce commission, is injured by such unlawful rate within the meaning of the Interstate Commerce Act without regard to the question of its reasonableness, and under § 16 the interstate commerce commission has power to make an award of damages therefor which may be enforced by action in a circuit court.[63]

Proceedings to Attack Schedule Rate.—The shipper has the right, by appropriate proceedings, to attack the rate or the classification and if either or both are held to be unreasonable can secure appropriate relief either by reparation order, or by suit in court, after such finding of unreasonableness. But so long as the tariff rate, based on value, remains operative it is binding upon the shipper and carrier alike and is to be enforced by the courts in fixing the rights and liabilities of the parties.[64]

§ 4140. Contractual Rate.—Common carriers having adopted classification sheets fixing transportation charges, and having filed them with the interstate commerce commission, are, as well as the shippers, bound thereby, and contracts between carriers and shippers are governed by the classification of the sheet in force at the date of the shipment.[65] An agreement whereby a carrier

state Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

59. Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

60. Baltimore, etc., R. Co. *v.* La Due, 108 N. Y. S. 659, 57 Misc. Rep. 614.

61. Where goods reshipped.—Bigbee, etc., Packet Co. *v.* Mobile, etc., R. Co., 60 Fed. 545.

62. Demurrage and storage charges.—United States *v.* Texas, etc., R. Co., 185 Fed. 820.

63. Damages for charge in excess of schedule.—Chicago, etc., R. Co. *v.* Feintuch, 191 Fed. 482.

64. Proceedings to attack schedule rate.—Great Northern R. Co. *v.* O'Connor, 232 U. S. 508, 34 S. Ct. 380; Kansas, etc., R. Co. *v.* Carl, 227 U. S. 639, 33 S. Ct. 391; Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397.

65. Contractual rate.—*United States.*—United States *v.* Standard Oil Co., 183 Fed. 223; Illinois Cent. R. Co. *v.* Segari & Co., 205 Fed. 998.

Alabama.—Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

Georgia.—Raleigh, etc., R. Co. *v.* Swanson, 28 S. E. 601, 102 Ga. 754, 39 L. R. A. 275.

Iowa.—McManus *v.* Chicago, etc., R. Co., 156 Iowa 359, 136 N. W. 769.

Kansas.—Chicago, etc., R. Co. *v.* Hubbell, 54 Kan. 232, 38 Pac. 266.

Kentucky.—Louisville, etc., R. Co. *v.* Allen, 153 S. W. 198, 152 Ky. 145, petition

accepts from the shipper less than the established and published rate violates the Interstate Commerce Act and is wholly illegal.[66] The rate is fixed by law and not by contract.[67] There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.[68]

Made before Act Took Effect.—Where a carrier is engaged in business authorized by charter or legislation prior to Interstate Commerce Act, and so interblended with the transportation as to defy separation, the authority of regulating is limited to compelling just and reasonable rates.[69]

for rehearing overruled 154 S. W. 371, 152 Ky. 837.

Massachusetts.—New York, etc., R. Co. *v.* York, etc., Co., 102 N. E. 366, 215 Mass. 36.

New Mexico.—Pecos Valley, etc., R. Co. *v.* Harris, 14 N. Mex. 410, 94 Pac. 951.

New York.—Pennsylvania R. Co. *v.* Mogi, 128 N. Y. S. 643, 71 Misc. Rep. 412; judgment, 108 N. Y. S. 659, 57 Misc. Rep. 614, reversed in Baltimore, etc., R. Co. *v.* La Due, 112 N. Y. S. 964, 128 App. Div. 594.

North Carolina.—Virginia-Carolina Peanut Co. *v.* Atlantic, etc., R. Co. (N. C.), 82 S. E. 1.

North Dakota.—Smith *v.* Great Northern R. Co., 15 N. Dak. 195, 107 N. W. 56.

Texas.—Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061; Houston, etc., R. Co. *v.* Dumas (Tex. Civ. App.), 43 S. W. 609. See, also, Missouri, etc., R. Co. *v.* Trinity County Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290; Texas, etc., R. Co. *v.* Clark, 4 Tex. Civ. App. 611, 23 S. W. 698.

Washington.—Fisher *v.* Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.

The time during which a rate different from the rate agreed upon between the carrier and a shipper is established by the filing and publishing of such rate is excepted from the term of such contract by the acts of congress regulating commerce which are a part thereof. Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

An interstate shipper is liable to pay the freight fixed by printed and published schedules of the initial carrier on file with the interstate commerce commission, notwithstanding any stipulations in the bill of lading to the contrary. Yorke Furniture Co. *v.* Southern R. Co. (S. C.), 78 S. E. 67.

Made before act took effect.—Act Cong. Feb. 4, 1887, entitled "An act to regulate commerce," abrogated all existing contracts with common carriers for special interstate commercial rates, and vested in the federal courts or tribunals specified therein exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Neb. 374, 59 N. W. 838.

Payment of schedule rate as prerequisite to recovery of goods.—24 Stat. 379, declares that, if any common carrier shall receive from any person a greater or less compensation for any service rendered than it receives from others for a like service, such carrier shall be guilty of unjust discrimination, which is declared to be unlawful. Held, that where plaintiff sued a railroad company to recover certain chattels without first paying freight charges thereon according to the company's published schedule, and plaintiff claimed an agreement whereby transportation charges were to be less than the published schedule, there could be no recovery, such contract being unlawful as to both parties. Church *v.* Minneapolis, etc., R. Co., 85 N. W. 1001, 14 S. Dak. 443.

66. Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543, citing Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

67. The interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) abrogated the right of the carrier and shipper to fix the freight rate by contract; the law fixing the rate. Baltimore, etc., R. Co. *v.* New Albany Box, etc., Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

68. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671.

69. **Made before act took effect.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

Where Rate Intentionally Misquoted.—The contract being against the public policy of the United States, as expressedly declared by these statutes, the fact that the shipper did not intend to violate the law is immaterial.[70] Where an unusually low rate has been given by the agent of several connecting carriers on a shipment of unusual character, and the initial carrier willfully misroutes the goods so that the shipper is compelled to pay a much higher rate, such initial carrier can not escape liability for damages on the ground that the rate given was in violation of interstate commerce law.[71]

Where Mistake in Quoting Rate.—A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the interstate commerce commission and posted in the stations of such carrier, as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted;[72] since otherwise, a discrimination in favor of the shipper would result, and this is so whether the mistaken rate is fixed in the bill of lading, or whether it was by parol agreement on a mistaken quotation of the rates made by the agent at point of shipment; and whether the shipper was ignorant of the actual published rate is immaterial.[73] A railroad company being prohibited by the interstate commerce act from charging any less freight on interstate traffic than prescribed by the interstate commerce commission for the route over which the shipment is actually carried, no contract, and no mistake in naming a wrong rate, can affect the right to collect such prescribed rate.[74] Where a carrier made an unintentional mistake in quoting a freight rate less than the regular tariff rate on file with the interstate commerce commission upon which the shipper fixed a price to be asked a customer for grain shipped and the difference between the quoted rate and the regular rate on file with the commission was subsequently collected, there could be no recovery by the shipper against the carrier; the Interstate Commerce Act binding both parties.[75] A contract between a station agent and a shipper for an interstate shipment was entered into on authority from railway headquarters, acting under the mistaken supposition that the shipment was to be within the state. The rate agreed on was less than the rate posted under the interstate commerce law. The contract could not be enforced.[76] A carrier can not contract for a different rate, directly or indirectly, as by payment under a mistake of fact as to weights, and settlement of such mistake.[77]

70. Where rate intentionally misquoted.—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272; Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543.

71. Pond-Decker Lumber Co. *v.* Spencer, 30 C. C. A. 430, 86 Fed. 846.

72. Where mistake in quoting rate.—*United States.*—Judgment, 98 Tex. 352, 83 S. W. 800, 107 Am. St. Rep. 633, reversed in Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; New York, etc., R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Illinois Cent. R. Co. *v.* Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290, 33 S. Ct. 176; Dunne *v.* St. Louis, etc., R. Co., 166 Mo. App. 372, 148 S. W. 997.

A carrier is not liable for the damages resulting from its mistake in quoting a rate less than the full published rate. Hamlen & Sons Co. *v.* Illinois Cent. R. Co., 212 Fed. 324.

Where a shipper of flour was, by a mistake of a responsible officer of plaintiff railroad company, given a rate which was less than that legally prescribed and shipped pursuant to such rate for two years, the railroad company, upon discovering the mistake was entitled to recover the difference between the legal rate and the rate paid by the shipper; equities in favor of the shipper constituting no defense. Central R. Co. *v.* Mauser, 88 Atl. 791, 241 Pa. 603.

73. St. Louis, etc., R. Co. *v.* Wolf, 100 Ark. 22, 139 S. W. 536.

74. Louisiana R., etc., Co. *v.* Holly, 127 La. 615, 53 So. 882.

75. Schenberger *v.* Union Pac. R. Co., 84 Kan. 79, 113 Pac. 433, 33 L. R. A., N. S., 391.

76. Houston, etc., R. Co. *v.* Dumas (Tex. Civ. App.), 43 S. W. 609.

77. St. Louis, etc., R. Co. *v.* Spring River Stone Co., 169 Mo. App. 109, 154 S. W. 465.

Misrepresentation of Shipper.—Where joint tariff rates were adopted by connecting carriers, and filed with the interstate commerce commission, as required by the interstate commerce law, fixing a lower freight rate for narrow-gauge cars for use of railroads engaged in the carrying business than for those intended to be used for logging purposes, a bill of lading fixing the lower rate for cars intended to be used for logging purposes, procured through the shipper's misrepresentation that they were intended to be used in the carrying business, is not binding on the railroad company, and it is entitled to recover the higher rate from the consignee, since it would be guilty of a criminal offense, under the Interstate Commerce Act, in accepting a lower rate than that fixed in the schedule of rates filed with the commission.[78] The fact that it may be unlawful for carriers to make a difference in the rate for such cars will not prevent the railroad company from recovering the higher rate for the transportation of the cars in question, where the evidence shows such compensation to be reasonable.[79]

Shipper's Knowledge of Schedule Rate.—One who has obtained from a common carrier transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the interstate commerce commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges.[80]

Shipment Through Foreign Country.—A contract for shipment of goods from a foreign port to an inland point in the United States for a through rate does not necessarily violate the interstate commerce law, though the proportion of the through rate allowed for the carriage from the port of entry to the destination is less than the rate scheduled for freight originating at such port and carried to such destination.[81]

Shipment over Connecting Lines.—Where freight is shipped over connecting lines, which have agreed on a joint tariff of rates, in compliance with the Interstate Commerce Act, the delivering line must collect the interstate commerce rate, and not that named in the bill of lading.[82] A stipulation in a bill of lading for a greater or less rate or permitting the carrier to make a different routing under conditions not provided for in the schedules, by which the cost to the shipper is affected, is void, and affords no defense to an action by the shipper to recover a sum exacted in excess of the schedule rate.[83] A contract for the shipment of freight beyond the line of a receiving carrier, at a rate which it has furnished the commission, and which is less than the aggregate of the rates charged by the connecting carriers, is not invalid, where the receiving carrier, without intending to violate the act, fixed such rate on quotations made to it by the connecting carriers, one of which, in quoting its rate and that of a connecting line, by mistake fixed the rate for such connecting line at less than it charged.[84]

78. **Contractual rate procured through misrepresentation of shipper.**—Missouri, etc., R. Co. *v.* Trinity County Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290.

79. Missouri, etc., R. Co. *v.* Trinity County Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290.

80. **Shipper's knowledge of schedule rate.**—Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802; Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628.

81. **Shipment through foreign country.**—Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061.

82. **Shipment over connecting lines.**—Where a carrier makes a contract for shipment of goods for a rate less than the interstate rate of the other lines over which it is forwarded, the delivering carrier may collect, not only the interstate rate, but the charges of the contracting line; such charges having been advanced by it to the connecting lines at the regular rates, in ignorance of the special contract. Missouri, etc., R. Co. *v.* Stoner, 5 Tex. Civ. App. 50, 23 S. W. 1020.

83. Louisville, etc., R. Co. *v.* Dickerson, 191 Fed. 705, affirming judgment, 187 Fed. 874.

84. Virginia, etc., Iron Co. *v.* Louisville, etc., R. Co., 98 Va. 776, 37 S. E. 310.

The agent of an interstate railway contracted with a shipper to transport live stock from a point in Arkansas to a point in Oklahoma. The shipments had to pass over the lines of the initial carrier and of another interstate carrier. The junction point was in Kansas. No through rate had ever been filed with the interstate commerce commission and published, but the initial carrier had on file and published an interstate rate on shipments from the point of origin of the shipments involved to the junction point, and the delivering carrier had on file and published a rate from the junction point to destination. The through rate contracted for by the initial carrier was less than the sum of the combined rates. Under the Interstate Commerce Act requiring the filing and publication of rates and forbidding interstate carriers from charging greater or less rates, the special contract was void, and the delivering carrier who on delivery of the consignment to it by the initial carrier had paid the freight charges of the initial carrier in accordance with its tariff was entitled on delivery of the shipments to the consignee to collect from him the freight charges so paid, and its freight charges in accordance with the tariff on file.[85]

Estoppel can not be based on an illegal contract; consequently the collection by an interstate carrier of a lesser rate than that contained in the public schedule, which is contrary to the provisions of the Interstate Commerce Act, can not raise an estoppel, precluding the carrier from collecting the balance.[86]

Under Joint Schedule.—Where carriers have filed and published schedules of joint through rates, it is the right of a shipper to have his property transported upon the lines joining in such schedules and at the rates therein specified, and the carrier receiving it can not avoid its obligation by any contract inserted in its bill of lading.[87] An initial carrier which has become a party to a joint through rate for the transportation of property over its own and connecting lines between two points in different states, which rate has been filed and published as required by the act, can not lawfully transport property between such points at a less and unpublished rate over another route and with different connections.[88]

Shipment of Fruit.—Where the initial carrier guaranteed a through rate and had the privilege to route the goods over the roads of the connecting carriers, it was held that the fruit was a special business and had nothing in common with other freight; therefore, there was no unlawful discrimination be-

85. Atchison, etc., R. Co. *v.* Bell, 31 Okla. 238, 120 Pac. 987, 38 L. R. A., N. S., 351.

86. New York, etc., R. Co. *v.* York, etc., Co., 215 Mass. 36, 102 N. E. 366.

87. Under joint schedule.—Dickerson *v.* Louisville, etc., R. Co., 187 Fed. 874; Wabash R. Co. *v.* Priddy, 101 Ind. 483, 101 N. E. 724.

Defendants' connecting carriers operated a through line from Kansas City to Spokane, and had filed a through rate on empty freight cars traveling on their own wheels of $90 per car in addition to freight earned by the use thereof in transit. Defendants and the Missouri Pacific Railroad Company operating a line from St. Louis to Kansas City had never published a joint free rate on such cars from St. Louis to Spokane, nor was the Missouri Pacific a party to any contract to transport plaintiff's cars from St. Louis to Spokane without charge other than the freight earned by such cars. Defendants had no line between St. Louis and Kansas City, but contracted to transport the cars from Kansas City to Spokane for a free rate. The fact that this rate was contrary to the rates filed with the interstate commerce commission having been discovered, the shippers were notified that the rate would not be adhered to before the cars were shipped, and defendants refused to deliver the cars without payment of the schedule rate. Held, that there was no authority for any rate on such shipment less than the joint rate from Kansas City to Spokane plus the rate from St. Louis to Kansas City. Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 95 Pac. 71, 49 Wash. 244.

An agreement with a single shipper for shipment over connecting lines having no joint through rate at less than the local rates for each road held void and not to prevent collecting the established rates by such carriers under Interstate Commerce Act Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1. Kansas, etc., R. Co. *v.* Albers Comm. Co., 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment 99 Pac. 819, 79 Kan. 59.

88. United States *v.* Vacuum Oil Co., 153 Fed. 598.

tween the shippers, and the provision in the Interstate Commerce Act prohibiting unlawful discrimination was not applicable.[89]

Contract for Excursion Rates.—Where a carrier sells a return excursion ticket for interstate transportation at a rate duly scheduled and filed as required by the Interstate Commerce Act, to expire on a certain date three days later than allowed by the schedule, the carriage of the passenger during the three days, the mistakenly written expiration date of the ticket issued to the passenger, is not a violation of the Interstate Commerce Act, since the erroneous issuance of a ticket in terms not conforming to the actual contract does not make an unlawful contract.[90]

Contract with Owner of Private Track.—An agreement by an interstate railroad carrier to accept less than its established and published rate by dividing the same with a shipper which built a private track over its own lands connected with the railroad company's line violates the Interstate Commerce Act, and is wholly illegal and unenforceable.[91]

Contract for Rebate.—Under this section of the Interstate Commerce Act a railroad's agreement to refund a part of rates lawfully charged and collected is in violation of law and unenforceable.[92]

Contract at Existing Rate for Fixed Time.—A contract between a carrier and a shipper to transport the latter's goods in interstate or foreign commerce, at the then established rate, for a definite time, is ineffective after a higher rate has been filed and published as required by law.[93]

Milling in Transit Agreement.—In a suit against a railroad for breach of a contract to maintain rates from a factory to competitive points not exceeding the rates from two other places, and providing for a milling in transit agreement whereby the railroad was to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory, the railroad filed a plea alleging that when the contract was made it was a common carrier engaged in interstate as well as domestic commerce, that it had then caused to be published schedules showing rates charged, that the rates specified in the contract were less than the published schedules, and that the contract was in violation of the act, and a further plea alleging in addition that the published schedule had been filed as required by the act. General demurrers were filed to each plea, and also a special demurrer to the former plea, on the ground that it was not shown that the railroad could not lawfully have amended its schedules so that it could lawfully have performed the contract, or that the schedules had been filed with the interstate commerce commission as required by the act, and to the latter plea on the ground that it was not shown that if the railroad should perform the contract it would be required to make any unreasonable preferences. The demurrers, general and special, were erroneously sustained.[94]

89. **Shipment of fruit.**—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

90. **Contract for excursion rates.**—Illinois Cent. R. Co. *v.* Fleming, 148 Ky. 473, 146 S. W. 1110; Illinois Cent. R. Co. *v.* Roberts, 148 Ky. 478, 146 S. W. 1113.

91. **Contract with owner of private track.**—Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543.

92. **Contract for rebate.**—Louisville, etc., R. Co. *v.* Coquillard Wagon Works' Assignees, 147 Ky. 530, 144 S. W. 1080.

93. **Contract at existing rate for fixed time.**—Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

94. **Milling in transit agreement.**—Gulf, etc., R. Co. *v.* Laurel Cotton Mills, 91 Miss. 166, 45 So. 982.

"We think the cases of Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075, and Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358, referred to by the learned counsel for the appellant, shed strong collateral light upon this inquiry, whilst not on exactly the same case on their facts." Gulf, etc., R. Co. *v.* Laurel Cotton Mills, 91 Miss. 166, 45 So. 982.

A contract by a railroad company to charge no greater rate from a certain factory to competitive points than was charged from certain other places, and to maintain a "milling in transit" agreement, is not illegal on its face, in the absence of any showing that the rates fixed by the contract were different from

Actual Weight of Goods.—Under the Interstate Commerce Act, prohibiting discrimination by special rate or device, a contract by a carrier for transportation for a less compensation than the published rate is invalid, and where at the time of a shipment neither the carrier nor the shipper had any actual knowledge of the actual weight of the goods, and the carrier received compensation based on a specified weight while the goods actually weighed more, it could recover the balance according to the schedule of rates established and filed.[95] Where a carrier receives goods for interstate shipment under the Interstate Commerce Act providing that the prescribed rates shall be charged on the basis of the marked capacity of the car, and its agent by mistake quotes and fixes a rate for a car based on the shipments' actual weight, the carrier's lien is for the amount fixed by the published rates, and can be discharged and the consignee become entitled to the goods only by payment or tender of such amount.[96]

Where Others May Make Same Contract.—A contract by a railroad company with a shipper to ship his horses to another state on a special through stock train, was not an agreement to perform a special service in violation of the Interstate Commerce Act every shipper being entitled to the same privilege upon request.[97]

Where Schedule Changed after Contract Made.—Where a contract for the interstate shipment of freight is illegal in being lower than the established schedules, as prohibited by the Interstate Commerce Act, a subsequent lowering of the rate to that specified in the contract does not validate the contract, and render the carrier liable for a breach thereof, on a future increase in the rate, and its refusal to carry the goods for the agreed rate.[98]

Purchase and Sale of Goods.—A carrier engaged in interstate commerce, which is not specially authorized to do so by its charter or existing legislation prior to the interstate commerce act, violates the provisions of such act, that the published rates must be adhered to, and prohibiting undue or unreasonable discriminations, and preferences, or rebates, in substance, if not in form, by buying, transporting and selling a commodity, even to complete a contract for the commodity sold, when the stipulated price does not fully cover the cost price, delivery and published tariff rates. Such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so.[99] Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities

those approved by the commissions, or that rates had been submitted to the commissions at all before the contract was made. Laurel Cotton Mills *v.* Gulf, etc., R. Co., 37 So. 134, 84 Miss. 339, 66 L. R. A. 453.

95. **Actual weight of goods.**—Pennsylvania R. Co. *v.* Mogi, 128 N. Y. S. 643, 71 Misc. Rep. 412.

96. **Actual weight instead of car capacity.**—Where a carrier receives goods for interstate shipment under the Interstate Commerce Act providing that the prescribed rates shall be charged on the basis of the marked capacity of the car, and its agent by mistake quotes and fixes a rate for a car of eighty thousand pounds capacity, based on the shipments' actual weight of forty thousand pounds, the carrier's lien is for the amount fixed by the published rates, and can be discharged and the consignee become entitled to the goods only by paying or tender of such amount; since, otherwise, a discrimination in favor of the shipper would result, and this is so whether the mistaken rate is fixed in the bill of lading, or whether it was by parol agreement on a mistaken quotation of the rates made by the agent at point of shipment; and whether the shipper was ignorant of the actual published rate is immaterial. St. Louis, etc., R. Co. *v.* Wolf, 100 Ark. 22, 139 S. W. 536.

97. **Where others may make same contract.**—Kirby *v.* Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252.

98. **Where schedule changed after contract made.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

99. **Purchase and sale of goods.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist.[1] As the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the carrier from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the carrier its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates.[2]

Contract Unenforceable.—The rule that an illegal contract will not be enforced at the suit of either party, and that the law leaves each party where it finds him, is applicable to a contract for a charge of a rate different from the schedule.[3] It being set up in defense that by reason of a large claim against the carrier, arising out of a similar preceding contract between same parties, from which it was released as part consideration for making the contract now considered, and that this caused the price largely to exceed in reality the cost of the coal with the published rates added thereto, it was held: Concluding, therefore, that both the contracts made by the carrier with the purchaser were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the purchaser, and afforded no legal basis for a claim of the purchaser against the carrier, and therefore this was no valid defense to the charge of infringing these prohibitions of the statute.[4] A contract between plaintiff, a lumber company, and defendant, an interstate railroad company, by which plaintiff agreed to build a private track on its own lands connecting with defendant's line, and to ship all of its product, with a certain exception, over defendant's road, in consideration of which defendant agreed to furnish cars and to carry plaintiff's product at certain rates differing from its established and published rates, was an entire and indivisible agreement, and being illegal as in violation of the Interstate Commerce Act, no action can be maintained for its breach by defendant for refusing to furnish cars.[5]

Estoppel to Assert Invalidity of Contract.—The act of the agent of a railroad company in contracting to carry goods at an illegal rate will not estop the carrier from repudiating such contract, as an estoppel can not be founded upon an illegal act.[6]

1. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

2. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

3. **Contract unenforceable.**—Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543.

4. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

5. Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543.

6. **Estoppel to assert invalidity of contract.**—Baltimore, etc., R. Co. *v.* New Albany Box, etc., Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

Under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), a person dealing with a carrier is as effectually bound by the law and the orders of the commerce commission, as to both freight and passenger tariffs, as is the carrier itself, and neither is estopped to assert the illegality of a contract made in violation of the act and orders of the commission. Melody *v.* Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, Ann. Cas. 1912C, 727.

Effect on Action for Breach of Contract.—The illegality of a contract for the interstate shipment of freight at a less rate than specified in the printed schedules of rates, which is prohibited by the interstate commerce act, prevents the recovery by the shipper for a breach thereof.[7]

Right of Passenger to Ride on Ticket.—A ticket issued to a passenger by a carrier in violation of the terms and conditions of orders of the interstate commerce commission confers no right to passage, and is not required to be accepted by the conductor of a train, and such passenger may be ejected without liability by the carrier to damages.[8]

Carrier's Lien.—Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount.[9]

Recovery of Excess of Schedule over Contract Rate.—In interstate commerce, the freight charges are fixed by the rates filed and posted in accordance with the act and where a carrier quotes a lower rate and collects it, it may thereafter recover the difference between the rate collected and that which should have been collected.[10] And where the published rate is collected at the destination, the difference between the rate agreed upon and the published tariff can not be recovered in an action by the shipper.[11] On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the state of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.[12]

Burden of Proof.—Though the parties to an interstate transportation contract can not, by agreement, mistake, or otherwise, fix a rate different from any established under the Interstate Commerce Act, nevertheless proof, in an action for overcharge, that a rate less than that charged by the carrier at destination was contracted for and inserted by the carrier's agent in the bill of lading, and that plaintiff paid the increased rate at destination under protest, was sufficient to establish a prima facie case, the burden then shifting to the carrier to show that the higher rate had been established in accordance with the requirements of the Interstate Commerce Act.[13] In an action against a final carrier for damages caused by its failure to deliver cattle upon their arrival of destination, and demanding the payment of additional freight in excess of that contracted for by the initial carrier, where the petition alleged a valid and binding contract on the

7. **Effect on action for breach of contract.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

8. **Right of passenger to ride on ticket.**—Melody *v.* Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, Ann. Cas. 1912C, 727.

9. **Carrier's lien.**—Texas, etc., R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

10. **Recovery of excess of schedule over contract rate.**—Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; Georgia Railroad *v.* Creety, 5 Ga. App. 424, 63 S. E. 528.

11. Missouri, etc., R. Co. *v.* Bowles, 1 Ind. T. 250, 40 S. W. 899; Atchison, etc., R. Co. *v.* Holmes, 90 Pac. 22, 18 Okla. 92.

12. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

13. **Burden of proof.**—Hunter *v.* St. Louis, etc., R. Co., 167 Mo. App. 624, 150 S. W. 733.

part of the initial carrier and the connecting lines to convey the cattle to their destination, it was not incumbent on plaintiff to allege or prove that the amount paid as freight was the full amount that defendant should have collected under published rates fixed by the interstate commerce commission; but the burden was on defendant to prove that a rate had been fixed by the commission between the points of shipment, that such rate had been published, and that defendant only demanded the amount so fixed and published.[14] Any departure by an interstate railroad company from the demurrage charges fixed by its filed and published schedules constitutes a misdemeanor.[15]

Contract without Limitation of Liability.—A special contract for an interstate shipment without limitation of the carrier's liability to an agreed value has no binding force where the carrier's tariffs on file with the interstate commerce commission graduate the rates according to declared value and limit the carrier's liability accordingly.[16]

§ 4141. Presumed Legal Rate.—A freight charge made by a common carrier which conforms to the schedule of rates required to be fixed and published by the Interstate Commerce Act is prima facie a reasonable charge.[17] By requiring the fixing and publication of freight rates to be charged by common carriers, the Interstate Commerce Act supplies prima facie evidence of the contract rate, which can only be overcome by averment in avoidance thereof.[18]

Presumed Reasonably Low Rate.—No presumption of law that a freight rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the interstate commerce commission.[19]

Demurrage Charges.—Where the charges of a railroad for demurrage are based on tariffs filed with the interstate commerce commission, as provided by the Interstate Commerce Act, such charges as to cars engaged in interstate commerce are conclusively presumed reasonable in a state court, in the absence of any action of the commission thereon.[20]

§ 4142. As Constructive Notice to Shipper.—Where a carrier has promulgated its rates under the interstate commerce law, and has complied with the statute by filing a copy of the schedule with the commission, deposited a copy with its agent, and posted copies in two conspicuous places in the depot, the shipper is presumed to know the existence of the schedules and the rates contained therein.[21] The shipper as well as the carrier is bound to take notice of the

14. Southern Kansas R. Co. *v.* Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

15. Lehigh Valley R. Co. *v.* United States, 110 C. C. A. 513, 188 Fed. 879, affirming judgments, United States *v.* Philadelphia, etc., R. Co., 184 Fed. 543, and United States *v.* Lehigh Valley R. Co., 184 Fed. 546.

16. **Contract without limitation of liability.**—Atchison, etc., R. Co. *v.* Robinson, 233 U. S. 173, 34 S. Ct. 556; Atchison, etc., R. Co. *v.* Moore, 233 U. S. 182, 34 S. Ct. 558.

17. **Presumed legal rate.**—Baltimore, etc., R. Co. *v.* La Due, 108 N. Y. S. 659, 57 Misc. Rep. 614.

Rates fixed and published by the interstate commerce commission must be considered reasonable and must stand until the rate is changed upon application to the commission. Wabash R. Co. *v.* Priddy, 101 Ind. 483, 101 N. E. 724.

18. Baltimore, etc., R. Co. *v.* La Due, 108 N. Y. S. 659, 57 Misc. Rep. 614.

19. **Presumed reasonably low rate.**—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

20. **Demurrage charges.**—Erie R. Co. *v.* Wanaque Lumber Co., 75 N. J. L. 878, 69 Atl. 168.

21. **As constructive notice to shipper.**—St. Louis, etc., R. Co. *v.* Faulkner (Ark.), 164 S. W. 763; Christl *v.* Missouri Pac. R. Co. (Kan.), 141 Pac. 587; Mires *v.* St. Louis, etc., R. Co., 134 Mo. App. 379, 114 S. W. 1052.

Every shipper is presumed to know the schedules for interstate rates fixed by the interstate commerce commission, and whether the rates charged by the carrier were the regular tariff rates or not. Wyrick *v.* Missouri, etc., R. Co., 74 Mo. App. 406.

A shipper is chargeable with knowledge of the lawful rate on his shipment where it has been published and filed as required by law, where it is accessible to

filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing.[22]

A shipper is conclusively presumed to know the published rates of an interstate carrier, and may not rely on the representations of the carrier's agent.[23]

Rate Based on Value of Freight.—A shipper's knowledge that the carrier's rate was based upon the value of the shipment is to be presumed where this plainly appears from the terms of the bill of lading and from the published rates on file with the interstate commerce commission.[24]

§ 4143. As to Joint Rates.—A tariff rate between two points on different railroads, filed and published by one company and concurred in by the other, which does not designate any particular route, must be held as a matter of law to apply to the natural and direct route over the lines of the two companies between the designated points, and to constitute the lawful rate over such route.[25] Nothing in the provisions of the act requiring joint traffic rates, when agreed upon, to be filed with the interstate commerce commission, and made public when required, and empowering the commission to prescribe forms of schedules of such rates, forbids the adoption by common carriers, as part of an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guarantying the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his

the public, unless he was misled after using proper diligence to ascertain such rate. United States *v.* Standard Oil Co., 155 Fed. 305.

"The supreme court of the state in this case affirmed the instruction of the trial court upon which the case was given to the jury and held an instruction that the oral contract between the carrier and shipper is binding unless it is affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper and its terms assented to by him is erroneous, as it ignores the terms of shipment set forth in the schedules and permits a recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding effect of such filed schedules, and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred." Atchison, etc., R. Co. *v.* Robinson, 233 U. S. 173, 34 S. Ct. 556.

22. Atchison, etc., R. Co. *v.* Robinson, 233 U. S. 173, 34 S. Ct. 556; Kansas, etc., R. Co. *v.* Carl, 227 U. S. 639, 33 S. Ct. 391; Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397; Chicago, etc., R. Co. *v.* Cramer, 232 U. S. 490, 34 S. Ct. 383; Great Northern R. Co. *v.* O'Connor, 232 U. S. 508, 34 S. Ct. 380.

23. Hamlen & Sons Co. *v.* Illinois Cent. R. Co., 212 Fed. 324.

24. Rate based on value of freight.—Adams Exp. Co. *v.* Croninger, 226 U. S. 491, 33 S. Ct. 148.

Having the notice which follows from the filed and published regulations, as required by the statute and the order of the interstate commerce commission, the shipper might have declared the value of his luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of his baggage, or he might, for the purpose of transportation, have valued it at $100 and received free transportation and liability to that extent only, or, as he did, he might have made no valuation of his baggage, in which event the rate and the corresponding liability would have automatically attached. Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

The supreme judicial court of Massachusetts erred in deciding that the Interstate Commerce Act did not in anywise change the common-law rule, applicable in Massachusetts, that regulations of this character, limiting the amount of recovery for baggage lost, must be brought home to the knowledge of the shipper and assented to or circumstances shown from which assent might be implied. Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

25. As to joint rates.—Standard Oil Co. *v.* United States, 103 C. C. A. 172, 179 Fed. 614.

requests to divert shipments en route are usually allowed.[26]

§ 4144. As to Privileges and Facilities.—Under the provision that the schedule printed as by any common carrier shall plainly state all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine the value of the service rendered the passenger, shipper or consignee, a provision in a passenger's ticket sold by a railroad company making it nontransferable, where no such limitation is shown in the company's schedule, is unlawful and void, and the company can not maintain a suit in equity based on such provision to enjoin transfers of such tickets.[27] Under the Act of June 29, 1906, prohibiting a carrier from extending to any shipper facilities in transportation, except such as are specified in the tariff, a shipper can not, under a special contract with a carrier, claim special facilities in transportation, such as that the freight be transferred in a single, covered express wagon by itself, so that, in an action by a shipper based on such special contract, the express company could show as a defense that the tariff rates applicable did not provide for such privileges.[28]

As to Stop-Over Privileges.—Where the tariff filed fails to provide for stop-over of shipments of syrup, an agreement for such stop-over is invalid because the same service could not be demanded by other persons.[29]

§ 4145. As to Contract for Exemption from Liability.—If the limitation of liability for baggage is required to be filed in the carrier's tariffs, the shipper is bound by such limitation.[30] The schedules are required to state, among other things, in naming certain charges, "all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." The question then is, does the limitation as to liability for baggage based upon the requirement to declare its value when more than $100 was to be recovered, come within that provision? The ordinary signification of the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier.[31]

An unreasonable contract limiting the carrier's liability on an interstate shipment of horses is invalid though the carrier had filed schedule of rates and contracts with the interstate commerce commission.[32]

§ 4146. Change of Rates.—It is not a violation of the Interstate Commerce Act for a railroad company to make a difference in its rates for the transportation of merchandise between different seasons of the year, carrying the same articles at a lower rate during the summer, or dull, months, than during the winter, or busy, months.[33]

26. Decree, Interstate Commerce Comm. *v.* Southern Pac. Co., 132 Fed. 829, reversed in 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

27. As to privileges and facilities.—Baltimore, etc., R. Co. *v.* Hamburger, 155 Fed. 849.

28. Winn *v.* American Exp. Co., 149 Iowa 259, 128 N. W. 663.

29. As to stop-over privileges.—Interstate Commerce Act, June 29, 1906, § 6; Bergin *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 150 S. W. 1184.

30. As to contract for exemption from liability. — Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

31. Boston, etc., Railroad *v.* Hooker, 233 U. S. 97, 34 S. Ct. 526.

Where a carrier failed to comply with the Interstate Commerce Act, requiring the posting of a schedule of rates at all stations, etc., a limitation of liability in an interstate shipment, recited to be in consideration of reduced rates, was void for want of consideration, as the carrier had under the circumstances but one rate. Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

32. Blair *v.* Wells Fargo & Co., 155 Iowa 190, 135 N. W. 615.

33. Change of rates.—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 73 Fed. 409.

Notice.—The act forbids any advance or reduction in rates, fares, and charges, established and published, except upon public notice, of which changes the commission shall be notified.[34] It is provided that reduction in such published rates, fares or charges shall only be made after three days' public notice to be given in the same manner that notice of an advance in rates must be given.[35]

Presumptions.—There is no presumption of wrong arising from a change of rates by a carrier.[36] That a railroad company increased a rate from what it had previously been raises no presumption that the new rate is unjust or unreasonable.[37] Nor does it justify the commission in putting them back to what they had been, without regard to whether that could be properly said of them.[38]

Power of Commission.—The withdrawal by carriers' tariffs of shippers' precooling privileges for which a fixed charge was made and approved by order of the interstate commerce commission, affects a rate and the commission is acting within its powers in ordering the cancellation of the withdrawal and requiring the carriers to conform to the prior order.[39]

Awarding Reparation.—The interstate commerce commission has power to determine the reasonableness of rates, and likewise it is authorized to award reparation, and in both respects, where the reparation arises from a re-establishment of rates, its conclusions, being administrative, are final and conclusive, unless the commission has in some particular material to the controversy exceeded its prescribed functions.[40] Where the interstate commerce commission, in readjusting freight rates, awarded reparation in certain cases involving rates on the Pacific Coast, but omitted to award reparation in another case for the reason that it involved an initial adjustment of territory or a very material readjustment of territory from points within which it was deemed proper that differentials should be allowed on shipments eastward over the coast rates, such readjustment of territory constituted a sufficient reason for the commission's action, which was therefore conclusive.[41] Where an order of the interstate commerce commission, readjusting territory and providing for additional differentials, merely awarded that Pacific Coast rates with their differentials as fixed by the commission continue until the new schedule from the particular zones should become operative, and that the zone shippers were not entitled to the additional reparation on account of shipments made previous to the order establishing the new differentials, such order, in so far as it denied reparation, did not constitute real discrimination.[42]

34. **Notice.** — Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802.

35. Interstate Commerce Act, § 6, as amended March 2, 1889. Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 S. Ct. 802. See, also, Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

36. **Presumption upon change of rates.** —Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493.

37. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 28 S. Ct. 493, 209 U. S. 108, 705, 28 S. Ct. 493.

There is no presumption of wrong arising from a change of rates by a carrier. Judgment, 141 Fed. 1003, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

38. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

39. **Power of commission.**—Atchison, etc., R. Co. *v.* United States, 232 U. S. 199, 34 S. Ct. 291.

40. **Awarding reparation.** — Fidelity Lumber Co. *v.* Great Northern R. Co., 193 Fed. 924, 113 C. C. A. 552, citing Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

41. Fidelity Lumber Co. *v.* Great Northern R. Co., 193 Fed. 924; 113 C. C. A. 552.

42. Fidelity Lumber Co. *v.* Great Northern R. Co., 193 Fed. 924, 113 C. C. A. 552.

§ 4147. Payment of Charges for Transportation.—Medium of Payment.—A carrier engaged in interstate commerce can not lawfully charge, collect, or receive anything but money for transportation on its road since the enactment of the Act of June 29, 1906, prohibiting any carrier from demanding, collecting, or receiving a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.[43] It is expressly prohibited to any carrier, unless otherwise provided, to demand, collect, or receive "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. It can not be supposed that this change was without a distinct purpose on the part of congress. The words "or different," looking at the context, can not be regarded as superfluous or meaningless. The words of the act, therefore, must be taken to mean that a carrier engaged in interstate commerce can not charge, collect, or receive for transportation on its road anything but money.[44] The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company with certain specified exceptions, should be on a plane of equality. Those ends can not be met otherwise than by requiring transportation to be paid for in money, which has a certain value, known to all, and not in commodities or services, or otherwise than in money.[45] A state statute authorizing a railway company incorporated under the laws of the state to issue transportation in payment for printing and advertising must give way, so far as interstate transportation is concerned, before the provisions of the act to regulate commerce under which a carrier can accept nothing but money in exchange for interstate transportation.[46] Where a carrier receives a shipper's note in payment of freight charges for shipments in interstate commerce, it receives a different compensation from that which the law authorizes, to wit, money, in violation of the act.[47]

Payment in Advertising.—The acceptance of advertising by a carrier in lieu of money in payment of interstate transportation furnished to the publisher, his employees, and the immediate members of his and their families, violates the provisions of the act to regulate commerce, the act prohibiting the furnishing of interstate transportation for a less or different compensation than that specified in the carrier's published rates.[48]

Payment of Existing Debt.—Where a carrier owes an ascertained sum of money, which is a legally enforceable debt, it is not a violation of the Interstate Commerce Act for it to pay such debt by carriage done for the creditor at its legally established rates.[49]

Release of Claim for Damages.—An interstate carrier can not make a valid contract to issue annual passes for life in consideration of a release of a claim for damages, since the enactment of the act, expressly prohibiting any carrier

43. Payment of charges.—Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671, reversing decree 118 S. W. 982, 133 Ky. 652; Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272.

44. Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671.

45. Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272.

46. Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272, affirming judgment in 163 Fed. 114.

47. United States *v.* Sunday Creek Co., 194 Fed. 252.

48. Payment in advertising.—Chicago, etc., R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272, affirming judgment in 163 Fed. 114.

49. Payment of existing debt.—Interstate Commerce Comm. *v.* Chesapeake, etc., R. Co., 128 Fed. 59, decree modified New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.[50]

§ 4148. Enjoining Enforcement of Rates.—The interstate commerce commission having been given exclusive jurisdiction in the first instance to determine reasonableness of interstate rates by the Interstate Commerce Act, shippers can not maintain a suit in equity to prevent the filing of enforcement of a schedule of rates, or a change to unjust or unreasonable rates, pending determination of the reasonableness thereof by the commission.[51]

Under Provision for Recovery of Damages.—Section 9 of the act provides that persons claiming to be damaged may make their complaint either to the commission in the manner provided in the act, or by bringing suit on their own behalf for the recovery of damages for which such carrier may be liable under the provisions of the act in any district or circuit court of competent jurisdiction; and such persons shall not have the right to pursue both of these remedies, and must elect which of the two methods of procedure herein provided for they will adopt. This does not warrant the conclusion that it was the purpose of congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same, as to particular persons, was so unreasonable as to be unlawful, and to prevent its enforcement by injunction.[52]

§ 4149. Charges of Connecting Carriers.—Where No Joint Rate Established.—Shipments over connecting lines must, under the Interstate Commerce Act take the lawfully established rate on each line where there is no established joint rate.[53] The defendants, connecting carriers, operated a through line from Kansas City to Spokane, and had filed a through rate on empty cars traveling on their own wheels of ninety dollars per car in addition to freight earned by the use thereof in transit. The defendants and the Missouri Pacific Railroad Company operating a line from St. Louis to Kansas City had never published a joint free rate on such cars from St. Louis to Spokane, nor was the Missouri Pacific a party to any contract to transport the plaintiffs cars from St. Louis to Spokane without charge other than the freight earned by such cars. The defendants had no line between St. Louis and Kansas City, but contracted to transport the cars from Kansas City to Spokane for a free rate. The fact that this rate was contrary to the rates filed with the interstate commerce commission having been discovered, the shippers were notified that the rate would not be adhered to before the cars were shipped, and the defendants refused to deliver the cars without payment of the schedule rate. The court held that there was no authority for any rate on such shipment less than the joint rate from Kansas City to Spokane plus the rate from St. Louis to Kansas City.[54]

Duty to Establish Joint Rates.—One carrier is not compelled to make a joint tariff rate with another carrier, but may insist upon charging its local rates for all transportation over its lines.[55] Where two carriers owning connecting

50. Release of claim for damages.—Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S. 671, reversing 133 Ky. 652, 118 S. W. 982.

51. Enjoining enforcement of rates.—Atlantic, etc., R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114.

52. Under provision for recovery of damages.—Atlantic, etc., R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114, citing Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

53. Connecting carriers.—Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316, reversing judgment 79 Kan. 59, 99 Pac. 819.

54. Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

55. Duty to establish joint rates.—Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912; Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

lines unite in a joint through tariff, they form for the connecting lines practically a new and independent line.[56]

Competing Carriers.—The only principle by which it is possible to enforce the whole statute is the construction that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it.[57]

§§ 4150-4154. Interstate Commerce Commission—§ 4150. In General.—The interstate commerce commission is a corporate body.[58]

Executive, Legislative or Judicial.—The interstate commerce commission is purely an administrative body.[59] It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the acts creating it, and it is not the final judge of its own jurisdiction.[60] The power given to the commission is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative.[61] But see elsewhere.[62]

Creation and Organization.—By the eleventh section a commission is created and established, to be known as the interstate commerce commission, and to be composed of five commissioners, appointed by the president, by and with the advice and consent of the senate.[63] Whatever may be the power of congress, it did not attempt to do more than to regulate the interstate business of common carriers, and the primary purpose for which the commission was established was to enforce the regulations which congress had imposed.[64]

§ 4151. Salaries and Expenses.—The act to regulate commerce as amended March 2, 1889, provides that all of the expenses of the commission shall be allowed and paid on the presentation of itemized vouchers therefor approved by

56. New line established.—Chicago, etc., R. Co. *v.* Osborne, 3 C. C. A. 347, 52 Fed. 912; Coeur D'Alene, etc., R. Co. *v.* Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71.

57. Competing carriers.—"We say 'seemingly' on the one hand and 'apparently' on the other, because in the supposed cases the preference is not 'undue,' or the discrimination 'unjust.' This is clearly so when it is considered that the lesser charge, upon which both the assumption of preference and discrimination is predicated, is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge." East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516, quoted in Interstate Commerce Comm. *v.* Southern R. Co., 117 Fed. 741.

58. Interstate commerce commission.—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

59. Executive, legislative or judicial.—Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

60. Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

61. Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

62. Under Amendment of 1906.—See ante, "Under Amendment of 1906," § 4062.

63. Creation and organization.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998. See, also, Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

64. Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

the chairman of the commission. The appropriation act of the same date provides that hereafter expenses of the interstate commerce commission shall be audited by the proper accounting officers of the treasury.[65] Money expended by the secretary of the interstate commerce commission for sending telegrams, if done at the request of the commission, shall be allowed and paid on the presentation to the proper accounting officers of the treasury of itemized vouchers therefor, approved by the chairman of the commission. The rules requiring copies of telegrams concerning business of the commission to accompany these vouchers for which credit is asked may be disregarded by the secretary, the commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for the production is unreasonable.[66]

§ 4152. Rules.—If the commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the interstate commerce statute. Congress has not seen fit to grant legislative powers to the commission.[67] In an action for labor and material in constructing grain doors for box cars used in transporting grain, there being no allegation as to when a rule relied upon by defendant was adopted by the interstate commerce commission, it will not be presumed to have been adopted before the grain doors were furnished.[68]

§§ 4153-4154. Powers and Duties—§ 4153. In General.—The commission is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers. It must also see that that publicity, which is required by § 6, is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforce obedience to all these provisions tends to both reasonableness and equality of rate as contemplated by the interstate commerce act.[69] But its powers are not very clearly defined in the act, nor is its method of procedure very distinctly outlined.[70]

Conformity to Statute.—The acts of the interstate commerce commission in the exercise of its administrative functions must, in order to be effective, strictly conform to those provisions and requirements of the statute by which its authority is prescribed and defined.[71]

65. **Salaries and expenses.**—United States *v.* Moseley, 187 U. S. 322, 47 L. Ed. 198, 32 S. Ct. 90.

66. United States *v.* Moseley, 187 U. S. 322, 47 L. Ed. 198, 32 S. Ct. 90.

67. **Rules.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

68. Hanks *v.* Missouri Pac. R. Co., 92 Neb. 594, 138 N. W. 750.

69. **Powers and duties in general.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896. See Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

70. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

71. **Conformity to statute.**—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 207 Fed. 733, reversing judgment 200 Fed. 652.

§ 4154. Particular Powers.—To Enforce Act.—By § 12 it is provided that "the commission is hereby authorized and required to execute and enforce the provisions of this act."[72] Upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court and to prosecute under the direction of the attorney general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.[73] But under this section as it stood up to February 19, 1903, there was no authority or right in a district attorney of the United States, under the direction of the attorney general, to bring a suit upon a request made by the interstate commerce commission to do so, in order to compel compliance with the provisions of the act to regulate commerce, and to enjoin as a violation of the act to regulate commerce, complained of in the amended bill, an asserted discrimination between localities by a common carrier subject to the act, averred to operate an unjust preference or advantage to one locality over another.[74] But since power to prosecute a suit like the one now under consideration is expressly conferred by an act of congress adopted since this cause was argued at bar, that is, the act "To further regulate commerce with foreign nations and among the states," approved February 19, 1903, the ends of justice will best be served by reversing the decrees below refusing to sustain the demurrer and remanding the cause to the circuit court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of congress approved February 19, 1903.[75]

To Prescribe Rates.—The act to regulate commerce endows the commission with plenary administrative power to supervise freight tariffs, and charges it with the duty to annul any tariffs in contravention of such act, and generally to enforce the provisions thereof. It also evinces a clear purpose to require shippers seeking reparation predicted upon the unreasonableness of a published rate to primarily invoke redress through the Commission, which alone is vested with power to entertain original proceedings for the alteration of such established schedule, notwithstanding that, §§ 9 and 22 of such act seemingly give the aggrieved party the option of bringing suit in the first instance in the district court to recover damages for violation of the provisions of said act.[76]

72. Particular powers.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

73. Duty of district attorney.—Section 12, Interstate Commerce Act. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

74. Bearing in mind that, prior to the request of the commission upon which the suit was brought, no hearing was had before the commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, under such circumstances, the law officers of the United States at the request of the commission were not authorized to institute this suit. Missouri Pac. R. Co. *v.* United States, 189 U. S. 274, 47 L. Ed. 811, 23 S. Ct. 507.

75. Missouri Pac. R. Co. *v.* United States, 189 U. S. 274, 47 L. Ed. 811, 23 S. Ct. 507.

76. To prescribe rates.—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 200 Fed. 652, citing Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164; Proc-

To Change Rates.—A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the interstate commerce commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.[77]

To Determine Reasonableness of Rates.—The commission has power to pass on the reasonableness of an existing rate.[78] Although an established schedule of rates may have been altered by a carrier voluntarily or as the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.[79]

To Determine Discrimination in Rates.—Section *2* contemplates that there shall be a tribunal capable of determining whether, in given cases, the services rendered are "like and contemporaneous," whether the respective traffic is of a "like kind," and whether the transportation is under "substantially similar circumstances and conditions."[80]

To Institute Suits.—The interstate commerce commission is a corporate body or person in whose name a suit can be instituted, and it is not necessary that the commission sue in the names of the persons composing it.[81]

To Obtain Information.—Section 12, as amended March 2, 1889, gives the commission authority to inquire into the management of the business of all common carriers subject to the provisions of the act, to demand full and complete information from them, and adds, "and the commission is hereby authorized to execute and enforce the provisions of this act."[82] This is clearly constitutional.[83]

To Construe Act.—See elsewhere.[84]

ter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761; Morrisdale Coal Co. *v.* Pennsylvania R. Co., 176 Fed. 748, affirmed in 106 C. C. A. 269, 183 Fed. 929. See, also, Erie R. Co. *v.* Wanaque Lumber Co., 75 N. J. L. 878, 69 Atl. 168. See ante, "Established by Commission," §§ 4061-4065.

77. **To change rates.**—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

78. **To determine reasonableness of rates.**—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700. See ante, "Determination of Reasonableness of Rate," §§ 4067-4074.

79. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

80. **To determine discrimination in rates.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666. See ante, "Determination of Discrimination and Preference," §§ 4078-4083.

81. **To institute suits.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666, citing Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844; Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 149 U. S. 264, 37 L. Ed. 727, 13 S. Ct. 837, which were suits instituted by the commission in the circuit courts of the United States, and in neither of which was any objection made to the right of the commission to sue by its statutory designation.

82. **To obtain information.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

83. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

84. **To construe act.**—See ante, "Construction of Act," § 3984.

To Require Uniform System of Accounting.—Congress did not exceed its power under the commerce clause by enacting the Act of February 4, 1887, § 20, as amended by the Act of June 29, 1906, under which common carriers by water upon the Great Lakes, engaged in the transportation of passengers and property partly by water, under a joint arrangement for the continuous carriage or shipment, may be required by the interstate commerce commission to adopt a uniform system of accounting and bookkeeping, and to make annual reports, which shall embrace not only the joint rail and water business, but the other business of the carriers as well, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks.[85] Leaving to the interstate commerce commission the carrying out of details in the exercise of its discretion to prescribe a uniform system of accounting and bookkeeping for the carriers subject to that act, does not render such section invalid as a delegation of legislative authority.[86] As to accounts, the statute permits the commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The commission may, the statute provides, in its discretion, prescribe the forms of all accounts, records, and memoranda to be kept by the common carriers, to which accounts the commission shall have access. And the act makes it unlawful for the carriers to keep any accounts, records, or memoranda other than those

85. To require uniform system of accounting.—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

The authority of the Interstate Commerce Commission under the Act of June 29, 1906, prescribing a system of accounting for carriers, is not exceeded because it tends to control the conduct of the carrier as a public servant in interstate commerce. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

The regulations of the interstate commerce commission adopted under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, are not an abuse of power because they reject the theory that the cost of property abandoned on a permanent improvement should remain in the property account, rather than be charged to operating expenses. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

A carrier is not relieved from compliance with the regulations of interstate commerce adopted under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, because they reject the theory that the cost of property abandoned on permanent improvement should remain in property account because they were promulgated after the carrier had issued bonds to finance such improvement. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

The powers of the interstate commerce commission under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, were not abused by regulations under which a railroad can not carry into its property account the full cost of reducing grades but is required to deduct from such costs the replacement cost of portions of track less salvage, carrying the difference only into the property account and charging the replacement cost to operating expenses. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

Judicial belief that the cost of property abandoned as an incident to permanent improvements should be charged to accumulated surplus or to profit and loss, does not authorize a holding that the interstate commerce commission abused their powers given by Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, because under these regulations the cost must be charged to operating expenses. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

The interstate commerce commission, acting under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, did not abuse its powers because a railway company under its regulations erecting a new shop and permanent plant on a new location can not charge the value of the property thereupon abandoned against the accumulated surplus in the profit and loss account, but must charge the estimated replacement lost less salvage to operating expenses. Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

There is here no unconstitutional delegation of legislative powers. Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436; Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

86. Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

prescribed by the commission. This section contains ample authority for the commission to require a system of accounting and reports such as has been provided for in its orders. And it is immaterial that the accounts required to be kept are general in their nature, and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between railroads and carriers by water, since the commission is charged under the law with the supervision of such rates as to their reasonableness, and with the general duty of making reports to congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If, therefore, the commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see, and concerning which it can require no information.[87] The requiring of information concerning the business methods of such corporations, as shown in its accounts, is not a regulation of business not within the jurisdiction of the commission. The object of requiring such account to be kept in a uniform way, and to be open to the inspection of the commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the commission, and had been the subject of great consideration. It has caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the commission to examine in the affairs of the corporations, with a view to discharging its duties of regulation concerning them.[88] Corporations organized under state laws, engaged in interstate carriage, could validly be subjected to regulation and control by the interstate commerce commission, in the exercise of its power, to prescribe a uniform system of accounting and bookkeeping and to require annual reports.[89]

Distinguishing Capital from Expense Accounts.—It is difficult to define and perhaps more difficult to consistently apply a precise distinction between capital and expense accounts; and while the propriety of distributing improvement costs over a series of years was recognized, the impossibility of scientific accuracy in that regard was acknowledged.[90]

87. Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

The interstate commerce commission did not exceed its authority under the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, as amended by the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), to prescribe a uniform system of bookkeeping and accounting for, and to call for annual reports from, common carriers by water upon the Great Lakes, which, being engaged in the transportation of passengers and property, partly by railroad and partly by water, under a joint arrangement for a continuous carriage or shipment, are, by § 1 of that act, brought within its terms, because such accounting system and reports are not limited to the joint rail and water business, but are required to embrace as well the other business of the carriers, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks. Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

88. **Not a regulation of business of carriers.**—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

89. **As to corporations organized under state laws.**—Interstate Commerce Comm. *v.* Goodrich Trans. Co., 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436.

90. **Distinguishing capital from expense accounts.**—Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

"In Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700, the commission had held that while repairs were properly chargeable to current operating ex-

§§ 4155-4219. Civil Proceedings against Carrier—§§ 4155-4190. Proceedings before Commission—§ 4155. In General.—Statutory Provision.—The provisions of § 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section (as to long and short haul charges) as to those arising under the other sections of the act.[91]

Prerequisites to Jurisdiction.—In a proceeding before the interstate commerce commission by a shipper to recover damages because of collection by a carrier at the lawfully established rate of an excessive amount because of the unreasonableness of the rate, the finding and prescription by the commission of a reasonable maximum rate to be observed in the future and an order forbidding the use of a rate in excess thereof are conditions precedent to its exercise of its power to order reparation.[92]

Judicial Power of Commission.—The acts of the interstate commerce commission are administrative and not judicial. It has no power to enter judgments and decrees, such as belong to courts of general jurisdiction.[93] It is not a court and cannot try actions for damages to interstate shipments, but can hear complaints in regard to rates and rebates.[94]

§ 4156. Exclusive Jurisdiction.—An action against a carrier for discrimination in rates and granting unlawful rebates to plaintiff's competitors, affecting not only the plaintiff, but other shippers in the same region, cannot be first instituted in a federal circuit court; the interstate commerce commission having exclusive jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial, and this though the regulation or practice complained of had ceased.[95] The effect of the act is not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation or practice established by an interstate carrier while such rate or regulation remains in force, but to supersede such right entirely, and substitute therefor the remedy provided by the act itself; and the shipper's independent right of action

penses, yet expenditures for improvements and equipment 'should not be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, projected proportionately over the future.' And in this court it was said (p. 462): 'It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year.'" Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

91. **Proceedings before commission.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45. See provisions of § 16, recited in Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

92. **Prerequisites to jurisdiction.**—Denver, etc., R. Co. *v.* Baer Bros. Mercantile Co., 109 C. C. A. 337, 187 Fed. 485.

93. **Judicial power of commission.**—United States *v.* Interstate Commerce Comm., 37 App. D. C. 266, judgment affirmed in Interstate Commerce Comm. *v.* Humboldt Steamship Co., 32 S. Ct. 556, 224 U. S. 474, 56 L. Ed. 849.

94. Louisville, etc., R. Co. *v.* Scott, 133 Ky. 724, 118 S. W. 990, 19 Am. & Eng. Ann. Cas. 392.

95. **Exclusive jurisdiction.**—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 183 Fed. 908, dismissing for want of jurisdiction 181 Fed. 403.

in a court is not revived by the abolition of the unlawful rate or regulation.[96]

Action for Damages for Discrimination in Distribution of Cars.—Where an alleged unlawful discrimination in the distribution of coal cars in violation of the Interstate Commerce Act had been practiced by the defendant railroad company, resulting in injury to plaintiff, for which it was entitled to damages, such discrimination having been applicable to a class of shippers and not to complainant alone, the interstate commerce commission had exclusive original jurisdiction to afford complainant relief, it not being entitled to sue in the first instance in an action for alleged damages sustained thereby, authorized by section nine and this, though the acts constituting the alleged discrimination had ceased prior to the commencement of the suit.[97]

That demurrage charges fixed by the rate schedules of interstate railroad companies in a certain district were discriminatory as between a shipper located in such district and competitors placed in other districts and governed by different rates is no defense to a prosecution of a railroad company or the shipper for granting or receiving a concession by a cancellation of such charges, the only legal mode of correcting the discrimination being by a change in the schedules on proper notice or under authority from the interstate commerce commission.[98]

Relief against Unreasonable Charges.—Relief from excessive freight charges on interstate shipments, made according to established rates promulgated by the interstate commerce act, must be sought through the interstate commerce commission.[99]

§ 4157. Summons and Process.—The procedure prescribed by the Interstate Commerce Act, requiring a statement of charges against a carrier filed with the interstate commerce commission to be forwarded to such common carrier who shall be required to answer the same, which procedure is required to be followed in case of hearings for the prescribing of rates, is analogous to that in all legal controversies and sufficient, and it is no objection to the validity of an order of the commission prescribing rates to be charged by a carrier between certain localities that it will affect the rates of other carriers not before the commission who may be in the succession of all or any interstate transportation which includes that in question.[1] Proceedings were commenced before the interstate commerce commission against a railroad company, which was at the time in the hands of a receiver, to enforce compliance with the long and short haul clause of the Interstate Commerce Act. Before the decision therein, the railroad was sold under foreclosure, and conveyed and delivered to the purchasers. An order was made by the commission requiring a reduction of rates. A few days after this order was made, the railroad was conveyed by the purchasers at the sale to a new company. The order was served on the former receiver of the road, but not on the new company. Such new company was not bound by the order, notwithstanding a provision in the order of sale of the road requiring the purchaser to pay and discharge all claims made against the receiver, and all obligations contracted or incurred by him and not paid by him before the delivery of possession.[2]

§ 4158. Parties.—Interest in Controversy.—A complaint against the carrier will not be dismissed because the complainant before the commission did not

96. Morrisdale Coal Co. *v.* Pennsylvania R. Co., 106 C. C. A. 269, 183 Fed. 929, affirming judgment, 176 Fed. 748.

97. **Action for damages for discrimination in distribution of cars.**—Morrisdale Coal Co. *v.* Pennsylvania R. Co., 176 Fed. 748.

98. Lehigh Valley R. Co. *v.* United States, 110 C. C. A. 513, 188 Fed. 879.

99. **Relief against unreasonable charges.**—Atchison, etc., R. Co. *v.* Superior Refin. Co., 112 Pac. 604, 83 Kan. 732.

1. **Summons and process.**—Louisville, etc. R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

2. Behlmer *v.* Louisville, etc., R. Co., 71 Fed. 835.

show any real interest in the case brought.[3]

Persons Injured.—The right of recovery given by the interstate commerce act against a carrier for violation of its provisions, to any person or persons injured thereby, for the full amount of damages sustained in consequence of such violation, is in the nature of a penalty, and only exists on proof, not only of the wrong, but that it has in fact operated to plaintiff's injury.[4] An allegation that a joint tariff rate established by a defendant railroad company and another was not filed with the commission as required by the law, nor published, but was concealed from the plaintiff and other shippers, does not authorize a recovery under such provision, where it is not alleged that plaintiff made any shipments to the points covered by such rate, or that he would or could have availed himself of the rate had he known of it.[5] Railway companies may complain of a reduction made by the commission so far as it affects their revenues, but they may not complain of it as it may affect shippers or trade centers. The courts will not listen to a party who complains of a grievance which is not his.[6]

Connecting Carrier.—The provision forbidding discrimination against any locality or description of traffic, is for the protection of the locality or traffic itself, and cannot be invoked by a carrier as against a connecting carrier which discriminates by requiring prepayment of freight and car mileage, between goods which come from different localities.[7]

Competing Carriers.—It is no objection to the enforcement by the court of an order made against a railway company by the interstate commerce commission that the complainants before the commission have no real grievance, but are instigated by a competing railroad, since § 13 of the Interstate Commerce Act expressly provides that no complaint shall be dismissed by the commission because of the absence of direct damage to the complainant, and since the commission has power, of its own motion, to institute investigations, make orders, and apply to the courts for their enforcement.[8]

Carrier Participating in Joint Rate.—In a proceeding against a railroad to enforce an order of the commission, the fact that the order involves rates participated in by another railroad, as owner of a portion of the line over which the through freight is carried, does not make the latter company a necessary party defendant, although it is a proper party.[9]

Successor to Original Party.—When an order against unjust discrimination made by the interstate commerce commission is binding on a railroad company, it is binding on the successor of such company.[10] A valid order of the interstate commerce commission, made in a proper proceeding against certain railroad companies, directing each of them to cease to make certain unlawful freight charges under a joint traffic arrangement, is binding on the successor of one of such companies, although the name of such successor does not appear in the order.[11]

Where a lessee railroad company operated a part of a through route over

3. **Parties.** — Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563.

4. **Persons injured.**—Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887.

5. Parsons *v.* Chicago, etc., R. Co., 17 S. Ct. 887, 167 U. S. 447, 42 L. Ed. 231, affirming judgment, 63 Fed. 903, 11 C. C. A. 489.

6. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Clark *v.* Kansas City, 176 U. S. 114, 44 L. Ed. 392, 20 S. Ct. 284; Smiley *v.* Kansas, 196 U. S. 447, 49 L. Ed. 546, 25 S. Ct. 289.

7. **Connecting carrier.**—Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 61 Fed. 158, 9 C. C. A. 409, affirming 51 Fed. 465.

8. **Competing carriers.**—Interstate Commerce Comm. *v.* Detroit, etc., R. Co., 57 Fed. 1005.

9. **Carrier participating in joint rate.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

10. **Successor to original party.**—Interstate Commerce Comm. *v.* Western New York, etc., R. Co., 82 Fed. 192.

11. Behlmer *v.* Louisville, etc., R. Co., 28 C. C. A. 229, 83 Fed. 898, reversing on another point in 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

which oil was transported under an alleged discriminating rate, but was not a party to a proceeding before the interstate commerce commission to recover reparation, an order in favor of petitioners including discriminating freight charges by such lessee company was neither conclusive nor effective as to it.[12]

In Proceeding to Establish Switch.—The remedy, given by § 1 of the Act of June 29, 1906, on complaint by the shipper to the interstate commerce commission when an interstate railway carrier refuses to establish a switch connection with a lateral, branch line, is exclusive, and the general powers given by other sections of the statute can not be deemed to authorize a complaint to the commission by the lateral, branch railway company. If they were applicable to a branch road, they would have been equally applicable to shippers, and there was no more reason to mention complaints by shippers than by others. The argument that shippers were mentioned to insure their rights in case of a refusal to connect with a lateral line is excluded by the form of the statute, which obviously is providing the only remedy that congress had in mind. It may or may not be true that the distinction is not very effective, but it stands in the law, and must be accepted as the limit of the commission's power.[13]

§ 4159. Limitation and Laches.—The act provides that all complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues and not after, provided that claims accrued prior to the passage of this act may be presented within one year.[14] A claim which accrued prior to the passage of the act may be presented at any time within two years after the date of its accrual, although complaint is not filed until more than a year after the passage of the act.[15] The limitation imposed on the time for filing a claim for damages, as applied to a claim for excessive charges made by a carrier, begins to run when such charges become due and payable and not when they are actually paid.[16]

§ 4160. Pleadings.—Necessity of.—There must be a complaint. Assuming that a valid complaint may be made before the commission, by such trade organizations as boards of trade, or chambers of commerce, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations, it would not be competent for the commission, without a complaint made before it, and without a hearing, to subject common carriers to penalties.[17]

Proceeding Instituted by Commission without Complaint.—The commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but, under § 13—"may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." But there is nothing in the act requiring the commission to proceed singly against each railroad company for each supposed or alleged violation of the act.[18]

12. Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

13. In proceeding to establish switch.—Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 S. Ct. 415.

14. Limitation and laches.—Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1909, p. 1159).

The limitation provisions of § 16 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 5, held not to authorize the filing with the Interstate Commerce Commission of a claim for damages which accrued more than two years before the passage of the amendatory act. Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785.

15. Dickerson *v.* Louisville, etc., R. Co., 187 Fed. 874.

16. Arkansas Fertilizer Co. *v.* United States, 193 Fed. 667.

17. Pleadings.—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

18. Proceeding instituted by commission without complaint.—Interstate Com-

Sufficiency.—No formal pleadings are required by the act.[19] Under the provision that all complaints for damages shall be filed with the interstate commerce commission within two years from the time the cause of action accrues, a letter to the commission setting out the facts and containing a substantial prayer for relief by way of damages is a sufficient complaint.[20] The Interstate Commerce Act, provides that every common carrier shall provide equal facilities for the interchange of traffic with connecting lines; and that there shall be no discrimination in rates and charges between such lines. A petition, presented by a line affected, averred that petitioner was deprived by respondent of equal facilities with a competing connecting line for interchange of traffic, a discrimination in rates, the withdrawal of a joint through traffic, and a threat to close a through route via petitioner's line. The petition was held to be a sufficient charge, not only of discrimination in rates, but of failure to provide equal facilities for interchange of traffic, and to bring before the commission the determination of both offenses.[21]

Bill in Equity.—In the absence of objection to the manner and form of invoking jurisdiction the commerce court may entertain and grant the relief sought by a bill to enjoin the performance of a contract which offends against the provisions of the Interstate Commerce Act intended to prevent undue advantages or unlawful discrimination.[22]

§ 4161. Burden of Proof and Presumptions.—When it is shown that the carrier has not supplied the facilities demanded, the burden is upon the carrier, in order to exonerate itself from such charge of undue preference, to show that it is prorating its cars fairly and equally among all the operators who are similarly situated and engaged in transporting freight over its lines.[23] If a complaint be filed before the commission and no proof adduced to support it, the complaint will be dismissed. This is because of the principle that the party who asserts the affirmative in any controversy ought to prove the assertion, and that he who denies may rest on his denial until at least the probable truth of the matter asserted has been established.[24]

Violation of Schedule Rate.—Where, in an action by a carrier against a consignee for freight charges based on the schedule filed with the interstate commerce commission, the defendant counterclaims for prior charges exacted by defendant in excess of the rates fixed by an agreement between the parties, valid before the passage of the Interstate Commerce Act, the plaintiff has the burden of showing that the agreement was contrary to the provisions of the act.[25]

§§ 4162-4165. Evidence—§ 4162. In General.—The interstate commerce commission is an administrative tribunal leading with practical problems, and, so long as parties affected by its orders are fully heard, it can grant such relief as the facts shown call for, even though they may be presented by evidence technically outside the issues raised by the pleadings, but which were germane to the subject matter of the investigation.[26] The inquiry of a board of the character of the interstate commerce commission should not be too narrowly

merce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998.

19. **Sufficiency.**—Louisville, etc., R. Co. *v.* Dickerson, 191 Fed. 705, affirming 187 Fed. 874; Norfolk, etc., R. Co. *v.* United States, 195 Fed. 953.

20. Louisville, etc., R. Co. *v.* Dickerson, 191 Fed. 705, affirming judgment, 187 Fed. 874.

21. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

22. **Bill in equity.**—United States *v.* Union Stock Yards, etc., Co., 226 U. S. 286, 33 S. Ct. 83.

23. **Burden of proof and presumptions.**—Pitcairn Coal Co. *v.* Baltimore, etc., R. Co., 165 Fed. 113.

24. **Burden of proof.**—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

25. **Violation of schedule rate.**—Baltimore, etc., R. Co. *v.* La Due, 108 N. Y. S. 659, 57 Misc. Rep. 614.

26. **Evidence.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 168 Fed. 131.

constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.[27]

Contracts with Third Persons.—The fact that contracts were made with third persons not parties to the proceeding does not render such contracts inadmissible in evidence in a proceeding before the interstate commerce commission charging certain railroads with violations of the act to regulate commerce.[28] And where contracts are made between railroad companies and coal companies for the purchase of the coal mines by the railroads in order to prevent the construction of a competing line of railroad by the mine owners, such contracts become relevant evidence in an inquiry by the interstate commerce commission touching the question of the reasonableness of transportation rates of coal, and the manner in which the rates are fixed.[29]

Pooling Agreements.—Contracts tending to show the pooling of freight and the charging of unreasonable rates are relevant evidence in a proceeding before the interstate commerce commission, charging railroads with violations of the Act of February 4, 1887, and the production of such contracts may be required.[30]

Order without Evidence to Support It.—An order of the interstate commerce commission reducing rates can not be said to have been made without substantial evidence to support it, where, although there is no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.[31]

§ 4163. Incriminating Testimony.—A shield against successful prosecution, available to the accused as a defense, and not immunity from the prosecution itself, is what was secured by the Act of February 25, 1903, as amended by the Act of June 30, 1906, providing that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under the Sherman Anti-Trust and Interstate Commerce Acts.[32] The Act of February 11, 1893, ch. 83, 27 Stat. 443, which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission, or in obedience to the subpœna of the commission, * * *

27. Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563.

28. **Contracts with third persons.**—Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563, cited in Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370.

The refusal to produce contracts under which railroad companies engaged in carrying coal from the anthracite regions in Pennsylvania to tidewater, or coal companies owned by the railroads, purchase coal from independent operators engaged in mining in that district, for which payment is made on the basis of a fixed percentage of the average price at certain tide points of coal of the same quality and size, can not be justified on the ground of irrelevancy, in a proceeding before the interstate commerce commission on a complaint charging the railroad companies with violating Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, by unfair discrimination and by charging unreasonable and unjust rates in carrying anthracite coal. Judgment, Interstate Commerce Comm. *v.* Philadelphia, etc., R. Co., 123 Fed. 969, reversed in Interstate Commerce Comm. *v.* Baird, 24 S. Ct. 563, 194 U. S. 25, 46 L. Ed. 860.

29. And so as to contracts for the purchase and transportation of coal for the same purpose as alleged. Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563.

30. **Pooling agreements.** — Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563.

31. **Order without evidence to support it.**—Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

32. **Incriminating testimony.**—Heike *v.* United States, 217 U. S. 423, 54 L. Ed. 821, 30 S. Ct. 539.

on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding," is not incompatible with the clause of the fifth amendment of the constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself." This statute affords absolute immunity against prosecution, penalties or forfeiture as to any transaction, matter or thing concerning which the witness testified, and the immunity is intended to be general, and to be applicable whenever and in whatever court, state or federal, such prosecution may be had. A witness is thereby deprived of his constitutional right to refuse to answer.[33]

Not Unconstitutional as Unreasonable Search.—The immunity from unreasonable searches and seizures as guaranteed by the fourth amendment to the federal constitution is not infringed upon by requiring the production of certain contracts as evidence in a proceeding before the interstate commerce commission, since the act of February 4, 1887, as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law.[34]

Not Unconstitutional as Forfeiture.—The contention that to require the production of certain contracts would be to compel the witnesses to furnish evidence against themselves which might result in forfeiture of estate in violation of the fifth amendment to the constitution is not well founded, since the Act of February 4, 1887, as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pur-

33. Brown *v.* Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644.

Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. 7 Stat. 443, ch. 83. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

"The act (of congress of February 11th, 1893, c. 83, 27 Stat. 443), is supposed to have been passed in view of the opinion of this court in Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 S. Ct. 195, to the effect that § 860 of the Revised Statutes, providing that no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment (fifth) was intended to guarantee. The gist of that decision is contained in the following extracts from the opinion of Mr. Justice Blatchford (pp. 564, 585), referring to § 860: 'It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.' And again: 'We are clearly of opinion that no statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates.' The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify." Brown *v.* Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644. See, also, Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

34. Not unconstitutional as unreasonable search.—Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563. See Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370.

suance of the requirements of the law.[35]

Immunity Extends to State Courts.—But the immunity extends to any transaction, matter or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.[36]

§ 4164. Power to Compel Witnesses to Attend.—For the purposes of the act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing.[37] The commission is given power to require the testimony of witnesses "for the purposes of this act," and the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint.[38] The main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These are the purposes here referred to; in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary, namely, those where the investigation concerns a specific breach of the law.[39] Witnesses can not be required to testify before the interstate commerce commission except in connection with complaints for violation of the Interstate Commerce Act or with the investigation by the commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of § 12 of that act, giving the commission power to require testimony "for the purposes of this act," which power can not be exercised by the commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the requirement of § 20 respecting reports by carriers, nor to aid the commission in recommending, pursuant to § 21, additional legislation to congress.[40] The contention of the interstate commerce commission that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the Act of February 4, 1887, but to aid in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind is not warranted by the act itself.[41]

Power to Punish Disobedience.—Since 1893 the commission has had power to enforce obedience to its lawful demands for the eliciting of information from witnesses, or the production of testimony, by a criminal prosecution, disobedience thereto being made an offense punishable by fine or imprisonment, or both.[42]

35. Not unconstitutional as forfeiture.—Interstate Commerce Comm. *v.* Baird, 194 U. S. 25, 46 L. Ed. 860, 24 S. Ct. 563.

36. Immunity extends to state courts.—Brown *v.* Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644.

37. Power to compel witnesses to attend.—Interstate Commerce Act, § 12. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

38. Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

39. Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

40. Orders, 157 Fed. 432, affirmed in part and reversed in part. Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

41. Harriman *v.* Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

42. Power to punish disobedience.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125. See act of Feb. 11, 1893, which provides a punishment of fine or impris-

This power conferred upon the commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement. And these issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them.[43]

Aid of Courts.—The constitutionality of the Interstate Commerce Act, so far as it authorized the circuit courts to use their processes in aid of inquiries before the commission, has been sustained. It was clearly competent for congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation.[44] The twelfth section of the act is not unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the commission. The constitution extends the judicial power of the United States to all cases in law and equity arising under the instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (art. 3, § 2), and the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress.[45] Under the circumstances, the supreme court declined to go further than to adjudge, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.[46]

Punishment for Failure to Obey Order.—Any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by

onment or both for disobedience of the lawful orders of the commission in this regard. See 27 Stat. 443, ch. 83.

43. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

44. Aid of courts.—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125; Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370.

45. 25 Stat. 434, ch. 866. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

46. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

such court as a contempt thereof.[47]

Jury Trial.—The issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, etc., called for, is manifestly not one for the determination of a jury, being not one of fact but of law exclusively.[48] Of course, the question of punishing the defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the circuit court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law."[49]

Constitutionality of Statute.—This provision is not invalid because in derogation of the fundamental guarantees of personal rights inhering in the freedom of citizens. The supreme court of the United States has spoken fully upon that general subject. Nothing need be added to what has been there said. Suffice it in the present case to say that as the interstate commerce commission, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the commission could have been dismissed upon its merits.[50]

Nature of Proceeding.—It is not merely an ancillary and advisory proceeding, but one for determining rights that concern both the general public and the individual defendants, in which an enforcible judgment may be obtained, that will be conclusive on the parties until reversed by the federal supreme court. The performance of the duty which, it is claimed, rests upon the defendants, can not be directly enforced except by judicial process.[51] It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by congress in execution of a power granted by the constitution.[52]

§ 4165. Production of Books and Papers.—The production of contracts under which railroad companies engaged in interstate carriage of anthracite coal, who had acquired certain collieries whose proprietors were about to build a competing line, guarantied the stock and bonds issued in payment therefor by a corporation whose charter they had purchased for that purpose, may be compelled in a proceeding before the interstate commerce commission on a complaint charging such railroad companies with violations of the act, by the pooling of freights and the charging of unreasonable rates in carrying anthracite coal.[53]

47. **Punishment for failure to obey order.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

48. **Jury trial.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

49. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

50. **Constitutionality of statute.**—Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 S. Ct. 195; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

51. **Nature of proceeding.**—Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

52. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

53. **Production of books and papers.**—Judgment, Interstate Commerce Comm. *v.* Philadelphia, etc., R. Co., 123 Fed. 969,

§§ 4166-4181. Hearing and Determination—§ 4166. Necessity.—In proceedings before the interstate commerce commission, there must be a hearing and determination.[54]

§ 4167. Extent of Hearing.—The commission in making an investigation on the complaint filed by a shipper against a change of classification of freight, increasing inequitably the rates on certain articles by changing them to a higher class, has the power, in the public interest, disembarrassed by any supposed admissions contained in the statement of complaint, to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, would create preference or engender discriminations; in other words, its conformity to the requirements of the act to regulate commerce. And finding, as the commission did, that the classification by percentage of common soap in less than carload lots operating throughout official classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such territory, the commission was clearly within the authority conferred by the act to regulate commerce in directing the carriers to cease and desist from further enforcing the classification operating such results.[55] Assent to this view of the power of the commission of course also conclusively disposes of the contention that the court was without authority to determine the validity of the order of the commission by the scope of the act to regulate commerce, because of an admission asserted to exist in the complaint originally filed before the commission.[56] "The discriminations and preferences which the commission and the court below found to exist were results arising from the application to the conditions prevailing in official classification territory of the modified percentage classification. In other words, the order forbidding the enforcement of the modified percentage classification was based on the finding that that classification disturbed the rate relations theretofore existing in official classification territory and created preferences and discriminations which would disappear if the further enforcement of the changed classification was prevented."[57]

All Circumstances and Interests.—In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers.[58] When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.[59]

reversed in Interstate Commerce Comm. *v.* Baird, 24 S. Ct. 563, 194 U. S. 25, 46 L. Ed. 860.

54. Hearing and determination.—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

55. Extent of hearing.—Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

56. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

57. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

58. All circumstances and interests.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

59. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

As to Combinations and Monopolies.—A resolution of the interstate commerce commission ordering an investigation and inquiry into consolidations and combinations of carriers subject to the interstate commerce act and the relations existing between them, including community of interests therein and the practices and methods of such carriers affecting the movement of interstate commerce, to ascertain whether the same result in violation of said act or tend to defeat its purposes, is broad enough to include an inquiry into a purchase by such carrier of stock in other connecting or competing carriers from its own officers or directors, the price paid for the same, and what, if any, profit such officers or directors made thereon; but it does not authorize an inquiry as to whether the action of the directors of a railroad company in withholding public announcement of the declaration by them of an increased dividend was for the purpose of private speculation in the stock.[60]

Matter Arising Pending Hearing.—An advanced rate of freight on certain articles, filed with the interstate commerce commission, and put into effect pending a hearing before the commission on the legality of the rate previously in force, is properly before the commission for consideration on such hearing.[61]

As to Property Acquired by Carrier.—One purpose of the interstate commerce legislation is to compel interstate carriers to perform their commercial functions adequately, and, under the power specifically given the interstate commerce commission, to ascertain the cost and value of the carrier's property, and, as affecting the ability of a carrier to perform such adequate service, the commission has authority to inquire into purchases of property made by it, the prices paid, and the lawfulness and propriety of its acquisition.[62]

§§ 4168-4181. Judgment or Order—§ 4168. Contents.—Finding of Facts on Which Judgment Based.—By § 14 it is made the duty of the commission, whenever an investigation is made by it, not only to make a report in writing, but to make a finding of facts upon which its conclusions are based, which findings shall be included in its report.[63]

Facts Showing Jurisdiction.—An order of the interstate commerce commission requiring a carrier to render certain services to a shipper must necessarily be based on a finding that such services are not only transportation services, but that in performing them the carrier acts in the capacity of an interstate carrier.[64]

Order for Reparation.—Where pending proceedings before the interstate commerce commission for reparation for excessive charges on a specified shipment due to the carrier's misrouting it, because no through rate had been provided over shorter routes, the carriers established a through rate by such shorter routes, it was not necessary that the commission in granting reparation should enter any order with reference to the through rate so adopted or prohibit the use thereafter of any rate in excess of the one adopted.[65] Where a reparation order was entered May 1, 1911, and defendant seasonably filed a motion for rehearing, which was not denied until October 9 following, suit not having been brought on the order until after the rehearing was denied, defendant was not prejudiced by the fact that the order required payment on or before January 15, 1911.[66]

60. **As to combinations and monopolies.**—Interstate Commerce Comm. *v.* Harriman, 157 Fed. 432.

61. **Matter arising pending hearing.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

62. **As to property acquired by carrier.**—Interstate Commerce Comm. *v.* Harriman, 157 Fed. 432.

63. **Contents.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

64. **Facts showing jurisdiction.**—Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

65. **Order for reparation.**—St. Louis, etc., R. Co. *v.* Samuels & Co., 211 Fed. 588.

66. St. Louis, etc., R. Co. *v.* Samuels & Co., 211 Fed. 588.

Recommendation as to Reparation.—By § 14 the report required of the commission upon an investigation made by it, shall include, in addition to the finding of facts upon which its conclusions are based, a recommendation as to what reparation, if any, ought to be made to any party or parties who may be found to have been injured.[67]

Reparation and Rates in Same Order.—That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true.[68] But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in is nature private and the other public. One is made by the commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public.[69]

§ 4169. Service on Carrier.—By §§ 15 and 16 of the act, if it appears to the satisfaction of the commission that anything has been done or omitted to be done, in violation of the provisions of the act, or of any law cognizable by the commission, it is made its duty to cause a copy of its report to be delivered to the carrier, with notice to desist, and failing that to apply to the courts for an order compelling obedience.[70]

§ 4170. Operation and Effect.—The Interstate Commerce Act provides that, whenever an investigation shall be made by the commission, it shall make a report in writing which shall include the findings of fact on which the commission's conclusions are based, and such findings shall thereafter be deemed prima facie evidence as to each and every fact found in all judicial proceedings.[71]

67. Recommendation as to reparation.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

68. Reparation and rates in same order.—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Robinson *v.* Baltimore, etc., R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114.

69. Baer Bros. Mercantile Co. *v.* Denver, etc., R. Co., 233 U. S. 479, 34 S. Ct. 641.

"The order while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometmes be separate shows that the presence of both is not jurisdictional and that the absence of a provision for one need not operate to invalidate an order as to the other." Baer Bros. Mercantile Co. *v.* Denver, etc., R. Co., 233 U. S. 479, 34 S. Ct. 641.

70. Service.—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

71. Operation and effect.—Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 4, 25 Stat. 859 (U. S. Comp. St. 1901, p. 3165); Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

A finding by the interstate commerce commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundredweight was prima facie evidence of its own truth. Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

"In the case of Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 102 Fed.

Finding of Questions of Law.—The decisions of the commission on questions of law are not conclusive upon the appellate court and may be reviewed.[72]

Finding of Fact.—The interstate commerce commission from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact.[73] Especially when the evidence is conflicting.[74]

Finding Concurred in by Court.—And when these findings are concurred in by the circuit court, they will not be interfered with, unless the record establishes that clear and unmistakable error has been committed.[75] And where the circuit court of appeals adopted the views of the circuit court, in respect to the reasonableness of the rate charged on first class freight carried on defendant's line from Cincinnati to Atlanta; and as both courts found the existing rates to have been reasonable, the supreme court will not review their finding on that matter of fact.[76]

Finding of Discrimination.—Because of the nature and extent of the authority conferred on the commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, an exertion of power by the commission concerning such matters is entitled to great weight, and not lightly to be interfered with.[77]

Wrong Reason Assigned.—Where the interstate commerce commission made an order and proceeded to have it enforced, it was held that the court was not confined to the grounds stated by the commission, and if the rule was found, in itself, for any reason illegal as a violation of the act, the order could be valid and be a lawful order, although the commission had given a wrong reason for making it.[78] However, the conclusions of the commission are subject to review if it excluded "facts and circumstances that ought to have been considered."[79] Thus, the commission's construction of the Interstate Commerce Act by which its duties are prescribed and from which its powers are derived, may be reviewed.[80]

709, the circuit court of the United States for the Southern district of Alabama declares: 'The findings of fact in the report of the commission are made by law prima facie evidence of the matters therein stated, and the conclusions of the commission, based upon such findings, are presumed to be well founded and correct.'" Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

72. Finding of questions of law.—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

73. Findings of fact.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

74. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

75. Finding concurred in by court.—Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648; S. C., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

76. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700.

77. Finding of discrimination.—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

78. Wrong reason assigned.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

79. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700.

80. Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

Whether Proceeding Instituted by Commission or Individual.—The finding of facts in a report by the interstate commerce commission has no greater weight where the commission itself proceeds by petition to enforce obedience to its orders, than where an individual aggrieved so proceeds, and is not conclusive evidence of such facts.[81]

Pending Action by Court.—A decision of the interstate commerce commission that certain allowances in the tariff on sugar constituted rebates and should be eliminated operates to eliminate such allowances until the decision was reversed or suspended.[82]

Finding Reasonableness of Rates.—The interstate commerce commission may determine the reasonableness of rates and award reparation, and when it does so its conclusions are final unless it has exceeded its prescribed functions in some particular material to the controversy.[83]

Finding of Amount of Demurrage Charges.—A decision of the interstate commerce commission that demurrage charges assessed by a carrier were collectible, but that the commission had no means of determining their reasonableness, and that the consignee could file a formal complaint, was not res judicata as to the amount of demurrage and storage charges which the carrier might collect on a different shipment.[84]

§§ 4171-4181. Enforcing, Enjoining and Annulling—§ 4171. In General.—Interstate Commerce Act, § 16, provides that whenever any common carrier, as defined in such act, shall violate, refuse, or neglect to obey any lawful order or requirement of the commission, not founded on a controversy requiring a trial by jury, it shall be lawful for the commission or any person interested to apply in a summary way by a petition to the circuit court of the United States sitting in equity for the enforcement of such order; and, if the matters involved require a trial by jury, it shall be lawful for any person interested to apply to a court of the United States sitting as a court of law to fix a time for a trial of the case, etc The interstate commerce commission, though clothed with quasi-judicial functions, being an administrative body, no lawful order referred to is self-executing.[85] The interstate commerce commission is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive; nor is it invested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it; but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement of the order or report of the commission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.[86]

§ 4172. Necessity for Lawful Order.—If the order be not a lawful one, the court is without power to enforce it.[87] Under the decisions of the supreme

81. Whether proceeding instituted by commission or individual.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289; Interstate Commerce Comm. *v.* Lehigh Valley R. Co., 49 Fed. 177.

82. Pending action court.—American Sugar Refin. Co. *v.* Delaware, etc., R. Co., 200 Fed. 652.

83. Finding reasonableness of rates.—Fidelity Lumber Co. *v.* Great Northern R. Co., 113 C. C. A. 552, 193 Fed. 924.

84. Finding of amount of demurrage charges.—Neustadt *v.* Lehigh Valley R. Co. (App. Div.), 144 N. Y. S. 911.

85. Enforcing, enjoining and annulling.—Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

86. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

87. Necessity for lawful order.—Southern Pac. Co. *v.* Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330.

Unless a valid order has been made by the commission and violated by the company, no relief can be granted to the petitioners. Farmers', etc., Trust Co. *v.* Northern Pac. R. Co., 83 Fed. 249.

court prior to the amendment of the statute, which conclusively determined that the interstate commerce commission has no power to fix rates for the carriage of interstate freight, a decree of a court for the enforcement of a rate so fixed by the commission is without authority.[88]

Order Presumed Valid.—In a proceeding to enforce, enjoin or annul an order of the interstate commerce commission, the presumption is that the order is valid, and the burden is upon the party taking it to make a clear case showing its invalidity.[89] On demurrer to a bill filed by the interstate commerce commission for the enforcement of an order made by it, any substantial doubt as to the lawfulness of the order should be resolved in its favor.[90]

Order Supported by Finding.—A finding by the interstate commerce commission that the purpose and effect of a rule and practice adopted by railroad companies, by which, as initial carriers, they reserved the right to route through shipments beyond their own lines, were to assist in carrying into effect a pooling agreement between their connecting carriers, made in violation of the interstate commerce law, is pertinent to, and supports the lawfulness of, an order requiring the companies to desist from maintaining and enforcing such rule.[91]

Necessity for Identification of Cause of Action in Order.—An action may be maintained in a circuit court under the Interstate Commerce Act to enforce an order of the interstate commerce commission awarding reparation to a shipper for an unlawful charge by a railroad company, where the complaint and the record show that the cause of action is the same as that acted on by the commission, which need not necessarily be set out in its order.[92]

Order Fixing Rates.—A court having no constitutional power to regulate commerce or to fix rates to be charged by a carrier can not suspend or vacate an order of the interstate commerce commission prescribing rates under the power conferred by the Interstate Commerce Act except on the ground that in making such order the commission transcended its power or exercised such power without due regard to law and in violation of some legal, constitutional or natural right of the carriers affected.[93]

Order Ignoring Facts.—An order of the interstate commerce commission prohibited railway carriers from charging greater compensation for the transportation of window shades of any description than the rate charged for the transportation of the materials used in making such shades. On petition to enforce compliance with the order, that the court would refuse to enforce such order, ignoring, as it did, the element of the value of the service in fixing the reasonable compensation of the carrier, and denying him any remuneration for additional risk.[94]

Indefinite and Uncertain.—An order by the interstate commerce commission, authorizing a railway company to make commodity rates on competitive traffic to terminal points less than rates on like traffic to intermediate points, but directing that such commodity rates must not be lower than necessary to meet competition, nor be applied to articles not actually subject thereto, is a mere general statement of legal duty too indefinite to be enforced.[95]

Order to Operate Indefinitely.—It is not an objection to an order of the interstate commerce commission, or to the rendition of a decree of the circuit court for its enforcement, that it is made in terms to operate indefinitely, without any

88. Southern Pac. Co. *v.* Colorado, etc., Iron Co., 101 Fed. 779, 42 C. C. A. 12.

89. **Order presumed valid.**—Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

90. Interstate Commerce Comm. *v.* Southern Pac. Co., 123 Fed. 597.

91. **Order supported by finding.**—Interstate Commerce Comm. *v.* Southern Pac. Co., 123 Fed. 597.

92. **Necessity for identification of cause of action in order.**—Chicago, etc., R. Co. *v.* Feintuch, 191 Fed. 482.

93. **Order fixing rates.**—Philadelphia, etc., R. Co. *v.* Interstate Commerce Comm., 174 Fed. 687.

94. **Order ignoring facts.**—Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 64 Fed. 723.

95. **Indefinite and uncertain.**—Farmers', etc., Trust Co. *v.* Northern Pac. R. Co., 83 Fed. 249.

reservation of power to modify it in accordance with changes of conditions.[96]

Facts Not Conclusions to Be Stated.—It is not sufficient for the report of the interstate commerce commission, upon a complaint made to and investigated by it, to state merely conclusions, with respect either to law or facts; but it should show what the issues in the case are, and what facts it finds in regard to such issues, with suitable reference to the evidence, so as to give the parties and the court, in any judicial proceedings afterwards instituted, such definite and distinct information as to what was found, and the commission's opinion thereon, as would be necessary to make a judicial opinion sufficient and satisfactory for the purposes of ordinary litigation.[97]

Arbitrary Ruling.—An order of the commission, directing a railroad company to wholly discontinue a long-established custom of furnishing cartage to consignees and consignors in a particular city, is not a lawful order, such as the courts are required, by the act, to enforce, if it will operate to deprive the carrier of its business at that place. The method of redress by readjusting rates must always be left, in the first instance, at least, to the carrier itself; and an arbitrary and peremptory order to abandon a long-established accessorial cartage service at a particular place, without regard to any rates, or without any option to readjust them, is unlawful.[98]

Sufficiency of Evidence to Support Order.—The lawfulness of an order of reparation issued by the interstate commerce commission does not necessarily depend on a sufficiency of evidence adduced before the commission, but on the existence of facts, whether disclosed or not before that body, warranting the reparation ordered; and in an action to enforce such reparation it is sufficient that such facts be established by proper evidence.[99]

§ 4173. Nature of Proceeding.—The act does not make the circuit court the mere executioner of the commissioners' order or recommendation, so as to impose upon the court a nonjudicial power. The court is not restricted to the mere ministerial duty of enforcing an order of the commission. The suit in the federal court is, under the provisions of the act, an original and independent proceeding, in which the commissioners' report is made prima facie evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause de novo, upon proper pleadings and proofs; the latter including not only the prima facie facts reported by the commission, but such further testimony as either party may introduce, bearing upon the matters in controversy.[1] A state statute requiring affidavits of defense, which is applicable only to actions founded on contract alone, does not apply to a statutory proceeding to enforce an order of reparation by the interstate commerce commission.[2]

§ 4174. Jurisdiction and Venue.—The circuit court is given authority to enforce any lawful order or requirement of the commission.[3] Congress has exer-

96. **Order to operate indefinitely.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 73 Fed. 409.

97. **Facts not conclusions to be stated.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 73 Fed. 409.

98. **Arbitrary ruling.**—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803.

99. **Sufficiency of evidence to support order.**—Western New York, etc., R. Co. *v.* Penn Refin., Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

1. **Nature of proceeding.**—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

A suit brought by one in whose favor the interstate commerce commission has made an award of damages by way of reparation, under the authority of Interstate Commerce Act Feb. 4, 1887, § 16, as amended by Act March 2, 1889, § 5, and Act June 29, 1906, § 5, is not a suit on the award qua award to recover the amount of the same, but a plenary suit for damages actually sustained by the plaintiff by reason of some violation of the act by defendant. Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717.

2. Naylor & Co. *v.* Lehigh Valley R. Co., 188 Fed. 860.

3. **Jurisdiction and venue.**—Act Feb. 4, 1887, § 16.

cised this power, and the righteous orders of the great commission it has primarily entrusted with the tremendous duty should in all proper cases be respected and enforced by the courts of the country.[4]

Equity Jurisdiction.—Under the Interstate Commerce Act the circuit courts, sitting in equity, have jurisdiction to entertain, hear and determine suits to compel obedience to the orders of the commission, and also of suits to annul or enjoin the enforcement of such orders.[5]

One of Several Parties Not within District.—An order of the interstate commerce commission, made against two railroad companies in respect to a joint rate, in a proceeding to which both were parties, may be enforced by a circuit court against one of the companies which is within its jurisdiction, although the other is without its jurisdiction, and can not be made a party.[6]

Jurisdiction of State Court.—Jurisdiction of a claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by the Interstate Commerce Act of Feb. 4, 1887, to the interstate commerce commission or a district or circuit court of the United States, and the provision of the act, as amended by Act June 18, 1910, extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the commission, and on which it has made awards which have not been complied with.[7]

Power to Modify or Change.—The power given to the courts to compel obedience to the "lawful order" of the commission, being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it.[8]

§ 4175. Parties.—Proper and Necessary Parties.—In proceeding against a carrier of interstate commerce to enforce an order of the commission, another carrier concerned with the defendant in jointly making the forbidden rate is a proper, but not a necessary, party defendant.[9] In a suit by the interstate commerce commission against a railroad company to enforce obedience to an order requiring it to desist from the enforcement of a rule reserving to itself, as initial carrier, the unqualified right of routing beyond its own terminal all shipments made under an established through joint rate, the connecting carriers joining in the making of such through rate, while proper, are not necessary, parties.[10]

Intervenors.—In suits against the interstate commerce commission to enjoin

4. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

5. **Equity jurisdiction.**—Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

6. **One of several parties not within district.**—Interstate Commerce Comm. *v.* Texas, etc., R. Co., 6 C. C. A. 653, 57 Fed. 948, affirming 52 Fed. 187.

Where a number of railroads, operated under a common control and management, establish a rate interdicted by an order of the interstate commerce commission, the act of one of the companies in charging freight at such rate in a particular judicial district, to be carried over the various lines, is a violation or disobedience of the order in such district, within the meaning of § 16 of the interstate commerce act, as amended in 1889 (24 Stat. 860), so as to give the circuit court of that district jurisdiction of a suit by the commission to enforce its order against all the companies. Interstate Commerce Comm. *v.* Southern Pac. Co., 74 Fed. 42.

7. **Jurisdiction of state court.**—Darnell *v.* Illinois Cent. R. Co., 190 Fed. 656.

8. **Power to modify or change.**—Detroit, etc., R. Co. *v.* Interstate Commerce Comm., 21 C. C. A. 103, 74 Fed. 803, reversing 57 Fed. 1005.

9. **Parties.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666, affirming 6 C. C. A. 653, 57 Fed. 948.

In proceedings under § 16 of the Interstate Commerce Act (24 Stat. 384) against a carrier to enforce an order of the commissioners, it is not necessary that another carrier, making the forbidden rate jointly with defendant, be made a party to the suit. Interstate Commerce Comm. *v.* Texas, etc., R. Co., 52 Fed. 187.

10. Interstate Commerce Comm. *v.* Southern Pac. Co., 123 Fed. 597.

orders issued by them, parties similarly situated may intervene.[11] In a suit by a railroad company against the interstate commerce commission to enjoin or annul an order of the commission, third parties interested in such order are not entitled to intervene as of right, but may be permitted to do so at the request of the commission, on condition that the hearing shall not thereby be delayed.[12] Under the broad provisions of the last proviso of § 5 of the Act of June 18, 1910, creating the commerce court, "that communities, associations, corporations, firms and individuals who are interested in the controversy or question before the interstate commerce commission, or in any suit which may be brought by any one under the terms of this act, relating to action of the interstate commerce commission, may intervene in said suit or proceeding at any time after the institution thereof," an incorporated grain exchange or a board of trade of a city, most or all of whose numbers are engaged in business which will be directly affected by an order of the commission, is interested in the question involved, and is entitled to intervene in a suit in the commerce court brought to enjoin the enforcement of such order.[13]

Enforcement against Receiver.—In an application to enforce an order of the interstate commerce commission against railroad receivers, the same rules and principles must be applied as if the railroad were being operated by the railroad company itself.[14] Since execution can not issue against the property of a railroad company in the hands of a receiver appointed by a federal court to enforce a judgment for damages sustained by the charge of discriminating freight rates in violation of the Interstate Commerce Act, the receiver as such should not be joined with other railroad companies constituting a through route, against which the judgment would constitute a personal liability, to be enforced by execution at law.[15]

Joinder of Parties.—Any party against whom an order fixing rates is made by the interstate commerce commission may petition the court for redress without joining other parties to the order, such suit being plenary, and the injury, if any, being several and not joint.[16]

Persons Affected by Order.—Parties injuriously affected by orders of the interstate commerce commission may sue in the circuit courts to enjoin, suspend, or annul such orders, though they were not parties to the proceedings before the commission on which the orders were based.[17]

Competing Carriers.—Interstate carriers who, although not parties to proceedings before the interstate commerce commission, nor named in an order made by the commission fixing rates on a commodity between certain points, are competitors of the carriers named therein in such traffic and therefore necessarily affected by the order, have such an interest therein as entitles them to maintain a suit to enjoin its enforcement, and, while they may properly apply to the commission for a rehearing, such action is not a necessary condition precedent to such a suit.[18]

§ 4176. Pleadings.—In a suit by carriers to annul an order of the interstate commerce commission fixing rates on the ground that such rates are confiscatory and unconstitutional, in that they are not reasonably compensatory, and would

11. **Intervenors.**—Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

12. Delaware, etc., R. Co. *v.* Interstate Commerce Comm., 169 Fed. 894.

13. Nashville Grain Exch. *v.* United States, 191 Fed. 37.

14. **Enforcement against receiver.** — Farmers', etc., Trust Co. *v.* Northern Pac. R. Co., 83 Fed. 249.

15. Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

16. **Joinder of parties.**—Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449.

17. **Persons affected by order.**—Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.
Carriers necessarily affected by an order of the interstate commerce commission, although not parties thereto, may maintain a suit to enjoin its enforcement. Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449.

18. **Competing carriers.**—Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449.

not produce enough revenue to pay the actual cost of the service and a reasonable profit, the bill should allege facts in support of such conclusions, such as the amount of revenue derived from the traffic affected, and so far as possible the cost of the service, or other facts from which the court can determine for itself whether the rates fixed are reasonably compensatory, and would produce a reasonable profit.[19]

Allegations of Law and Fact.—The allegation that there was no evidence offered, heard, or introduced is an allegation of fact so far as the question of pleading is concerned, but whether or not there is at the close of a final trial any evidence to sustain a finding of fact made by a judicial or quasi judicial tribunal is always a question of law, which in a case like the one at bar this court has jurisdiction to determine.[20] In a suit by carriers to annul an order of the interstate commerce commission declaring an existing rate unjust and unreasonable and establishing a lower rate, an allegation in the bill that there was no evidence before the commission to show the unreasonableness of the existing rate or the reasonableness of the one prescribed is an allegation of fact and sufficient as a matter of pleading, but whether or not there is at the close of a final trial any evidence to sustain the findings of the commission is a question of law, which the court has jurisdiction to determine.[21]

Presumptions and Burden of Proof.—The act to regulate commerce creates a rule of presumption in favor of the report of the interstate commerce commission which on its introduction in evidence changes the burden of proof and casts it upon the party against whom the report is made.[22] The conclusions of the interstate commerce commission, based upon its findings of fact that charges made by a railroad company are unjust and unreasonable or unlawfully discriminating, are presumed to be well founded and correct, and in a suit to enforce its orders the burden rests upon the company to show them to be erroneous.[23]

§§ 4177-4178. Evidence—§ 4177. Admissibility.—Evidence taken before the interstate commerce commission is not a part of the record, but either party, upon petition to enforce the order of the commission, may introduce any testimony taken before the commission, which is competent and relevant.[24] Under the charge of a denial of equal facilities for the interchange of traffic, the conduct of respondent in so arranging the running of its trains that greater facilities for interchanging, forwarding, and delivering freight were afforded to a competing connecting line than to petitioner, was proper to be shown to the court in a proceeding to enforce an order of the commission, though no question of the hours of running trains was presented to the commission in express terms.[25]

§ 4178. Weight and Sufficiency.—Explicit law, the settled policy of the government, and the practical principles of reason and justice, require that the national courts should not discredit the conclusions of the interstate commerce

19. **Pleadings.**—Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449.

20. **Allegations of law and fact.**—Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449, citing Ward *v.* Joslin, 186 U. S. 142, 147, 46 L. Ed. 1093, 22 S. Ct. 807; United States Fidelity, etc., Co. *v.* Board, 76 C. C. A. 114, 145 Fed. 144; Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525, 16 S. Ct. 366; Southern Pac. Co. *v.* Pool, 160 U. S. 438, 40 L. Ed. 485, 16 S. Ct. 338; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Clement *v.* Phœnix Ins. Co., 7 Blatchf. 51, Fed. Cas. No. 2,882; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 35 L. Ed. 213, 11 S. Ct. 569; Howe *v.* Parker, 190 Fed. 738; Fisher *v.* Scharadin, 186 Pa. 565, 40 Atl. 1091.

21. Atlantic, etc., R. Co. *v.* Interstate Commerce Comm., 194 Fed. 449.

22. **Presumptions and burden of proof.**—Tift *v.* Southern R. Co., 138 Fed. 753, decree affirmed in 148 Fed. 1021, 79 C. C. A. 536 and 27 S. Ct. 709, 206 U. S. 428, 51 L. Ed. 1124.

23. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 118 Fed. 613.

24. **Evidence.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 64 Fed. 981.

25. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

commission.[26] Evidence can not be weighed by the supreme court, as a matter of first impression, in a suit to enforce an order of the interstate commerce commission, for the purpose of ascertaining whether it establishes such substantial and material competition as justified a carrier in concluding that dissimilarity of circumstance and condition was brought about.[27] It is in evidence that, regardless of competition, a cheap grade of lumber could not get to market from a certain place without a favoring rate and whether traffic will move at a given rate is always some evidence as to whether the rate responds to the value of the service performed. The commission had this and the other matters to which reference is made to guide in the conclusion reached. The rate was thus not fixed arbitrarily or without considerations which justified it, and, above all, not for the purpose of enforcing a policy inaugurated by the carrier, which it was held could not equitably be abandoned, but in the exercise of due judgment, after full consideration of the entire subject, as shown by the reasons given for it; and, this being so, the order was lawfully made.[28]

The mere opinions of the interstate commerce commission are inadmissible in an action brought for the enforcement of an order of pecuniary reparation.[29] But where a proceeding to enforce the commission's findings is tried by a federal court without a jury, it is not error for the court to receive the commission's report in evidence without excluding matters of opinion stated therein, as distinguished from the commission's findings of fact.[30] An action by one in whose favor the interstate commerce commission has made an award by way of reparation for excessive rates is governed by the same rules of evidence as other civil actions, except that the findings and order of the commission are admissible as prima facie evidence "of the facts therein stated;" but the award of the commission is not such a finding, and is not evidence of any liability of defendant to plaintiff.[31] If this case had been tried before a jury, it might have been the court's duty to separate the findings of fact from matters of opinion and to instruct the jury to disregard the latter,[32] but such a rule is inapplicable to a trial before the court alone.[33] The commerce court, in examining the report of the interstate commerce commission, to ascertain the particular provisions of the interstate commerce act relied on to sustain a particular order, is limited to the report of the majority of the commission, the views of the minority not being open to consideration.[34]

Facts Stated in Order.—The provision of the act that a report of the commission in writing in respect to investigations into the reasonableness of rates, and that in case damages are awarded such report shall include the findings of fact on which the award is made, does not authorize the commission on a determination that a party complaining is entitled to an award of damages against a carrier because of the charge and collection of excessive rates in the violation of the provision to make an order directing the payment of such damages on or before a day named, and that on a failure to comply with such order, the complainant may file a petition in a circuit court, set forth causes for which he

26. Weight and sufficiency.—Decree, Tift *v.* Southern R. Co., 138 Fed. 753, affirmed in 148 Fed. 1021, 79 C. C. A. 536.

27. Decree, Behlmer *v.* Louisville, etc., R. Co., 83 Fed. 898, 28 C. C. A. 229, reversed in 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

28. Southern Pac. Co. *v.* United States, 197 Fed. 167.

29. Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

30. The findings and the conclusions of the commission were embraced in an opinion prepared by one of the members. Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

31. Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717.

32. Western New York, etc., R. Co. *v.* Penn. Refin. Co., 70 C. C. A. 23, 137 Fed. 343.

33. Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

34. Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 188 Fed. 229; Southern Pac. Co. *v.* Interstate Commerce Comm., 188 Fed. 241.

claims damages and the order of the commission, and that such suit shall proceed in all respects like other suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein named, do not make the order prima facie evidence in such suit of the liability of the carrier, but only of the facts stated in the order and findings, and it is the province of the court to determine whether such facts sustain the order.[35] An order of the interstate commerce commission awarding damages to a complainant against railroad companies is not sustained by findings that the carriers charged a rate on lumber shipped by the complainant which was excessive and unreasonable to the extent of the damages awarded, where it is also found that the complainant added the increased freight to the price of the lumber and the same was paid by the consumer, and it is not found that the freight was in fact paid by the complainant, or that it in any way suffered actual damage from the excessive rate.[36]

Orders as to Long and Short Haul.—On a proceeding in the circuit court, under Interstate Commerce Act, § 16, to enforce an order of the commissioners directing certain carriers to desist from charging a greater rate for a shorter than for a longer haul, the facts found by the commission are not conclusive, but are merely prima facie evidence, subject to be overcome by other evidence produced before the court.[37]

Order Awarding Reparation.—In an action against a railroad company brought under the Interstate Commerce Act to enforce an order of the interstate commerce commission, awarding reparation to a shipper, which is tried to the court, the admission in evidence of the report of the commission is not error although it may contain irrelevant matter.[38]

Analogous to Report of Referee.—The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of prima facie evidence in such judicial proceedings as may thereafter be had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United

35. **Facts stated in order.**—The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, §§ 14, 16, 24 Stat. 384 [U. S. Comp. St. 1901, pp. 3164, 3165]), as amended by Act June 29, 1906, c. 3591, §§ 3, 5, 34 Stat. 589, 590 (U. S. Comp. St. Supp. 1909, pp. 1157, 1159), provides that the interstate commerce commission shall make a report in writing in respect to its investigation into the reasonableness of rates, and that "in case damages are awarded such report shall include the findings of fact on which the award is made." They authorize the commission on a determination that a party complainant is entitled to an award of damages against a carrier because of the charge and collection of excessive rates in violation of the act to make an order directing the payment of such damages on or before a day named, and provide that, on a failure to comply with such order, the complainant for whose benefit it is made may file a petition in a circuit court "setting forth briefly the causes for which he claims damages and the order of the commission in the premises;" that "such suit shall proceed in all respects like other suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated." Held, that such provisions do not make the order prima facie evidence in such suit of the liability of the carrier, but only of the facts stated in the order and findings, and that it was the province of the court to determine whether such facts sustained the order. Darnell-Taenzer Lumber Co. *v.* Southern Pac. Co., 190 Fed. 659.

36. Darnell-Taenzer Lumber Co. *v.* Southern Pac. Co., 190 Fed. 659.

37. **Order as to long and short haul.**—Interstate Commerce Comm. *v.* Atchison, etc., R. Co., 50 Fed. 295.

38. **Order awarding reparation.**—Chicago, etc., R. Co. *v.* Feintuch, 191 Fed. 482.

States upon which the jurisdiction is conferred or enforcing the rights, duties, and obligations recognized and enforced by said law.[39]

§§ 4179-4180. Hearing and Determination—§ 4179. In General.—Originally the duty of the courts to determine whether an order of the commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the commerce court that in considering the subject of orders of the commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the constitution, a want of conformity to statutory authority or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically so.[40] It has also been determined in considering whether an affirmative order of the commerce court, that the commission should be enforced, on the one hand, or set aside and declared nonenforceable on the other was endowed only with the jurisdiction and power existing, at the time that act was passed in the circuit courts of the United States; and as, at that time, it was conclusively settled that the courts had authority to re-examine the findings of the commission in such cases only for the purpose of ascertaining whether the action of the commission was repugnant to the constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the commerce court was likewise limited in passing upon the petition brought before it.[41] Explicit law, the settled policy of the government, and the practical principles of reason and justice, require that the national courts should not discredit the conclusions of the interstate commerce commission.[42] In an action by the commissioners, under § 16 of the Interstate Commerce Act, in the circuit court sitting as a court of equity, to restrain the defendant railroad companies from further continuing the violation and disobedience of an order of the commission, and to enjoin obedience to the same, where the order, besides requiring the several defendant companies to cease and desist from certain acts found by the commission to constitute unlawful discrimination between shippers, also required them to make reparation to the complaining shippers, the commissioners afterwards determining the amount to which each claimant was entitled, so far as the petition seeks the enforcement of these claims, the court has no jurisdiction of the subject-matter, but as to the other matters charged it has jurisdiction.[43] In a proceeding in a circuit court to enforce an order made by the commission, the court can not adjust differences between the litigants, or correct abuses in the conduct by a railroad company of its business.[44]

Confined to Order.—Though an action to recover pecuniary reparation ordered by the interstate commerce commission is triable de novo, the cause of action must have been included in the order of reparation, and have constituted the whole or part of the basis of such order, whether the proceeding to enforce the same is in equity or at law.[45]

39. Analogous to report of referee.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

40. Hearing and determination.—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

41. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761; United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

42. Tift *v.* Southern R. Co., 138 Fed. 753, decree affirmed in 148 Fed. 1021, 79 C. C. A. 536, and 27 S. Ct. 709, 206 U. S. 428, 51 L. Ed. 1124.

43. Interstate Commerce Comm. *v.* Western New York, etc., R. Co., 82 Fed. 192.

44. Farmers', etc., Trust Co. *v.* Northern Pac. Co., 83 Fed. 249.

45. Confined to order.—Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

Reason for Finding.—Where the bill in a suit by the interstate commerce commission to enforce obedience to an order requiring a railroad company to desist from the enforcement of a rule promulgated by such company alleges generally that the rule is violative of the interstate commerce act, which allegation the defendant denies, the issue thus raised extends to every possible violation of the act, and the court is not confined to the grounds or reasons assigned by the commission for its conclusion, but may, without going beyond the issue, reach a like or different conclusion on the same or other grounds or reasons.[46] The enforcement of an order of the interstate commerce commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a federal circuit court if it finds such rule is, for any reason, in violation of the act although such reason may not have been the one relied upon by the commission itself to invalidate the rule.[47]

Trial de Novo.—A suit brought by the interstate commerce commission in the United States circuit court to enforce an order of the commission is an original and independent proceeding, and the court may hear and determine the cause de novo upon proper pleadings and proof.[48] Both in suits to enforce and to annul or enjoin orders of the interstate commerce commission, the court is not confined to a consideration of the sufficiency of the facts as determined by the commission to sustain the order, but the hearing may be de novo, and may include the taking and consideration of evidence other than that before the commission.[49]

Trial by Jury.—In an action to enforce an interstate commerce reparation order based on a discriminating freight rate, whether such rate was just and reasonable or unreasonable and excessive is a question for the jury.[50]

Amendment and Modification of Order.—In a proceeding in a circuit court to enforce an order of the interstate commerce commission, the court has no power to amend or modify such order, or to sever from the remainder a part which is illegal, but must enforce the same, if at all, in its entirety as made by the commission.[51]

Distinction between Proceeding to Enforce and Proceeding to Annul.—The scope of inquiry in a proceeding in equity to compel obedience to orders of the

46. **Reason for finding.**—Interstate Commerce Comm. *v.* Southern Pac. Co., 132 Fed. 829, reversed Southern Pac. Co. *v.* Interstate Commerce Comm., 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

47. Decree, Interstate Commerce Comm. *v.* Southern Pac. Co., 132 Fed. 829, reversed in 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

48. **Trial de novo.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 56 Fed. 925.

The court will not be limited on the hearing to a review of the evidence before the interstate commerce commission, and a hearing de novo on the merits should be granted where the findings and petition of the commission are within the letter of the act. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 94 Fed. 272.

49. Sections 15 and 16 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165], as amended by Act June 29, 1906, c. 3591, §§ 4, 5, 34 Stat. 589, 590 [U. S. Comp. St. Supp. 1907, pp. 900, 902]) confer on the circuit courts, sitting in equity, jurisdiction to entertain, hear, and determine suits to compel obedience to orders of the commission prescribing rates, and also of suits to annul or enjoin the enforcement of such orders. The scope of the inquiry in both classes of suits is the same, and the court is not confined to a consideration of the sufficiency of the facts as determined by the commission to sustain the order, but the hearing may be de novo, and may include the taking and consideration of evidence other than that before the commission; but the presumption is that the order is valid, and the burden is upon the party attacking it to make a clear case showing its invalidity. Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

50. **Trial by jury.**—Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

51. **Amendment and modification of order.** — Decree, Interstate Commerce Comm. *v.* Lake Shore, etc., R. Co., 134 Fed. 942, affirmed in 26 S. Ct. 766, 202 U. S. 613, 50 L. Ed. 1171.

commission and in a suit to annul or enjoin the enforcement of such orders, is the same.[52]

Findings of Law.—Under the provisions of the Interstate Commerce Act the courts have jurisdiction to set aside or suspend any order of the interstate commerce commission resulting from a misconception and misapplication of the law to conceded or undisputed facts.[53]

Findings of Fact.—The findings of fact set forth in the report of the interstate commerce commission are, in all judicial proceedings, deemed prima facie evidence as to each and every fact found.[54] The provision that the findings of fact of the interstate commerce commission shall be prima facie evidence of the facts found in a subsequent proceeding to enforce the commission's order, contemplated that the findings of fact should be so prepared and arranged in the commission's report that they could be offered in evidence unaccompanied by extraneous or incompetent legal arguments, opinions, or other conclusions.[55] Originally the duty of the courts to determine whether an order of the commission should or should not be enforced carried with it the obligation to consider both the facts and the law; but prior to the passage of the act creating the commerce court the statute had made the findings of the commission prima facie correct, so that in considering the subject of orders of the commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. In reviewing the findings of the commission, therefore, the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order; or whether the commission acted arbitrarily and unjustly and contrary to the evidence; or whether its authority was exercised in such an unreasonable and arbitrary manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power.[56] In a proceeding to enforce the orders of the commission, the circuit court has jurisdiction to review the judgment of the commission upon questions of fact as to whether rates charged are unjust or unreasonable or constitute unjust discriminations or preferences, or whether circumstances and conditions are substantially similar, and the court is not limited to the inquiry whether or not the commission has misconstrued the statute and thereby exceeded its power, and there is general jurisdiction to take evidence upon the merits of the original controversy. This is apparent from those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in

52. Distinction between proceeding to enforce and proceeding to annul.—Missouri, etc., R. Co. *v.* Interstate Commerce Comm., 164 Fed. 645.

53. Findings of law.—Stickney *v.* Interstate Commerce Comm., 164 Fed. 638.

54. Findings of fact by commission.—Tift *v.* Southern R. Co., 138 Fed. 753, decree affirmed in 148 Fed. 1021, 79 C. C. A. 536, and 27 S. Ct. 709, 206 U. S. 428, 51 L. Ed. 1124.

55. Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

56. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108; Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648; Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; S. C., 218 U. S. 113, 54 L. Ed. 959, 30 S. Ct. 660, reversing 171 Fed. 680; Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392, reversing 166 Fed. 499; Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

such manner as to do justice in the premises.[57] Having arrived at the conclusion that the order of the commission was not sustained by the facts upon which it was predicated, the court can not enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable it to do so, in order that new and substantive findings, of fact may be evolved, upon which the order of the commission may be sustained.[58] But the findings of fact made by the interstate commerce commission are only prima facie evidence. The court may direct further evidence to be taken, and, if it shall appear that the facts are otherwise than as reported by the commission, the court would be governed by the facts as found by itself.[59] If the particular matter in issue before the interstate commerce commission and inquired into was one of fact, and a full hearing was afforded, and the conclusion reached is supported by substantial evidence, it will not be nullified by the courts.[60] On application to the courts to enforce an order of the interstate commerce commission which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the commission to make a further investigation of the facts.[61]

§ 4180. Particular Orders of Commission.—Denying Constitutional Rights.—The wisdom of the lawful discharge of the administrative duties of the interstate commerce commission is not reviewable by the courts; but they may relieve from orders of the commission which deprive complainants of their property without due process of law or without just compensation, or from those which show an unreasonable exercise of power.[62]

Fixing of Rates.—Since the fixing of a schedule of interstate rates by the interstate commerce commission is a legislative act, such schedule can not be disturbed by the commerce court on complaint of a shipper as unconstitutionally high unless it clearly appears that the rates so fixed are so high as to be violative of the shipper's constitutional rights, guaranteed by the fifth amendment to the federal constitution.[63] It is not ground for interference by the courts with an order of the interstate commerce commission reducing certain rates charged by a railroad company that competing companies in consequence of their failure to meet the reduction are losing traffic.[64]

Where Rate Confiscatory.—The action of the interstate commerce commission in fixing a rate to be charged by an interstate carrier under the legislative power conferred by the Interstate Commerce Act, can be reviewed by the courts only on the constitutional ground that it is confiscatory, and such claim should be clearly established to warrant their interference.[65] But it has been held that an order of the interstate commerce commission fixing rates to be charged by a

57. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

58. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

59. Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

60. Norfolk, etc., R. Co. *v.* United States, 195 Fed. 953.

61. Interstate Commerce Comm. *v.* Clyde Steamship Co., 21 S. Ct. 512, 181 U. S. 29, 45 L. Ed. 729, modifying decree, 93 Fed. 83, 35 C. C. A. 217; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719, reversing decree, 99 Fed. 52, 39 C. C. A. 413.

62. **Particular orders of commission.**—Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409.

63. **Fixing of rates.**—Hooker *v.* Interstate Commerce Comm., 188 Fed. 242; Eagle White Lead Co. *v.* Interstate Commerce Comm., 188 Fed. 256.

64. Norfolk, etc., R. Co. *v.* United States, 195 Fed. 953.

65. **Where rate confiscatory.**—Southern Pac. Co. *v.* Interstate Commerce Comm., 177 Fed. 963.

carrier is not conclusive and exempt from review by the courts merely because the rates fixed thereby are not confiscatory.[66]

Finding Just and Reasonable Rates.—With regard to the finding of the commission upon the character of a rate, whether it is unreasonable as decided, such decision, the court has said with tiresome repetition, is peculiarly the province of the commission to make, and that its findings are fortified by presumptions of truth, due to the judgments of a tribunal appointed by law and informed by experience.[67] The statute makes the finding of the interstate commerce commission prima facie correct, and the courts will not examine the facts on which the interstate commerce commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order.[68] A finding by the interstate commerce commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundredweight was prima facie evidence of its own truth.[69] A petition by the interstate commerce commission for an order of a federal court enjoining a carrier from making certain charges, which the commission has declared to be unreasonable and unjust, is authorized by the Interstate Commerce Act, and is not subject to objection as an attempt to fix maximum rates; the question of the reasonableness of the charges complained of being one which the court is required to determine in such proceeding.[70]

Finding Discrimination in Rates.—The circuit court should enforce an order of the interstate commission forbidding any discrimination in rates, even though some discrimination might be justifiable, when the rates actually charged are unlawful, and the carrier makes no showing as to what would be a lawful discrimination under the circumstances.[71]

Finding Discrimination in Long and Short Haul.—The determination of the commission upon questions of discrimination, under the third section, and on questions as to the similarity of circumstances and conditions, as affecting the right to charge a greater amount for a longer than for a shorter haul, under the fourth section, is not conclusive upon the courts; but, when the power of the courts is invoked to enforce the commission's orders, such courts are entitled to

66. Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

67. Finding just and reasonable rates.—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

Findings of the interstate commerce commission that certain through rates are unreasonable in themselves carry with them a presumption of correctness. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; S. C., 218 U. S. 113, 54 L. Ed. 959, 30 S. Ct. 660, reversing decrees in 171 Fed. 680.

Where the commission exercises its authority to find existing rates unreasonable and undertakes to correct the same by prescribing reasonable rates, its finding is not subject to be reviewed by the court. In other words, an order of the commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

68. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108. See, also, Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648.

69. Judgment, St. Louis, etc., Grain Co. *v.* Southern R. Co., 149 Fed. 609, affirmed in 153 Fed. 728, 82 C. C. A. 614.

Findings and conclusions of the interstate commerce commission that the transportation of freight by the defendant railroads from New Orleans to Lagrange, and the transportation of like freight from New Orleans to other and more distant points, were under substantially similar circumstances and conditions, and that a higher rate charged to Lagrange than to the more distant points was discriminative, and also unreasonable and unjust in itself, and in violation of the interstate commerce law, affirmed, and an order based on such findings enforced by injunction. Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 102 Fed. 709.

70. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 94 Fed. 272.

71. Finding discrimination in rates.—Interstate Commerce Comm. *v.* Texas, etc., R. Co., 6 C. C. A. 653, 57 Fed. 948.

determine these questions upon the pleadings and the evidence adduced before the commission, and to hear additional evidence, giving effect, however, to the commission's finding of facts as prima facie evidence of the matters therein stated.[72]

Finding Discrimination and Prejudice.—A finding by the interstate commerce commission that a rule promulgated by railroad companies, and the practice thereunder, with respect to a particular kind of traffic, subject shippers to an undue, unjust, and unreasonable prejudice and disadvantage, and give to the carriers an undue and unreasonable preference and advantage, is one of fact; and an order, based thereon, requiring the companies to desist from maintaining and enforcing such rule, as in violation of the interstate commerce law, is prima facie a lawful order, such as a court is required to enforce in a suit instituted for that purpose.[73]

Refusing to Annul Demurrage Rule.—Since capacity to sue in the commerce court depends on the general equity practice in force in the circuit courts, and prior to the creation of the commerce court a shipper claiming to be injured by a ruling of the interstate commerce commission refusing to annul a private car demurrage rule could have sued in the circuit court to set aside the commission's ruling, such ruling, though granting no affirmative relief, should be construed as an order of the commission which the commerce court had jurisdiction to review on petition of the person conceiving himself injured thereby.[74] Though it is proper, if not necessary, for a shipper objecting to a carrier's demurrage rule to apply first to the interstate commerce commission for relief, the fact that the commission merely dismissed the petition without granting any affirmative relief does not render its action conclusive, so as to deprive the shipper of the right thereafter to proceed to have the commission's ruling reviewed by the commerce court on the ground that the demurrage rule was confiscatory as to the shipper, and, if sustained, would deprive it of its property without due process of law.[75]

Findings in Report of Commission.—Findings of fact in a report of the interstate commerce commission are made by law prima facie evidence of the matters therein stated, and the conclusion of the commission, based upon such findings, that a rate charged by a railroad company between two points is unreasonable and unjust, is presumed to be well founded and correct, and will not be set aside unless error clearly appears.[76]

§ 4181. Injunction.—The granting by the commerce court of an injunction pendente lite, suspending, until determination of the suit, an order of the interstate commerce commission, requiring carriers to desist from alleged discriminatory allowances, is not in excess of its power under Act June 18, 1910, § 3 unless plainly unnecessary.[77] The commerce court, in the exercise of the legal discretion vested in it, will grant a preliminary injunction suspending the operation of an order of the interstate commerce commission, where it is shown that its enforcement will result in the destruction of the business of a large class of shippers in a city and a large loss to them, while the damage which will result to others from its suspension will be small in comparison.[78] Only temporary restraining

72. **Finding discrimination in long and short haul.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree, 74 Fed. 715, 21 C. C. A. 51.

73. **Finding discrimination and prejudice.**—Interstate Commerce Comm. *v.* Southern Pac. Co., 123 Fed. 597.

74. **Refusing to annul demurrage rule.**—Procter, etc., Co. *v.* United States, 188 Fed. 221.

75. Procter, etc., Co. *v.* United States, 188 Fed. 221.

76. **Findings in report of commission.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 102 Fed. 709.

77. **Injunction.**—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

78. The word "discretion," as used in § 3 of Act June 18, 1910 (36 Stat. 542, c. 309), creating the commerce court, means a legal discretion, a discretion controlled and limited by sound principles of law applied to the facts in each particular case. Nashville Grain Exch. *v.* United States, 191 Fed. 37.

orders of the commerce court, staying operation of order of the interstate commission, for not more than sixty days, are affected by requirement as to statement of fact as to irreparable damage, and do not apply to a preliminary injunction.[79] Orders made by the interstate commerce commission, which are beyond the power conferred on it by the statute, are subject to review by the courts, which may enjoin their enforcement.[80] A circuit court in a suit to enjoin the enforcement of a rate prescribed by the interstate commerce commission does not act as an appellate rate making commission, but its office is to see that the commission does not exceed its powers, and not to determine whether it erred in the exercise of them. While the court has power to determine whether a rate prescribed is reasonable or not, the power may be limited by circumstances which do not admit of its exercise until the proper conditions exist; and the rule by which it is exercise is that the court will not interfere with the action of the commission, unless it clearly appears that it is beyond its authority and injuriously affects some substantial right of the complainant—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such a controversy.[81]

Necessity for Showing Cause.—On motion for a preliminary injunction to restrain certain carriers from violating an order of the interstate commerce commission, the complaint made the alternative suggestion that, if the defendants be allowed to charge and receive present rates, they be required to keep an account with every shipper, and to pay into the registry of the court the excess to be disposed of after the hearing as the court may order. This is an application for a rule nisi, which ought not to be granted unless there is a showing of right in favor of the complainant, which would authorize the granting of a preliminary injunction.[82]

Where Right to Preliminary Injunction Denied by Answer.—A preliminary injunction to compel a carrier to obey an order of the interstate commerce commission in reference to freight rates should be denied, where the answer denies that the rates defendant charges were unreasonable.[83]

§ 4182. Rehearing.—In proceedings to enforce an order of the interstate commerce commission, the circuit court can not, on motion for rehearing, substitute the order made by the commission for an order which the commission certified it intended to make.[84]

§§ 4183-4189. Review—§ 4183. Right of Review.—By § 2 of act, the right to appeal to the United States supreme court from an order of the commerce court issuing a preliminary injunction against the enforcement of the affirmative order of the interstate commerce commission, is given in express terms.[85]

Branch Line to Review Order against Main Line.—A tap line railroad company which is directly affected by an order respecting allowances made for services by the trunk line company may have such order reviewed, although it is

79. United States *v.* Baltimore, etc., R. Co., 32 S. Ct. 817, 225 U. S. 306, 56 L. Ed. 1100.

80. Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 171 Fed. 680.

81. Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

82. **Necessity for showing cause.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 64 Fed. 981.

83. **Where right to preliminary injunction denied by answer.**—Shinkle, etc., Co. *v.* Louisville, etc., R. Co., 62 Fed. 690; Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 64 Fed. 981.

A preliminary injunction to restrain a carrier from disobeying an order of the interstate commerce commission will not be granted in proceedings under 24 Stat. p. 384, § 16, as amended, when the answer denies the facts on which the order was based. Interstate Commerce Comm. *v.* Lehigh Valley R. Co., 49 Fed. 177.

84. **Rehearing.** — Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 64 Fed. 723.

85. **Appeal.**—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

not directed against the tap line company but against the trunk line company.[86]

§ 4184. Presumptions on Appeal.—Lack of formal proof to sustain an order of the interstate commerce commission reducing rates can not be supplied by a presumption that its findings were supported by the information which the commission is required by the Act of Feb. 10, 1891, § 12, to obtain in order to carry out the objects for which it was created.[87] The interstate commerce commission can not be said to have based its order reducing rates upon a mistake of law in regarding the long maintenance by the carriers of a lower rate while earning dividends as raising a presumption of reasonableness, where the reduced rate fixed by the commission was higher than such earlier rate.[88]

Reasonableness of Other Rates.—On review of an order of the interstate commerce commission requiring the reduction of a particular rate by a railroad company, there is no presumption in favor of the reasonableness of the many other rates in force, which were not under direct investigation, that will overthrow substantial evidence that the rate in question was unreasonable.[89]

§ 4185. Harmless Error.—To constitute prejudicial error when an action at law is tried by the court without a jury, the evidence improperly admitted must have entered into the result at which the trial court arrived.[90] Where on writ of error in a suit to enforce a finding of the interstate commerce commission, the record affirmatively showed that neither the commission nor the circuit court based any part of the judgment sought to be reviewed on certain evidence admitted over objection, the admission of such evidence was harmless.[91]

§ 4186. Scope of Review.—The primary jurisdiction is with the commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as whether the action of the commission is within the scope of the delegated authority under which it purports to have been made.[92] To quote the language of Mr. Justice Lamar in a late case: "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow, determines the validity of the exercise of the power."[93] "Beyond con-

86. **Branch line to review order against main line.**—Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

87. **Presumptions on appeal.**—Louisville, etc., Railroad *v.* Interstate Commerce Comm., 195 Fed. 541.

88. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

89. **Reasonableness of other rates.**—Lehigh Valley R. Co. *v.* United States, 204 Fed. 986.

90. **Harmless error.**—Streeter *v.* Sanitary Dist., 66 C. C. A. 190, 133 Fed. 124.

91. If it be conceded that this evidence was not within the issues, the ruling would not necessarily afford a ground for reversal. Here the record affirmatively shows that neither the commission nor the circuit court based any part of the judgment on the objectionable evidence. Southern R. Co. *v.* St. Louis, etc., Grain Co., 153 Fed. 728, 82 C. C. A. 614.

92. **Scope of review.**—Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.

93. Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, citing Interstate

troversy, in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even though the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substances, and not the shadow, determines the validity of the exercise of the power."[94]

Questions of Jurisdiction and Authority.—The interstate commerce commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the acts creating it and it is not the final judge of its own jurisdiction. On the other hand, if it refused to take jurisdiction under a mistaken view of the law in a proper case, a mandamus will lie to compel it to take jurisdiction.[95]

Questions of Law and Fact.—In determining mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. The findings of the commission are made by law prima facie true, and the federal supreme court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final, not that its decision, involving, as it does, so many and such vast public interest, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.[96] An independent investigation of the facts can not be entered upon by the supreme court of the United States on appeal from a decree refusing to demand compliance with an order of the interstate commerce commission, in order to evolve new and substantive findings of fact upon which the order of the commission may be sustained, even if the record is in such condition as to permit such a course.[97]

Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417; Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

94. Justice White, delivering opinion in Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155. See, also, Postal Telegraph-Cable Co. *v.* Adams, 155 U. S. 688, 39 L. Ed. 311, 15 S. Ct. 268, 360.

95. Questions of jurisdiction and authority.—Mandamus lies to compel the interstate commerce commission to take jurisdiction of a petition alleging violations of the Interstate Commerce Act by a railway company operating in Alaska, where the commission refused to entertain the petition, upon the ground that Alaska was not a territory of the United States, and that the subject matter of the petition was therefore not within the scope of the commission's powers. Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

96. Mixed questions of law and fact.—Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, citing Illinois Cent. R. Co. *v.* Interstate Commerce Comm., 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700.

The commerce court is not authorized to review the determination of disputed questions of fact by the interstate commerce commission, made after a full and fair hearing, on proper notice, unless the commission, exercised its power in an arbitrary and unreasonable manner, or in violation of petitioner's constitutional rights. Florida, etc., R. Co. *v.* United States, 200 Fed. 797.

97. Decree 43 C. C. A. 209, 103 Fed. 249, affirmed in Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 22 S. Ct. 824, 186 U. S. 320, 46 L. Ed. 1182.

Matters of Record.—On review of an order made after a full hearing on the ground that it is not sustained by any substantial evidence and that the commission acted arbitrarily, such issues must be determined exclusively by the record made before the commission, and new evidence is not admissible.[98]

Matters Not Raised before Commission.—The contention that an arrangement between a terminal company and interstate carriers violates the commodity clause of the Act of June 29, 1906, will not be considered on appeal from the commerce court to review an order enjoining an order of the interstate commerce commission, where such contention is not shown to have been raised before the commission.[99] The contention that an arrangement between a terminal company and certain interstate railway carriers violates the commodity clause of the Act of June 29, 1906, will not be considered on appeal to the federal supreme court from the commerce court, to review an order enjoining the enforcement of an order of the interstate commerce commission, where there is nothing in the record showing that such a contention was pressed upon the commission or considered by that body, or that the order rendered was in any event based upon the commodity clause, especially where the assumption that the order was based upon that clause would necessitate the conclusion that the commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exercised to suppress.[1]

Matters of Discretion.—The courts can not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the interstate commerce commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or inexpediently exercised.[2] Arguments which point out and assail the imperfection which may appear in the result, assail, it is said, the wisdom of congress in conferring upon the commission the power which has been lodged in that body to consider, complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.[3] Although the order made by the commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power.[4] Where the order entered by the commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the commission was satisfied that it was a wise policy to do so, because a railroad had so conducted itself

98. **Matters of record.**—Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

99. **Matters not raised before commission.**—United States *v.* Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75.

1. United States *v.* Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75.

2. **Matters of discretion.**—Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; decree, Chicago, etc., R. Co. *v.* Interstate Commerce Comm., 173 Fed. 930, reversed in 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

3. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

4. Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered, it shows that the commission has been guilty of an abuse of power which the courts have jurisdiction to review and correct.[5]

Finding of Discrimination.—Findings of fact made by the interstate commerce commission in a proceeding for redress for unlawful discrimination in railway rates are not open to review in the courts.[6]

Finding of Establishment of Through Route.—The courts may review the determination of the interstate commerce commission upon the question whether a reasonable or satisfactory through route exists within the meaning of the Act of June 29, 1906, conditioning the authority of the commission to establish through routes and joint rates upon the nonexistence of such route.[7]

Finding That Railroad Is Industrial Track.—A finding of fact that a tap railroad, as to a proprietary company, is a mere plant facility, is reviewable only on an allegation that it is not supported by any substantial evidence or that it is arbitrary.[8]

§ 4187. Modification of Decree of Court.—Where an error was made in rates at a certain point by basing same on an error of fact, which was corrected by the companies on its being brought to their notice by the commission and at the hearing before the court, and a modified tariff was put into operation by the railroad companies at once, immediately after the argument of the case in the circuit court of appeals, and continued in force from that time, the decree below having been entered more than one year after the submission of the cause, and the relief sought by the complaint and that accorded by the commission was inconsistent with the theory that the rates should be based on either of these states of fact, as the altered tariff had been in force more than one year prior to the entry of the decree below, the court doubtless considered it unnecessary to provide for its continuance. The record does not disclose, nor was it suggested, that any application was made to the circuit court of appeals to modify its decree so as to direct the continuance of such new tariff, both parties evidently acting on the reasonable assumption that it was an accomplished fact. Under these circumstances, a formal modification of the decree of the circuit court of appeals is not required.[9]

5. Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

Thus where a railroad company fixed a rate of $3.10 per ton upon lumber shipped from a certain locality and continued it in force for several years and until the industry had grown and reached considerable proportions in that locality, the commission had no power to abolish a new rate of $5.00 per ton where such rate was not shown to be unreasonable of itself, but merely upon the ground that the prosperity of the lumber business in that locality would be seriously impaired by the enforcement of the new rate, and that the railroad company, having established a rate under which the industry had grown up, was now estopped from fixing a rate which, while not unreasonable for the service rendered, would impair the prosperity of the business which had grown up under the old rate. Southern Pac. Co. *v.* Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

6. **Finding of discrimination.**—Interstate Commerce Comm. *v.* Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392, reversing decree 166 Fed. 499, citing Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164; Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

7. **Establishment of through route.**—Interstate Commerce Comm. *v.* Northern Pac. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417.

8. **Finding that railroad is industrial track.**—Arbitrary action in such case can be predicated only on a disregard by the commission of the very criteria which it adopts to determine the ultimate question of fact or on the adoption in different cases of distinctions without real differences. Louisiana, etc., R. Co. *v.* United States, 209 Fed. 244.

9. **Modification.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687.

§ 4188. Remand to Commission.—Where, so far as the reasonableness per se of the rates was concerned, in the consideration of this question the commission had been in effect controlled by its finding, held to have been erroneous, that there had been violations of the third and fourth sections of the act, the controversy, in so far as the intrinsic reasonableness of the rates was concerned, should not be foreclosed, but should be left for further consideration and decision upon the evidence already introduced and such additional evidence as might be taken on a further hearing before the commission if such new hearing was desired. After deciding that the orders of the commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness per se of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the commission to primarily consider and pass upon a controversy concerning the unreasonableness per se of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the commission had not considered such a disputed question, to remand the case to the commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the commission, primarily to determine the reasonableness of rates in force through an established schedule.[10] "We do not, of course, mean to imply that the commission may not directly institute proceedings in a circuit court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to 'hear and determine the matter as a court of equity,'

10. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075. The cases of Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209, and Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687, involved the enforcement against carriers of orders of the commission.

In the case of Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, the findings of the commission were overruled by the circuit court, after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the circuit court of appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence and in this court to review their decisions. Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

So in the case of Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666, the decision of the circuit court of appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the circuit court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings of conclusions of the commission." Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45. See, also, Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

which necessarily implies that the court is not concluded by the findings or conclusions of the commission; yet as the act provides that, on such hearing, the findings of fact in the report of said commission shall be prima facie evidence of the matters therein stated, we think it plain that if, in such a case, the commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in."[11] Where the interstate commerce commission refuses to weigh the evidence in regard to competition, merely because the competition is wholly between carriers who are subject to the act, the proper practice in this court is to dismiss the petition filed to enforce the order of the commission, and remand the case to the commission, without prejudice to the right of any party in interest to apply to the commission to proceed, on the evidence already introduced before it, or on such evidence as it may allow to be introduced, to hear and determine the matter in controversy in conformity to law.[12]

Where Commission Misconceived Its Powers.—If the circuit court of appeals was of opinion that the commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance, at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.[13]

Where Commission Erroneously Declined to Find Facts.—Where the commission by reason of its erroneous construction of the statute has in a case to it presented declined to adequately find the facts, it is the duty of the courts, on application being made to them to enforce the erroneous order of the commission, not to proceed to an original investigation of the facts which should have been passed upon by the commission, but to correct the error of law committed by that body, and after doing so to remand the case to the commission so as to afford it the opportunity of examining the evidence and finding the facts as required by law.[14]

§ 4189. Supersedeas Pending Appeal.—The provision of the act, under which resort to the circuit court can be had for the enforcement of lawful orders or requirements of the interstate commerce commission, provides that, when the subject in dispute shall be of the value of two thousand dollars or more, either

11. Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

12. Interstate Commerce Comm. *v.* Southern R. Co., 105 Fed. 703.

13. **Where commission misconceived its powers.**—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

14. **Where commission erroneously declined to find facts.**—Interstate Commerce Comm. *v.* Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729, 21 S. Ct. 512; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeals; but such appeals shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, Such provision of the act to regulate commerce relates only to the effect of an appeal, and it does not deprive the circuit courts of their right of control over their own decrees during the term at which they are rendered, and before an appeal is prayed.[15] The provision of § 16 of the Interstate Commerce Act providing that, in proceedings thereunder to enforce an order of the commission, an appeal shall not operate to stay or supersede the order of the court appealed from, is merely declaratory of the general rule in equity, and does not affect the power of the court, under equity rule 93, to grant a stay pending appeal, in its discretion.[16] The enforcement of an order of the interstate commerce commission will be suspended pending an appeal from the commerce court sustaining the order when it is proper from the facts of the case to maintain the status quo.[17] On an appeal to the circuit court of appeals from a decree in proceedings to enforce an order of the interstate commerce commission, the decree of the circuit court is not superseded; but, if an appeal be taken to the supreme court from the decree of the circuit court of appeals, the latter decree is superseded, so that the decree of the circuit court remains in force in any event.[18] A circuit court will not supersede a decree enjoining railroad companies from violating an order of the interstate commerce commission affecting rates, entered in a suit brought by the commission pursuant to § 16 of the Interstate Commerce Act pending an appeal from such decree, where it does not appear that the damage to defendants from the enforcement of the decree will be greater than that which would result to shippers from its suspension.[19] The federal supreme court will not disturb, on appeal, the granting by the commerce court of an injunction pendente lite, until final determination of the suit, suspending an order of the interstate commerce commission requiring carriers to desist from alleged discriminatory allowances, unless an abuse of discretion appears.[20]

§ 4190. Effect of Repeal of Statute on Pending Proceedings.—The new remedies to compel compliance with the act to regulate commerce, given by the Act of Feb. 19, 1903, are so far made applicable to prior pending proceedings to enforce the former act by the provision that pending causes shall not be affected by the repeal of conflicting laws provided for therein, but shall be prosecuted to a conclusion in the manner theretofore provided, "and as modified by the provisions of this act" that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized, because brought before the passage of the later act, must be reversed, and the cause remanded for further proceedings consistent with the act to regulate commerce as originally enacted and subsequently amended.[21]

§§ 4191-4211. Proceedings in Federal Courts—§ 4191. In General.—It is the manifest purpose of the statutes regulating interstate commerce to strike through all pretense and all ingenious devices to the substance of the

15. Supersedeas pending appeal.—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 101 Fed. 146.

16. Interstate Commerce Comm. *v.* Southern Pac. Co., 137 Fed. 606.

17. Omaha, etc., St. R. Co. *v.* Interstate Commerce Comm., 222 U. S. 582, 56 L. Ed. 324, 32 S. Ct. 833.

18. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 42 L. Ed. 889, 18 S. Ct. 502.

19. Interstate Commerce Comm. *v.* Southern Pac. Co., 137 Fed. 606.

20. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

21. Effect of repeal of statute on pending proceedings.—Missouri Pac. R. Co. *v.* United States, 189 U. S. 274, 47 L. Ed. 811, 23 S. Ct. 507.

transaction, and it is the duty of the courts to recognize and carry into effect such purpose in suits for their enforcement.[22]

§ 4192. Statutory Provision.—Section 22 of the act to regulate commerce, provides that nothing in the act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies, can not in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.[23] The special remedies provided by the Interstate Commerce Act are cumulative, and not exclusive of the general remedies given by the federal judiciary act conferring jurisdiction of all suits and controversies arising under an act of congress, regardless of any diversity of citizenship between the parties.[24] The Hepburn amendment of June 29, 1906, to the Interstate Commerce Act materially restricted the jurisdiction of the courts, and the primary jurisdiction of the interstate commerce commission, particularly under § 10 of Act March 2, 1889, has been considerably extended.[25]

§§ 4193-4200. Jurisdiction and Venue—§ 4193. In General.—A suit to enforce compliance with the provisions of the Interstate Commerce Act, and to prevent a threatened breach thereof, brought by a person or corporation concerned, is a case arising under the constitution and laws of the United States, and is within the jurisdiction of the federal circuit courts independently of the citizenship of the parties.[26]

No New Jurisdiction Conferred by Act.—Congress did not undertake by the Interstate Commerce Act and its amendments to confer any new judicial power upon the courts, but assumed that their ordinary powers would continue and might be invoked by parties complaining of injuries, past or apprehended, from some abuse of its power by the commission resulting in a trespass upon vested rights.[27]

Under Provisions of General Law.—A shipper seeking relief because of the refusal of a carrier to accept interstate shipments of intoxicating liquors consigned to local option or "dry" points, which the carrier seeks to justify under a state statute forbidding the transportation of such shipments, which is attacked as an unlawful regulation of commerce, may invoke the jurisdiction of the courts without first applying to the interstate commerce commission, since the question involved is one of general law, for a judicial tribunal and one not competent for the commission as a purely administrative body.[28]

Under Provision Preserving Common-Law Remedies.—Investigation by the interstate commerce commission and an appropriate finding and order are prerequisite to the right of a shipper to maintain an action to recover from a carrier the excess which he claims to have paid under a regularly established and published rate which is attacked as unjustly discriminatory, notwithstanding the

22. **Proceedings before court.**—United States *v.* Milwaukee, etc., Trans. Co., 142 Fed. 247.

23. **Statutory provision.**—Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

24. Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. 771.

25. Langdon *v.* Pennsylvania R. Co., 186 Fed. 237.

26. **Jurisdiction.**—In re Lennon, 166 U. S. 548, 41 L. Ed. 1110, 17 S. Ct. 658.

27. **No new jurisdiction conferred by act.**—Louisville, etc., R. Co. *v.* Interstate Commerce Comm., 184 Fed. 118.

28. **Under provisions of general law.**—Louisville, etc., R. Co. *v.* Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 S. Ct. 189.

provisions of the Act of Feb. 4, 1887, § 22, that nothing therein contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."[29]

Judicial Questions.—Where the questions involved are of a judicial character, not suitable to be determined by a purely administrative body, as in the case of matters involving questions of general law, or where the complaint relates to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, resort may be had to the courts direct.[30]

§ 4194. Before Hearing by Commission.—Where the grievances complained of are primarily within the administrative competency of the interstate commerce commission they are not subject to be judicially enforced until that body has been afforded, by a complaint made to it, opportunity to exert its administrative functions.[31] When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the interstate commerce commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the commission, and would be destructive of the uniformity and equality which the act was designed to secure.[32] The Act of Feb. 4, 1887, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt coming within the scope of the administrative unity which we have mentioned primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated, the act did give to the courts power to hear the complaint of a

29. **Under provision preserving common law remedies.**—Robinson *v.* Baltimore, etc., R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114, affirming 64 W. Va. 406, 63 S. E. 323.

30. **Judicial questions.**—Louisville, etc., R. Co. *v.* Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 S. Ct. 189; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

31. **Before hearing by commission.**—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761, citing, as illustrating and making clear the point, Oregon R., etc., Co. *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535; Southern R. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164; Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846; Robinson *v.* Baltimore, etc., R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114, affirming 64 W. Va. 406, 63 S. E. 323.

A person having a claim for overcharge by a carrier or damages from discrimination or attacking the reasonableness of rates, rules, etc., governing interstate commerce, can not sue in the courts until he has presented his claim to the Interstate Commerce Commission. Homer *v.* Oregon, etc., R. Co. (Utah), 128 Pac. 522.

32. Robinson *v.* Baltimore, etc., R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

The decision in Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846, does not qualify the ruling in the Abilene Case, and is not an authority supporting the right to resort to the courts in advance of action by the commission for relief against unreasonable rates or unjust discriminatory practices which, from their nature, primarily require action by the commission. Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

party concerning a violation of the act, but only conferred power to give effect to such complainants, when by previous submission to the commission, they had been sanctioned by a command of that body.[33] In the long interval which intervened between 1887 when the act to regulate commerce was enacted, and June 18, 1910, when the Commerce Court Act was passed, there was no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the interstate commerce commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by a determining as an original question that there had been a compliance or noncompliance with the provisions of the act.[34] Prior to the Act of Congress Feb. 19, 1903, a United States circuit court had no jurisdiction in equity over a suit instituted by the attorney general of the United States to enjoin a railroad company from granting rebates under the interstate commerce law, especially where no order had been made by the interstate commerce commission on the railroad company to discontinue the forbidden act.[35]

Where Right to Hearing before Commission Barred.—The dismissal of a suit brought by a shipper to recover damages from a carrier for alleged violations of the Act of February 4, 1887, will not be stayed by the federal supreme court, where it concurs in the view of the two courts below that the circuit court had no jurisdiction because of lack of previous action by the interstate commerce commission, until plaintiff can apply to the commission and obtain a ruling upon the question, if the right to apply to the commission was barred by the Act of June 29, 1906, when the case was filed in the court below.[36]

Relief against Unreasonable Rates.—A shipper, seeking relief from unreasonable rates established for interstate commerce, is required by the Interstate Commerce Act to primarily invoke redress through the interstate commerce commission, which is vested with exclusive original jurisdiction to determine the reasonableness of rates fixed in an established schedule.[37] An action against a car-

33. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

34. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

35. United States *v.* Atchison, etc., R. Co., 142 Fed. 176.

36. Where right to hearing before commission barred.—Morrisdale Coal Co. *v.* Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 938.

37. Relief against unreasonable rates.—Judgment, 108 N. Y. S. 659, 57 Misc. Rep. 614, reversed in Baltimore, etc., R. Co. *v.* La Due, 112 N. Y. S. 964, 128 App. Div. 594.

A transportation company may at the outset establish its rates without previous application to the interstate commerce commission and the question as to the reasonableness of such rate can be heard in the first instance only before such commission. Oregon R., etc., Co. *v.* Coolidge (Ore.), 116 Pac. 93.

A United States circuit court is without jurisdiction to enjoin the enforcement of interstate railroad rates in advance of action thereon by the interstate commerce commission under the Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906. Atchison, etc., R. Co. *v.* Foster Lumber Co., 122 Pac. 139, 31 Okla. 661.

Under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) a court has not the power, in the first instance, to inquire into the reasonableness of a rate regularly established by a carrier and filed with the interstate commerce commission and published, but whether or not a rate is reasonable is, in the first instance, for the commission. Great Northern R. Co.

rier for discrimination in rates and granting unlawful rebates to plaintiff's competitors, affecting not only the plaintiff, but other shippers in the same region, can not be first instituted in a federal circuit court, the interstate commerce commission having exclusive original jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial, and this though the regulation or practice complained of had ceased.[38] An interstate railroad company published a tariff on poles providing that the poles might be dressed, sawed, concentrated in transit, and shipped from origin to concentration point and then to destination at through rates which were less than the sum of the local rates but only on condition that the shipping bill issued at the point of origin specified the ultimate destination. This condition, having been submitted to the interstate commerce commission on the complaint of other shippers, was declared void and an order passed that it should be disregarded. The complainant was entitled to sue in a federal court to recover the difference in rates paid on shipments of poles on which it was not accorded through rates because of the enforcement of such condition prior to its being declared void by the commission without itself presenting its cause of action to the commission and obtaining a reparation order on which to sue; such requirement imposed by § 16, Interstate Commerce Act, being intended only for the exercise of the commission's legislative powers to determine the reasonableness of the condition, and, the commission having once acted, it was not necessary that an injured shipper should again present the same question to the commission before electing to sue directly in the federal court as authorized by § 9.[39]

Relief against Discrimination in General.—The original jurisdiction of the federal courts under § 9 of the Interstate Commerce Act, has not been entirely destroyed, and they still may redress such wrongs as can consistently with the act be redressed without previous action by the interstate commerce commission, and, when one sues for discrimination by a carrier, it is necessary in the first in-

v. Loonan Lumbee Co., 25 S. Dak. 155, 125 N. W. 644.

Enjoining increase in rates.—Where a railroad company entered into a contract with complainant that, in consideration of complainant's establishment of a cement factory on its line with a capacity of not less than 600 barrels a day, the carrier's regular established tariff rates on cement during a specified period should not exceed those set out in a schedule, complainant, in a suit to restrain the railroad company from establishing and filling higher rates than those contained in the schedule, could not obtain such relief in the courts in advance of a finding by the interstate commerce commission on the issue whether the subsequent rates were reasonable or unreasonable, to be determined in the light of the railroad's operation as an entirety. Sandusky-Portland Cement Co. *v.* Baltimore, etc., R. Co., 187 Fed. 583.

A shipper can not maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the interstate commerce commission, where such rate has been filed with that commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the act, must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and the provision that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," can not be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute. Judgment, Abilene Cotton Oil Co. *v.* Texas, etc., R. Co., 38 Tex. Civ. App. 366, 85 S. W. 1052, reversed in 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553, 9 Am. & Eng. Ann. Cas. 1075.

38. Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 183 Fed. 908, dismissing for want of jurisdiction 181 Fed. 403.

39. National Pole Co. *v.* Chicago, etc., R. Co., 211 Fed. 65.

stance to determine whether the wrong can be redressed by the courts.[40] Under the amendments[41] to the twelfth section of the Interstate Commerce Act, the district attorney, when requested, may, under the direction of the attorney general, prosecute suits in the name of the United States against railroad companies to enjoin them from discriminating against the city in favor of another, and a preliminary investigation by the commission is not necessary to jurisdiction.[42] The Act of Feb. 19, 1903,[43] provides a remedy in court, without going before the interstate commerce commission, for any discriminations forbidden by law, includind discriminations or preferences prohibited by Interstate Commerce Act Feb. 4, 1887.[44] A party claiming to be injured by a discriminatory rule for the distribution of coal cars by an interstate railroad can not maintain in a court of law an action for the recovery of damages before the interstate commerce commission has investigated the case, and determined by its report that the rule is or was discriminatory.[45]

Relief against Discrimination in Joint Traffic Arrangements.—Discriminations practiced in the giving or refusing of joint traffic arrangements contrary to the act regulating commerce can not be redressed by the courts in advance of action by the interstate commerce commission.[46]

Relief against Discrimination in Distribution of Cars.—A suit by a shipper to recover damages from a carrier, alleged to have been occasioned by an unlawful distribution of cars to it and an undue allotment of cars to its competitors, contrary to the Act of February 4, 1887, § 3, can not be maintained in advance of a ruling by the interstate commerce commission that the method of distribution adopted by the carrier was unreasonable.[47]

Relief against Rebates.—A shipper of coal and coke can not maintain in advance of action by the interstate commerce commission a suit against a carrier for damages resulting from rebates, past or present, given to his competitors doing their own hauling from mine to station, in the form of trackage or lateral allowances from the published tariff, which, though naming the rate as from station to destination, has been uniformly construed to include the haul from the mine, since such lateral allowances would be unlawful only when unreasonable, and this was a question in the first instance for the commission, notwithstanding the provisions of the Act of February 4, 1887, § 9, giving an individual the right to maintain actions to obtain pecuniary redress for violations of the act, and of § 22, that nothing therein shall abridge or alter existing common-law or statutory remedies.[48] But allowing shippers of coal and coke as a rebate from the published tariff which named the rate as from station to destination, was uniformly construed to include the haul from the mine, a trackage or lateral allowance for the haul from mine to station, being absolutely forbidden by the Act of February 4, 1887, § 2, regardless of the amount, where the carrier itself does the hauling, previous action by the interstate commerce commission is not a condition precedent for the maintenance by another shipper, under §§ 8, 9, of an action against the carrier to recover the damages sustained by reason of such illegal allowances to his competitors.[49]

40. **Relief against discrimination.**—Langdon *v.* Pennsylvania R. Co., 186 Fed. 237.

41. Acts Mar. 2, 1889 and Feb. 10, 1891.

42. United States *v.* Missouri Pac. R. Co., 65 Fed. 903.

43. Act Feb. 19, 1903, c. 708, § 3, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600.

44. Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 141 Fed. 1003, affirmed in 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

45. Morrisdale Coal Co. *v.* Pennsylvania R. Co., 106 C. C. A. 269, 183 Fed. 929.

46. **Relief against discrimination in joint traffic arrangements.**—United States *v.* Pacific, etc., Nav. Co., 33 S. Ct. 443, 228 U. S. 87.

47. **Relief against discrimination in distribution of cars.**—Morrisdale Coal Co. *v.* Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 938.

48. **Relief against rebates.**—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 472, 33 S. Ct. 916.

49. Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 472, 33 S. Ct. 916.

Previous action by the interstate com-

Action for Loss of Baggage.—An action for loss of baggage through negligence of an interstate carrier is maintainable without first presenting the claim to the interstate commerce commission, although the carrier had filed with that commission a rule limiting its liability for the loss of baggage.[50]

Action for Demurrage.—A circuit court of the United State has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage, under the rules adopted by the company and filed with the interstate commerce commission, where it depends on the construction, and not on the reasonableness or unreasonableness, of such rules, although the latter question is one primarily for the commission.[51]

Refusal of Carrier to Transport Goods.—A shipper seeking relief for refusal of carrier to accept interstate shipments of intoxicating liquors to local option points may invoke the jurisdiction of the courts without first applying to the interstate commerce commission.[52] A suit against a railway company to recover for its refusal to accept shipments of cross ties for a point beyond its own line can not be maintained in the absence of previous action of the interstate commerce commission, when based on the want of any published rate; its position being that such cross ties were a distinct commodity, not embraced by its filed tariff fixing joint through lumber rates.[53] And the acceptance by a railway company of three interstate carload shipments of cross ties for a point beyond its own line under its joint through lumber rate does not dispense with previous action by the interstate commerce commission before the shipper may maintain a suit to recover damages for failure to accept further shipments, based on want of any applicable and published rate.[54]

Refusal to Afford Equal Facilities.—The obligation of a railroad company to afford equal facilities to all connecting lines of telegraph is not enforceable by bill in equity, the remedy before interstate commerce commission being exclusive.[55]

Averment of Resort to Commission.—Congress by Interstate Commerce Act having established the interstate commerce commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable and what are illegal and excessive, it will be presumed, in the absence of averments to the contrary, that every interstate carrier

merce commission is not a condition precedent to the maintenance of an action under the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159), § 8, to recover from a carrier the damage sustained by a shipper who has been charged and who has paid the lawful published freight rates on interstate shipments of "free" coal, while lower rates resulting from rebates have been allowed to other shippers of "contract" coal during the same period, and between the same termini, the published tariffs making no distinctions between "contract" and "free" coal, but naming one rate for all alike. Pennsylvania R. Co. *v.* International Coal Min. Co., 230 U. S. 184, 33 S. Ct. 893.

50. Action for loss of baggage.—Homer *v.* Oregon, etc., R. Co. (Utah), 128 Pac. 522.

51. Action for demurrage.—Order, Central R. Co. *v.* Hite, 166 Fed. 976, reversed in 171 Fed. 370, 96 C. C. A. 326.

52. Refusal of carrier to transport goods.—Louisville, etc., R. Co. *v.* Cook Brewing Co., 32 S. Ct. 189, 223 U. S. 70, 56 L. Ed. 355, affirming judgment 172 Fed. 117, 96 C. C. A. 322.

A suit to compel an interstate carrier to receive and transport goods tendered to it for shipment, which it wholly refuses to do, is one to compel the performance of a duty imposed on it by law, and within the jurisdiction of the courts; and complainant is not required to resort in the first instance to the interstate commerce commission. Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

53. A carrier's insistence as a pretext to prevent an interstate shipment over its line on the absence of any published rate does not justify a resort by the shipper to the courts, in advance of action by the interstate commerce commission, to recover damages resulting from the carrier's refusal to furnish cars for such shipment. Texas, etc., R. Co. *v.* American, etc., Timber Co., 234 U. S. 138, 34 S. Ct. 885.

54. Texas, etc., R. Co. *v.* American, etc., Timber Co., 234 U. S. 138, 34 S. Ct. 885.

55. Refusal to afford equal facilities.—Act Aug. 7, 1888, § 3; Union Pac. R. Co. *v.* United States, 59 Fed. 813, 8 C. C. A. 282.

has complied with the law by establishing, printing, filing, publishing, and posting them; and hence no action can be maintained unless the complaint alleges that resort has been had to the interstate commerce commission and the rate charged and paid declared excessive or unreasonable.[56]

Action for Damages because of Allowance to Other Shippers.—Allowing shippers of coal a rebate from published tariff which named the rate as from station to destination, but which was uniformly construed to include the haul from the mine to the station, being forbidden by the Act of Feb. 4, 1887, where the carrier does the hauling, previous action by the commission is not a condition precedent for maintenance by another shipper to recover damages for such illegal allowances to his competitors.[57]

Enjoining Shipment of Intoxicating Liquor.—Where a bill to restrain intrastate shipments of liquor by express did not involve any question of regulation of rates, it was immaterial that the trial court had no jurisdiction to pass on the validity of a difference of rates applicable to such shipments and interstate shipments until the interstate commerce commission had passed on it.[58]

§ 4195. After Hearing by Commission.—The ultimate power of determining the right and justice in the matter of discriminating rates rests with the courts.[59] The Interstate Commerce Act provides that if, after hearing on a complaint by shippers, the commission shall determine that any party is entitled to an award of damages for a violation of the act, the commission shall direct payment thereof, and if the carrier does not pay within the time limited in the order the complainant may sue to recover such damages, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. All complaints for the recovery of damages are also required to be filed with the commission within two years after the cause of action accrues, and a petition for the enforcement of an order within one year after the date of the order. An action by an interstate shipper to recover damages for a charge of illegal and excessive rates is not maintainable until after a hearing and award before the interstate commerce commission.[60]

What Amounts to Hearing by Commission.—Where an interstate rate on railroad ties duly filed, had never in itself been declared illegal or excessive by the interstate commerce commission, the fact that such rate was higher than the rate charged for rough lumber, and that the commission in another proceeding had determined that rough lumber and railroad ties should take the same classification, was insufficient to entitle a shipper having paid the tie rate to recover the excess over the rate fixed for lumber, without a hearing and an award before the commission.[61]

Discrimination and Preference.—Where there has been a preliminary inquiry and findings by the interstate commerce commission on the question of an unlawful discrimination, a suit against the carrier may be maintained by the government.[62]

Pleading Hearing by Commission.—Since, by the Interstate Commerce Act, the interstate commerce commission is charged with the duty of determining whether a carrier's charge for service rendered in interstate commerce is reasonable, a shipper seeking to recover for imposition of an alleged unreasonable charge

56. **Averment of resort to commission.**—Meeker *v.* Lehigh Valley R. Co., 162 Fed. 354.

57. **Action for damages because of allowance to other shippers.**—Mitchell Coal, etc., Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 472, 33 S. Ct. 916.

58. **Enjoining shipment of intoxicating liquor.**—Southern Exp. Co. *v.* Long, 202 Fed. 462, 120 C. C. A. 568, reversing decree, 201 Fed. 441.

59. **After hearing by commission.**—Interstate Commerce Comm. *v.* East Tennessee, etc., R. Co., 85 Fed. 107.

60. Howard Supply Co. *v.* Chesapeake, etc., R. Co., 162 Fed. 188.

61. **What amounts to hearing by commission.**—Howard Supply Co. *v.* Chesapeake, etc., R. Co., 162 Fed. 188.

62. **Discrimination and preference.**—United States *v.* Michigan Cent. R. Co., 122 Fed. 544.

must, as a condition to his right, allege and produce an order from the commission showing that the rate charged was unreasonable, and therefore illegal.[63] Congress having established the interstate commerce commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable and what are illegal and excessive, it will be presumed, in the absence of averments to the contrary, that every interstate carrier has complied with the law by establishing, printing, filing, publishing, and posting them; and hence no action can be maintained unless the complaint alleges that resort has been had to the interstate commerce commission and the rate charged and paid declared excessive or unreasonable.[64]

§ 4196. Offenses Arising in Several Districts.—Where an objection to the jurisdiction of the circuit court for the southern district of New York was raised by plea in abatement denying that the railroad company had its principal office in the state of New York, or that the acts complained of took place within the judicial district of said court, it was held, upon affidavits submitted under stipulation, that the ruling of the circuit court against the plea, based on said affidavits, did not appear to be erroneous.[65]

§ 4197. Mandamus.—Statutory Provision.—The only authority for the issuance of mandamus by a federal court in a suit by a shipper to prevent unlawful discrimination by an interstate railroad is conferred by the Act of March 2, 1889, supplementary to the interstate commerce act and its amendments, providing that the federal circuit and district courts shall have jurisdiction, on relation of any person, firm, or corporation, alleging violation by a common carrier of any of the provisions of the act which prevents relator from having interstate traffic moved on terms or conditions as favorable as those given by the common carrier for like traffic under similar conditions to any other shipper, to issue mandamus to prevent such discrimination, etc.[66] The Interstate Commerce Act authorizes the court, in its discretion, to grant a mandamus, when any question of fact as to the proper compensation of the carrier is raised, notwithstanding such question of fact is undetermined pending the determination of such question. This does not authorize the court to grant relief where a case of unjust discrimination is not made out.[67] An arrangement between an interstate railroad company and coal shippers in a certain field, fixing a basis which should be considered equitable for the distribution of cars between such shippers, does not operate to relieve the railroad company from the obligations imposed on it by § 3 of the Act of February 4, 1887, to treat shippers without discrimination, nor does it deprive one of such shippers of the right to maintain a proceeding in a federal court for a writ of mandamus under the Amendatory Act of March 2, 1889, to compel the company to furnish to relator its equitable proportion of cars, upon allegations that the basis of distribution fixed by the agreement was equitable and that defendant has refused to observe it, but has discriminated in favor of other shippers; the agreement being in fact in aid of the act of fixing as between the parties what should be considered and accepted as a compliance with its requirements.[68]

63. Pleading hearing by commission.—Geraty *v.* Atlantic, etc., R. Co., 211 Fed. 227.

64. In an action for injuries to complainant's property and business by an alleged combination and conspiracy between interstate railroads controlling the shipment of anthracite coal, an allegation that plaintiffs' loss resulted from their being obliged to pay "unlawful rates" for the transportation of coal due to such combination and conspiracy was not effective to allege that the rates charged had been declared unlawful by the interstate commerce commission. Meeker *v.* Lehigh Valley R. Co., 162 Fed. 354.

65. Offenses arising in several districts.—Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

66. Statutory provision.—United States *v.* Norfolk, etc., R. Co., 138 Fed. 849, reversed in 74 C. C. A. 404, 143 Fed. 266, on another point.

67. United States *v.* Delaware, etc., R. Co., 40 Fed. 101.

68. United States *v.* Norfolk, etc., R. Co., 143 Fed. 266, 74 C. C. A. 404.

To Compel Carrier to Make Report.—It is not within the jurisdiction of a federal court to issue a writ of mandamus to compel a railroad company to make a report which the act to regulate commerce gives the interstate commerce commission the right to require, and such jurisdiction can not be inferred from any of the powers granted by congress as collateral to the enforcement of that act.[69] A suit for a mandamus to compel a common carrier to make annual reports to the interstate commerce commission, can be maintained only after such report has been demurred and refused.[70]

To Compel Carrier to Publish Schedule of Rates.—Section 6 provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States, at the relation of the commission, failure to comply with which is punishable as for a contempt.[71]

To Compel Equal Distribution of Cars.—The grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it, which are alleged to violate the provisions of the act to regulate commerce of February 4, 1887, prohibiting unjust preferences or undue discriminations, can not be redressed, in advance of the action of the interstate commerce commission, by mandamus to prohibit the acts complained of and prescribe a rule or regulation for the future, since the provisions of the Act of March 2, 1889 § 10, authorizing mandamus to compel the furnishing of cars and other facilities for transportation, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the commission, rendered within the lawful scope of its authority, until set aside by the commission or enjoined by the courts.[72]

In Aid of Investigation by Commission.—Section 20 of the Interstate Commerce Act does not confer on the court power to compel by mandamus, in aid of an investigation by the interstate commerce commission ordered by the senate, a railroad company to disclose the amount of securities of another railroad company it controls, and whether the two companies serve the same territory, and whether, under separate ownership, they would be competitors, and facts showing further relations between them.[73] Mandamus will not lie to compel a disclosure of privileged communications between an individual and his counsel. Where the petition for mandamus under the Hepburn Act calls for the production of papers which originated before the act, and the allegations thereof are vague, so that the court can not determine what papers are privileged communications between attorney and client, and what not, and what part of them may be within the act and what not, the court in its discretion will deny the writ.[74]

Necessity for Discrimination.—In mandamus under the Act of March 2, 1889, to compel a common carrier to move and transport interstate traffic, or to furnish cars or other facilities for such transportation, on the ground that there has been such a violation of the Interstate Commerce Act of Feb. 4, 1887, as prevents

69. **To compel carrier to make report.**—Knapp *v.* Lake Shore, etc., R. Co., 197 U. S. 536, 49 L. Ed. 870, 25 S. Ct. 538.

70. Attorney General *v.* Union Stockyard, etc., Co., 192 Fed. 330.

71. **To compel carrier to publish schedule of rates.**—Interstate Commerce Comm. *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, affirmed and followed in Savannah, etc., R. Co. *v.* Florida Fruit Exch., 167 U. S. 512, 42 L. Ed. 257, 17 S. Ct. 998; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125. Interstate Commerce Act, § 6, as amended March 2, 1889.

72. **To compel equal distribution of cars.**—Baltimore, etc., R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 S. Ct. 164.

73. **In aid of investigation by commission.**—Attorney General *v.* Louisville, etc., R. Co., 212 Fed. 486.

74. Attorney General *v.* Louisville, etc., R. Co., 212 Fed. 486.

the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper, the gist of the whole proceeding is an unjust discrimination in favor of one shipper over another similarly situated. It is for the remedy of such a wrong that congress, by the act in question, gave the federal courts the power of mandamus, and for such a wrong alone. There must not only be a discrimination, but it must be an unjust discrimination; and that character of discrimination must not only be pleaded, but it must be proved, by the relator, otherwise the writ of mandamus will be denied him.[75]

§ 4198. Injunction.—A bill in equity exhibits a case arising under the constitution and laws of the United States, where it appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them.[76] And it does not follow, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the interstate commerce act, that a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates.[77] When a carrier has violated the terms of the Interstate Commerce Act in any particular, the court may grant a perpetual injunction as to the act, commodity and means employed; but the injunction will not be granted in general terms, prohibiting the carrier from any violation of the act.[78] It is competent for the shipper to proceed in the circuit court to apply by petition to the circuit court, "sitting in equity," for the court to hear and determine the matter "as a court of equity," and issue an injunction "or other proper process, mandatory or otherwise," to enforce the order of the commission. Under the broad powers conferred upon the circuit court by § 16 of the act and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, "but in such manner as to do justice in the premises," and in view of the stipulation of the parties, recited in the decree of the court, the carriers are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed.[79]

Applicability of General Principles of Law.—"The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice." [80]

75. United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

76. **Injunction.**—In re Lennon, 166 U. S. 548, 41 L. Ed. 1110, 17 S. Ct. 658.

A case arising upon a bill to enjoin interstate carriers from putting into effect alleged unreasonable rates is a case arising under the constitution and laws of the United States, since the right to be exempt from such unlawful exactions is one protected by the Interstate Commerce Act as well as the Anti-Trust Act, and, of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce is essentially involved. Macon Grocery Co. *v.* Atlantic, etc., R. Co., 215 U. S. 501, 54 L. Ed. 300, 30 S. Ct. 184.

77. Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846.

78. New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

79. Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846.

80. **Applicability of general principle of law.**—New York, etc., R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272.

To Prevent Irreparable Injury.—The injury which will be caused to a common carrier against which a combination to induce the officers of a common carrier corporation subject to the provisions of the Interstate Commerce Act, and its locomotive engineers, to refuse to receive, handle, and haul interstate freight from another like common carrier as directed will be irreparable; and in order to prevent this, and maintain the status quo until full relief can be granted, a preliminary mandatory injunction will issue against the company and its employees threatening the injury, restraining them from refusing to afford the proper interchange of interstate freight and traffic facilities to complainant.[81]

To Prevent Multiplicity of Suits.—Where, on a petition for an injunction to restrain a railroad company, a common carrier of freights, from practicing an unlawful discrimination, it appears that the plaintiffs' business is such as to make them frequent shippers, and that a continuous series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits, the court will intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that plaintiffs should have first established their rights by an action at law.[82]

Where Carrier Fails to File Report.—The interstate commerce commissioners are empowered, as complainants, to apply, in any proper circuit court of the United States, for a writ of injunction against any common carrier neglecting or refusing to file or publish such schedule or tariffs with rates, fares or charges as provided in § 6 to restrain such carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in this section of the act, until such common carrier shall have complied with the provisions of § 6 relating to the filing and publishing of schedules or tariffs of rates, fares and charges.[83]

Enjoining Schedule Rates.—The interstate commerce commission having been given exclusive jurisdiction in the first instance to determine the reasonableness of interstate rates by the Interstate Commerce Act shippers can not maintain a suit in equity to prevent the filing or enforcement of a schedule of rates, or a change to unjust or unreasonable rates, pending determination of the reasonableness thereof by the commission.[84] Under Interstate Commerce Act of

81. **To prevent irreparable injury.**—Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

82. **To prevent multiplicity of suits.**—Scofield *v.* Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846.

83. **Where carrier fails to file report.**—Interstate Commerce Act, § 6, as amended March 2, 1889. Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

84. **Enjoining schedule rates.**—Decree Macon Grocery Co. *v.* Atlantic, etc., R. Co., 163 Fed. 738, reversed in 166 Fed. 206, 92 C. C. A. 114; Potlatch Lumber Co. *v.* Spokane Falls, etc., R. Co., 157 Fed. 588.

A circuit court of the United States is without jurisdiction to enjoin the establishment of an interstate freight rate by a carrier, or to enjoin the enforcement of a new rates which has been published and filed, before its reasonableness and validity have been passed on by the interstate commerce commission. Houston Coal, etc., Co. *v.* Norfolk, etc., R. Co., 171 Fed. 723.

A circuit court of the United States possessed no jurisdiction, prior to the enactment by congress of legislation regulating the transportation of interstate commerce, to enjoin the promulgation and enforcement generally by a carrier of a particular rate or schedule of rates as unreasonable, its power being limited in any case to the protection of an individual shipper against the exaction from him of an unreasonable rate or charge, either local or interstate, when it had jurisdiction by reason of diverse citizenship; nor has it jurisdiction under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), to enjoin the filing, publication, or enforcement of a proposed rate alleged to be unreasonable, in advance of action thereon by the interstate commerce commission, which is by said acts vested with exclusive jurisdiction to determine with rea-

Feb. 4, 1887, § 6, requiring carriers to file freight rate schedules with the interstate commerce commission and to post them in railway stations, and providing that changes in rates shall not take effect until after thirty days' notice to the commission and to the public in the same way, a rate filed with the commission is put in force, though not so posted, as affecting the circuit court's jurisdiction to enjoin it.[85] A court of equity, however, may properly enjoin carriers from establishing, or increasing to, a rate believed to be unreasonable, at the same time leaving the matter in such shape that the commission may ultimately determine the question of the reasonableness of the proposed rate and prescribe what will be a just and reasonable rate.[86] Under § 22 of the Interstate Commerce Act, which expressly preserves all legal remedies, a circuit court of the United States has jurisdiction of a suit to enjoin railroad companies from filing or enforcing a proposed new schedule of rates alleged to be unjust and unreasonable pending a determination of their reasonableness by the interstate commerce commission, where it is shown that their enforcement would result in irreparable injury to complainants.[87] The complainants having established a rate for lemons from California to points between the Rocky Mountains and the Atlantic coast of a certain amount in carload lots, the interstate commerce commission passed an order prescribing a rate of not to exceed a less amount. The complainants claiming that such rate had not been adjusted according to the cost and value of the service, and that the commission could not lawfully prescribe a single blanket rate to points so widely separated, also that the rate was unjust and unreasonable, and so low that the traffic was not compensatory, applied for an injunction restraining the enforcement thereof until its validity could be finally determined. The validity of such rate being subject to grave and serious doubt, an interlocutory injunction will be granted until the case can be determined by the commerce court.[88] "Without now stopping to enumerate the contentions on behalf of the commission, it will suffice, for present purposes, to say that, after considering those contentions and giving effect to the presumption of validity which should and does attend an order of the commission, we entertain such grave and serious doubts of the validity of the order in question that we think its enforcement should be suspended until the questions presented by the complainants' objections can be adequately considered and thoughtfully determined. Those objections turn chiefly upon questions of law which are new and have an importance far beyond their bearing upon the present application. The time

sonableness of rates in the first instance. Columbus Iron, etc., Co. *v.* Kanawha, etc., R. Co., 171 Fed. 713.

For several years prior to November, 1904, an emergency freight rate of $1 per hundred on lemons from California to the New York market was in force to enable California growers to compete with lemons imported from Sicily. In November, 1904, after negotiation, the growers understood the rate made permanent, whereupon they enlarged their orchards and increased their business on the basis of that factor of expense. This rate was continued for five years and until after the passage of the Payne-Aldrich Tariff Law increasing the duty on lemons from 1 to 1½ cents a pound, whereupon defendants increased the freight rate to $1.15 on the plea of greater cost of labor. There was evidence, however, that the cost of transportation was no greater than before, and that if a temporary injunction restraining the new rate which the growers claimed was unreasonable was not granted a determination of the reasonableness thereof by the interstate commerce commission, the growers would be compelled to destroy their lemon trees and put their land to other uses, while the rights of the railroad companies could be protected by bond. Held, that the equities were in favor of the growers, and that they were entitled to a temporary injunction on executing a bond conditioned to pay the difference in the rates in case the higher rate was sustained. Arlington Heights Fruit Co. *v.* Southern Pac. Co., 175 Fed. 141.

85. Wickwire Steel Co. *v.* New York, etc., R. Co., 181 Fed. 316.

86. Kiser Co. *v.* Central, etc., R. Co., 158 Fed. 193.

87. Northern Pac. R. Co. *v.* Pacific Coast Lumber, etc., Ass'n, 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. *v.* Oregon, etc., Ass'n, 165 Fed. 13, 91 C. C. A. 51.

88. Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 182 Fed. 189.

when the order will become effective is near by, and this case is one which soon will pass from our jurisdiction to that of the commerce court, which has been created especially to consider and determine controversies such as this. Act June 18, 1910, c. 309, 36 Stat. 539. Any order which we may make will be interlocutory, and the final hearing must be in the commerce court. The same questions will then arise again, and they may arise in that court before that time, either through a like application in some other case or through further interlocutory proceedings in this case." [89] But when a controversy between parties relative to transportation rates is pending before the interstate commerce commission, and no irreparable injuries seem threatened, equity, in advance of the action of the commission, will not ordinarily enjoin the enforcement of the rates.[90] On an application for a temporary injunction to restrain the enforcement of an increased interstate freight rate, pending determination of its reasonableness by the interstate commerce commission, it is the duty of the court to balance the equities between the parties, and ascertain which of them will suffer greater detriment by the court's action.[91]

Injunction Pending Hearing before Commission.—Under § 22 of the Interstate Commerce Act of Feb. 4, 1887, which expressly preserves all legal remedies, a circuit court of the United States has jurisdiction of a suit to enjoin railroad companies from filing or enforcing a proposed new schedule of rates alleged to be unjust and unreasonable pending a determination of their reasonableness by the interstate commerce commission, where it is shown that their enforcement would result in irreparable injury to complainants.[92]

Perpetual Injunction.—If a suit by the attorney general of the United States to enjoin a railroad from granting rebates could have been continued under the Act of Feb. 19, 1903, where the antecedent offense of the railroad company was being continued after such date, an action by the United States attorney in the summary method authorized by the latter act would have presented an issue of fact entitling defendant to a hearing thereon, and any injunction granted would be as to violations of law then being committed, but would not vitalize an antecedent injunctive order granted by the court when it had no injunction to make it.[93] A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.[94]

Enjoining Violation of Anti-Trust Law.—The Interstate Commerce Act and the Sherman anti-trust law are separate and independent acts, and jurisdiction of the Circuit Court of the United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers can not be maintained on the ground that such act of the railroad company is a monopoly within the meaning of the second section of the Anti-Trust Act of July 2, 1890.[95]

Enjoining Increase in Rates.—Under Interstate Commerce Act Feb. 4, 1887, §§ 13, 15, authorizing complaints to the interstate commerce commission against unjust freight rates fixed by a carrier, and under § 16, authorizing awards of damages by the commission, and empowering the federal circuit court to enforce the commission's orders by injunction or other proper process, the

89. Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 182 Fed. 189.

90. Tift *v.* Southern R. Co., 123 Fed. 789.

91. Arlington Heights Fruit Co. *v.* Southern Pac. Co., 175 Fed. 141.

92. **Injunction pending hearing before commission.**—Northern Pac. R. Co. *v.* Pacific Coast Lumber, etc., Ass'n, 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. *v.* Oregon, etc., Ass'n, 165 Fed. 13, 91 C. C. A. 51.

93. **Perpetual injunction.**—United States *v.* Atchison, etc., R. Co., 142 Fed. 176.

94. Decree 128 Fed. 59, modified in New York, etc., R. Co. *v.* Interstate Commerce Comm., 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

95. **Enjoining violation of anti-trust law.**—United States *v.* Atchison, etc., R. Co., 142 Fed. 176.

circuit court has no jurisdiction of a suit to enjoin an advance in freight rates on a commodity pursuant to a conspiracy to discriminate against complaints, though § 9 provides that one claiming to be damaged by a carrier may elect to complain to the commission or sue in the federal courts, though § 22 provides that the act shall not alter existing remedies, and though § 23 gives the circuit and district courts jurisdiction in case of violations by carriers of certain provisions of the act to issue mandamus to compel conformity.[96] "Conceding this, it is argued that the circuit court may exercise its inherent powers to prevent threatened injury where the rates have not been actually fixed in accordance with the provisions of the statute. In other words, if the carrier simply threatens to fix a rate, or has not fixed the rate effectively, the court may restrain the carrier from so doing, if it regards the rate as unreasonable or likely to cause irreparable damage. The effect of this would be to prevent the carrier from ever fixing or changing its rates in accordance with the law. Be this as it may, we think the rate was fixed. Section 6 of the act requires the carrier to file with the commission and keep open to public inspection, by posting in every depot, station, or office where passengers or freight are received for transportation, schedules showing its rates between different points. Changes in rates are not to go into effect until after thirty days' notice to the commission and to the public has been given in the same way." [97]

Venue of Suit to Enjoin Increase of Rates.—A bill to obtain an injunction against various interstate carriers, who were nonresidents of the district, to restrain them from putting into effect an advance of rates for carriage of commodities in interstate commerce through a large area embracing parts of several different states, charging that the carriers were members of a freight association organized and maintained under agreements to constitute an illegal combination in restraint of trade and fostering a monopoly, presents for necessary consideration the proper construction of the Federal Interstate Commerce Act, so that the court's jurisdiction does not rest solely on diversity of citizenship of the parties, and hence the federal circuit court in the district of complainants' residence has no jurisdiction to compel the defendants to answer over their objection.[98]

Jurisdiction of Commerce Court.—The commerce court, under Act June 18, 1910, can enjoin an order of the commission requiring railroad companies to cease charging lower rates for coal intended for railway consumption than is

96. **Enjoining increase in rates.**—Wickwire Steel Co. *v.* New York, etc., R. Co., 181 Fed. 316.

"These broad provisions would apparently justify the exercise by the court of any of its inherent powers in behalf of persons complaining of any violations by carriers of the act; but the supreme court has held, in Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075, that they are to be construed with reference to and limited by the powers conferred by congress upon the interstate commerce commission, for the purpose of insuring and enforcing the establishment and maintenance of reasonable and uniform rates. In other words, they are to be construed as intended to redress wrongs that need not be complained of in the first instance to the interstate commerce commission. Mr. Justice White concluded his opinion with these words: 'Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief, if the right asserted had not been repugnant to the provisions of the act to regulate commerce.'" Wickwire Steel Co. *v.* New York, etc., R. Co., 181 Fed. 316.

97. Wickwire Steel Co. *v.* New York, etc., R. Co., 181 Fed. 316.

98. **Venue of suit to enjoin increase of rates.**—Atlantic, etc., R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114.

accorded to other shippers.[99]

Mandatory Injunction.—The duty imposed on railroad companies by the laws of a state and by the Interstate Commerce Act of receiving from connecting roads freight and passengers, is one which the federal courts in that state will enforce by mandatory injunction where the injury resulting from its nonperformance is continuing; and it is no defense to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that, if defendant's road should accept cars from the boycotted road, its own men would be called out.[1] Where a labor organization has declared a boycott against a railroad, and connecting roads are therefore refusing, or seem about to refuse, to afford equal facilities to the boycotted road, in violation of § 3 of the Interstate Commerce Act, they may be compelled to do so by mandatory injunction, since the case is urgent, the rights of the parties free from reasonable doubt, and the duty sought to be enforced is imposed by law.[2]

Enjoining Receiver.—The petition of a railroad company, intervener, represented that the receiver appointed by the court had issued an order in violation of his duties as a common carrier, and of a custom between the two roads, instructing his agents to receive no more through freight cars of the petitioner, and that freight of that character offered by the petitioner had been refused, though the proper tender of expense bills had been made. It also alleged that the Brotherhood of Locomotive Engineers had commanded a strike on petitioner's road, and, in order to boycott it, had issued instructions to its members on other connecting systems not to handle any of petitioner's freight. The prayer was for a peremptory order on the receiver to take such freight, for an injunction on the brotherhood from interfering with the engineers on the receiver's road, and for a rule on the officers of the brotherhood to show cause why they should not be punished for contempt. The answer of the receiver admitted the issuance of the order complained of, but set out that it was intended to be temporary only, and was, as a matter of fact, rescinded two days after the petition was filed, and another order made establishing intercourse on the old basis, and that this order was meant to be permanent. It was denied that the receiver or any of his engineers had been interfered with in any manner by the brotherhood, or that the first order was promulgated under moral duress of that association. It was held, that the objectionable order having been permanently rescinded, and no interference by the brotherhood having been proven, neither the peremptory order, nor the injunction, nor the rule asked for should issue, but that the petition should remain on file for further action, should any occasion therefor arise.[3]

§ 4199. In Particular Instances.—Proceeding to Compel Carrier to Transport Goods.—A suit to compel an interstate carrier to receive and transport goods tendered to it for shipment, which it wholly refuses to do, is one to compel the performance of a duty imposed on it by law, and within the jurisdiction of the courts; and complainant is not required to resort in the first instance to the interstate commerce commission.[4]

Proceeding to Compel Publishing Schedules of Rates.—The Interstate Commerce Act provided that common carriers should publish schedules of reasonable and uniform rates, and, where such provision of the act had been complied with, and copies of the schedule of rates had been filed with the commerce

99. **Jurisdiction of commerce court.**—Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 32 S. Ct. 742, 225 U. S. 326, 56 L. Ed. 1107, Ann Cas. 1914A, 504.

1. **Mandatory injunction.**—Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481.

2. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395, following Coe *v.* Louisville, etc., R. Co., 3 Fed. 775, 782.

3. **Enjoining receiver.**—Beers *v.* Wabash, etc., R. Co., 34 Fed. 244.

4. **Proceeding to compel carrier to transport goods.**—Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

commission and not found unreasonable by that body, a shipper could not recover, at common law, unreasonable freight charges on interstate shipments.[5] Although, when the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. It inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.[6]

Action to Recover Excess of Freight.—Until a schedule of rates, filed and published by a common carrier, pursuant to the act, has been declared excessive and unreasonable by the interstate commerce commission, a shipper can not maintain an action for the excess of freight exacted on interstate shipments, if the rates charged were those fixed by the schedule.[7] Where an interstate rate on railroad ties, duly filed, had never in itself been declared illegal or excessive by the interstate commerce commission, the fact that such rate was higher than the rate charged for rough lumber, and that the commission in another proceeding had determined that rough lumber and railroad ties should take the same classification, was insufficient to entitle a shipper having paid the tie rate to recover the excess over the rate fixed for lumber, without a hearing and an award before the commission.[8]

Action to Recover Damages.—The rule that an action at law to recover excessive interstate freight charges can not be maintained in advance of action by the interstate commerce commission will not prevent a federal circuit court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the commission, from granting relief in the exercise of its powers under Act Feb. 4, 1887, § 16, as a court of equity, on a

5. **Proceeding to compel publishing schedules of rates.**—Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846.

6. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

7. **Action to recover excess of freight.**—In an action by a shipper to recover the excess of freight on interstate shipments, the rates charged being according to the schedule filed and published by the carrier, pursuant to Act Cong. Feb. 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3153]), and the several acts amendatory thereof, nothing but a prior adjudication by the interstate commerce commission that such rates are excessive and unreasonable will justify a recovery. Robinson *v.* Baltimore, etc., R. Co., 63 S. E. 323, 64 W. Va. 406.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act Cong. June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1907, p. 902), provides that if, after hearing on a complaint by shippers, the commission shall determine that any party is entitled to an award of damages for a violation of the act, the commission shall direct payment thereof, and if the carrier does not pay within the time limited in the order the complainant may sue to recover such damages, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. All complaints for the recovery of damages are also required to be filed with the commission within two years after the cause of action accrues, and a petition for the enforcement of an order within one year after the date of the order. Held, that an action by an interstate shipper to recover damages for a charge of illegal and excessive rates is not maintainable until after a hearing and award before the interstate commerce commission. Howard Supply Co. *v.* Chesapeake, etc., R. Co., 162 Fed. 188.

8. Howard Supply Co. *v.* Chesapeake, etc., R. Co., 162 Fed. 188.

petition filed after the commission has acted, stating the substance of the findings of the commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made.[9]

Action for Penalty for Failure to Feed and Water Stock.—Since an action against an interstate carrier for violation of the twenty-eight hour law is a civil action for a penalty, § 4, authorizing such action to be brought in the circuit or district court of the United States within the district where the violation may have been committed or the person or corporation resides or carries on business, is not unconstitutional, as a violation of the sixth amendment of the federal constitution, declaring that in criminal prosecutions the accused shall be entitled to a trial in the district where the crime has been committed.[10]

§ 4200. Equity Jurisdiction.—Under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the interstate commerce law prohibiting discrimination between shippers.[11]

Statutory Provision.—The Act of Feb. 19, 1903, providing that the equity jurisdiction of the United States shall extend to cover a suit by the government against a carrier for unlawful discrimination between shippers, applies not only to violations of the interstate commerce law subsequent to its enactment, but to every violation, whether previously or subsequently.[12] Prior to the Act of Feb. 19, 1903, a United States circuit court had no jurisdiction in equity over a suit instituted by the attorney general of the United States to enjoin a railroad company from granting rebates under the interstate commerce law, especially where no order had been made by the interstate commerce commission on the railroad company to discontinue the forbidden act.[13]

Adequate Remedy at Law.—The rule that equitable relief will not be granted until the complainant's right or title has been established in an action at law does not apply where the subject matter of the litigation is alleged discrimination in violation of the interstate commerce act; and where, in such case, the remedy at law is not adequate, equity will take jurisdiction.[14]

§ 4201. Proceedings at Law or in Equity.—When the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.[15]

Action for Reparation Distinguished from Suit to Enforce Order.—The Interstate Commerce Act makes a clear distinction between a suit brought to enforce an administrative order made by the interstate commerce commission, which is in equity, the only question in issue being the lawfulness of the order, and an action brought to recover damages for which reparation has been awarded by the commission. The latter is not a suit to enforce the order, nor based thereon, but is an independent plenary action at law, triable to a jury, and to proceed "like all other civil suits for damages," except that the findings and order of the commission are receivable as prima facie evidence of the facts therein stated, the commission being required by § 14, on making an order award-

9. **Action to recover damages.**—Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846, affirming 138 Fed. 753.

10. **Action for penalty for failure to feed and water stock.**—Judgment United States *v.* Southern Pac. Co., 162 Fed. 412, affirmed in 171 Fed. 364, 96 C. C. A. 256.

11. **Equity jurisdiction.**—United States *v.* Michigan Cent. R. Co., 122 Fed. 544.

12. **Statutory provision.**—United States *v.* Michigan Cent. R. Co., 122 Fed. 544.

13. United States *v.* Atchison, etc., R. Co., 142 Fed. 176.

14. **Adequate remedy at law.**—Interstate Stockyards Co. *v.* Indianapolis, etc., R. Co., 99 Fed. 472.

15. **Proceedings at law or in equity.**—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

ing damages, but not otherwise, to make and report the findings of fact on which the award is made.[16]

§ 4202. Parties.—All parties in whose favor the interstate commerce commission has awarded damages by a single order may be joined as plaintiffs in a suit to recover those damages.[17] As in such a suit separate recoveries in favor of each plaintiff and against each defendant respectively may be secured by a single judgment, that judgment and every part of it may be challenged by a single writ of error to which all in interest are made parties.[18] Where the shipments under a schedule of rates were entirely without the district, and the other carrier, which was a party to such schedule, is not before the court, it has no jurisdiction over the schedule, or power to prevent a discrimination complained of.[19]

Proper and Necessary Parties.—A terminal or belt railroad company, which owns and leases tracks and switches in and around a city, and entirely within one state, and which has entered into a contract with the several roads entering the city, under which its property is entirely managed and operated by a board of managers composed of a member selected by each of such roads, who pay a fixed rental therefor, is a proper, but not a necessary, party to a suit against such roads for violating the Interstate Commerce Act by discriminating against a business establishment located on its lines, and its joinder in such suit does not deprive a federal court of jurisdiction.[20]

Action for Penalty.—An action under Interstate Commerce Act [21] against an interstate carrier to recover damages for a violation of the act, is not one strictly for the recovery of a penalty, and under a state statute [22] which provides that executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted except actions for slander, for libels, and for wrongs done to the person, such an action against a carrier which has abated by the death of the plaintiff may be revived in the name of his executors.[23]

Where, in an action to recover damages against an interstate carrier for imposition of alleged unreasonable rates, it appeared that some of the shipments were made by plaintiff, an objection that plaintiff was not the real party in interest because the rights of other shippers had been illegally assigned to it was unsustainable.[24]

Mandamus or Injunction to Prevent Discrimination.—The grant of power to federal courts to issue mandamus against a common carrier corporation to prevent discrimination necessarily embraced power to act on the officers of such corporation in control thereof, independent of § 2 of the Act of Feb. 19, 1903, providing that in any proceeding to enforce the statutes relating to interstate commerce it should be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the practice under consideration, etc.[25] Where there has been a preliminary inquiry and finding by the interstate

16. **Action for reparation distinguished from suit to enforce order.**—Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785.

17. **Parties.**—Act June 29, 1906, c. 3591, § 16, par. 3, 34 Stat. 590 (U. S. Comp. St. Supp. 1909, p. 1160).

18. "This case will therefore be considered upon the writ of error against all the defendants in error, and the writs against each of them respectively will be dismissed, without costs." Union Pac. R. Co. *v.* Updike Grain Co., 178 Fed. 223. See Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125.

19. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

20. **Proper and necessary parties.**—Interstate Stockyards Co. *v.* Indianapolis, etc., R. Co., 99 Fed. 472.

21. **Action for penalty.**—Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).

22. Act Pennsylvania Feb. 24, 1834, § 28, Pa. Laws, 78.

23. Langdon *v.* Pennsylvania R. Co., 194 Fed. 486.

24. National Pole Co. *v.* Chicago, etc., R. Co., 211 Fed. 65.

25. **Mandamus to prevent discrimination.**—West Virginia, etc., R. Co. *v.* Kingwood Coal Co., 134 Fed. 198.

commerce commission on the question of such unlawful discrimination, a suit against the carrier may be maintained by the government.[26] The Act of Feb. 19, 1903, § 3, authorizes a suit in equity by the United States to restrain a violation of the act by discrimination or the giving of rebates only against a common carrier, subject to its provisions.[27]

Injunction to Prevent Rebating.—The Act of Feb. 19, 1903, § 3, prohibiting rebates by carriers, provides for actions by the interstate commerce commission after investigation, and declares that it shall be the duty of the several district attorneys of the United States, whenever the attorney general shall direct, either of his own motion or upon the request of the interstate commerce commission, to institute and prosecute such proceedings. The attorney general had authority to institute a proceeding to restrain rebating by interstate carriers of his own motion, without direction or investigation on the part of the interstate commerce commission.[28]

§ 4203. Limitation and Laches.—A state statute providing that actions to recover a forfeiture or penalty on a penal statute shall be brought within one year, has no application to an action in a federal court against a common carrier to recover damages for discrimination in violation of Act of Feb. 4, 1887, providing that for a violation of the terms of the act the carrier shall be liable to the persons injured for the full amount of damages sustained and for a reasonable counsel or attorney's fee to be taxed by the court. Such action is governed by Rev. St., § 1047, providing that no suit or prosecution for any penalty or forfeiture accruing under the laws of the United States shall be maintained, except as otherwise specially provided, unless commenced within five years from the time when the penalty or forfeiture accrued, etc.[29]

Under Act of June 29, 1906.—State laws declaring contracts invalid which require the bringing of an action against a carrier for loss of or damage to a shipment in less than the statutory period were superseded, so far as interstate shipments are concerned, by the Carmack amendment of June 29, 1906, which furnishes the exclusive rule on the subject of the liability of the carrier under contracts for shipment.[30]

§ 4204. Pleadings.—Allegations as to Parties.—In an action brought by a shipper against a common carrier subject to the Interstate Commerce Act to recover alleged excessive charges discriminating against him in favor of other shippers, where one of the grounds alleged was the nonpublication of the tariff applicable at the stations of shippers as required by law, and failure to file same with the commission, and that the existence of the same was concealed from the knowledge of the plaintiff and other shippers and the benefits of the rates therein specified denied them, it was held that the allegations did not show, as they must show, that plaintiff had been injured by facts alleged if true.[31] The complainant's bill alleged that it was a wholesale dealer in merchandise, located at Portland; that the defendants, owners of connecting railroad lines, had established a schedule of joint-freight tariffs between Portland and points in

26. Injunction to prevent discrimination.—United States *v.* Michigan Cent. R. Co., 122 Fed. 544.

27. Attorney General *v.* Union Stockyard, etc., Co., 192 Fed. 330.

28. By whom instituted.—United States *v.* Milwaukee, etc., Trans. Co., 145 Fed. 1007.

29. Limitation and laches.—Carter *v.* New Orleans, etc., R. Co., 74 C. C. A. 293, 143 Fed. 99.

30. Under Act of June 29, 1906.—The shipper and carrier of an interstate shipment are not forbidden to stipulate that an action against the carrier in case of damages to the shipment must be brought within ninety days after the damage was sustained, by the provisions of the Carmack amendment of June 29, 1906, to the Act of February 4, 1887, § 20, prohibiting exemptions from the liability imposed by that act. Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397.

31. Pleadings.—Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887.

Idaho on the second line; that such second road, in connection with a third, had also established a schedule of joint rates on freight from San Francisco to the same points, under which the charge from San Francisco was the same as from Portland, although the distance was greater; and that, under the divisions made between the respective roads, the second road received a smaller rate, relative to the length of the haul over its line, under the latter than under the former schedule, in which the haul was from the opposite direction. The bill charged that such facts constitute an undue preference in favor of San Francisco and its merchants over Portland and its merchants, in violation of § 3 of the interstate commerce law, and that therefore the rates charged from Portland were unjust and unreasonable, under § 1 of such law. The bill stated no grounds for relief under either section, because the shipments under the second schedule being entirely without the district, and the other road, which was a party to such schedule, not being before the court, it had no jurisdiction over that schedule, or power to prevent the discrimination complained of.[32]

Allegations as to Discrimination.—Where a count in a complaint against an interstate carrier alleged a discrimination in rates against plaintiff, in that defendant charged plaintiff the full tariff rates and permitted plaintiff's competitors by a device to transport their similar products at a lower rate, it stated a cause of action for violating the Interstate Commerce Act, prohibiting discrimination, and was therefore not demurrable, though it also insufficiently attempted to allege a combination or conspiracy, on defendant's part, with certain other railroads to restrain trade, and to recover treble damages under the Anti-Trust Act, of Act of July 2, 1890.[33] The complainant's bill alleged that it was a wholesale dealer in merchandise, located at Portland; that the defendants, owners of connecting railroad lines, had established a schedule of joint-freight tariffs between Portland and points in Idaho on the second line; that such second road, in connection with a third, had also established a schedule of joint rates on freight from San Francisco to the same points, under which the charge from San Francisco was the same as from Portland, although the distance was greater; and that, under the divisions made between the respective roads, the second road received a smaller rate, relative to the length of the haul over its line, under the latter than under the former schedule, in which the haul was from the opposite direction. The bill charged that such facts constituted an undue preference in favor of San Francisco and its merchants over Portland and its merchants, in violation of § 3 of the interstate commerce law, and that therefore the rates charged from Portland were unjust and unreasonable, under § 1 of such law. The bill stated no grounds for relief under either section, because the rates from Portland, not being alleged to be unjust or unreasonable in themselves, could not become so by comparison with other joint rates from an opposite direction, and from a different and competing point on a different line of road.[34]

Allegations as to Rebates.—In a suit in equity by the United States against interstate carriers and others, brought, under the Act of Feb. 19, 1903, to enjoin the giving and receiving of unlawful rebates, in which the lawfulness of payments made by the carriers depends upon the intent with which they were made and received, the bill is sufficient on its face to show the unlawful intent and the illegality of the payments, where it alleges that a defendant brewing company, which was a large shipper of beer prior to the enactment of such statute, habitually received rebates from carriers; that shortly after such enactment its officers, who were also its controlling stockholders, organized a transit company (defendant) and became its officers and the owners of practically all of its stock, and

32. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

33. Allegations as to discrimination.—American Union Coal Co. *v.* Pennsylvania R. Co., 159 Fed. 278.

34. Allen *v.* Oregon R., etc., Co., 98 Fed. 16.

on behalf of the brewing company contracted with it to make all the shipments for the brewing company; that the transit company contracted for shipments with such interstate carriers as would pay it from one-tenth to one-eighth of the published rate for the transportation, ostensibly as a commission for obtaining the business, but in fact, as was well known to the carrier defendants, as a rebate for the benefit of the brewing company.[35]

Construing Allegations in Pleadings.—Where other shippers had brought actions for recovery on similar grounds as in this case, while, this being an action in behalf of a different plaintiff, he is not concluded by the evidence introduced on those trials, can state other and different facts, and recover on other and distinct grounds, yet the same acts on the part of the defendant are made in all the cases the basis of relief. Hence, allegations in this petition, which are doubtful in their meaning and susceptible of two constructions, may not unfairly be taken as intended to mean that which the testimony in the former cases showed were the facts. "The course of the litigation makes it apparent that the purpose was not simply to present a new case to the same court, but to obtain from a higher court a construction of the law applicable to the facts. The brief of counsel, while it points out what is alleged are differences between the case made in this petition and that established in the prior cases, also discloses that in his judgment the views expressed by the court of appeals in those cases were wrong, and that he is seeking the judgment of this court thereon. It was easy, if counsel intended to present an entirely different case, to make the averments so positive and distinct as to clearly distinguish it."[36] "It is urged as against the sufficiency of the statement of facts contained in the pleas that the rates fixed by the schedules are not so stated that the court may determine whether such rates are different from those fixed by the contract; that the times when the schedules were published is not shown; that the facts are not sufficiently stated to enable the court to determine that the rates provided by the contract are less than charged others for like and contemporaneous services under substantially the same conditions and circumstances. The contract in question is, however, set out in full in the plaintiff's declaration, and was thus properly before the court for consideration in connection with the pleas. Whatever may be said of the sufficiency of the first, second, and fourth pleas, it seems clear that the allegations of the third plea, taken in connection with the contract, definitely apprise the plaintiff of the defendant's contention that, at the time of the making of the contract and during its continuance defendant's rates, fares and charges were established and published in compliance with the provisions of § 6 of the act; and that by the agreement in question the defendant contracted to receive from the plaintiff a less compensation for the transportation of property than specified in the published schedules of rates, fares, and charges in force at the time and times in question. The third plea expressly asserts not only that defendant 'duly establishes, publishes and files its schedule of rates, fares, and charges for the transportation of passengers and property between the states aforesaid in the manner as therein provided,' but also that: 'It has at all times so established, published, and filed its schedules of rates and charges for the transportation of property between points in the state of Arkansas and the state of Tennessee, and other points in the several states through which its line runs, and particularly from Round Pond, Ark., to the city of Memphis.' It also asserts that: 'The terms of the agreement set forth in the plaintiff's declaration taken in connection with the statements and allegations in said declaration contained, and as construed by said statements and said declaration, particularly taken in connection with the allegation that said plaintiff is not a common carrier, require this defendant to divide its lawful, established,

35. **Allegations as to rebates.**—United States *v.* Milwaukee, etc., Trans. Co., 142 Fed. 247.

36. **Construing allegations in pleadings.**—Parsins *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887.

published, and filed schedule of rates and charges for the transportation of the property in plaintiff's declaration described with the plaintiff not as a common carrier, but as a shipper.'[37] The declaration alleges, however, that the only reason assigned by defendant and its predecessor in interest for failing to furnish sufficient cars was that the defendant did not have sufficient and adequate cars, and the rule is invoked that, where a party gives a reason for his conduct touching anything involved in the controversy, he is estopped, after litigation is begun, from changing his ground and putting his conduct on another and different ground. The general rule referred to is well supported."[38]

§ 4205. Issues, Proof and Variance.—In mandamus under the Act of March 2, 1889, to compel a common carrier to move and transport interstate traffic, or to furnish cars or other facilities for such transportation, on the ground that there has been such a violation of the Interstate Commerce Act of February 4, 1887, as prevents the relator from having interstate traffic moved by the common carrier at the same rates as are charged, or on terms as favorable as those given, by the carrier for like traffic under similar conditions to any other shipper, the gist of the whole proceeding is an unjust discrimination in favor of one shipper over another similarly situated, and that character of discrimination must not only be pleaded, but it must be proved, by the relator; otherwise, the writ will be denied.[39]

§ 4206. Presumptions and Burden of Proof.—The cause of action of a shipper who has been charged a rate, not alleged to be unreasonable, to recover from a carrier what he claims is an excess over what was charged other shippers of similar goods to some point from the same or greater distance on its line or lines under a common control, is based entirely on a statute, and to enforce what is in its nature a penalty. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant. Therefore, he is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act, he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed.[40] To support an action by a shipper against a carrier under § 8 of the Interstate Commerce Act, he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination practiced against him by which he has been pecuniarily damaged, and he can not recover, on a merely technical construction of the law, because, in addition to the ordinary scheduled rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the interstate commerce commission.[41] In an action against a railroad company for damages from failure to make connections with a certain train so as to get plaintiff's baggage at destination at a certain time, the burden was on defendant to show that the contract of carriage was illegal, as violating the federal statutes.[42]

§ 4207. Evidence.—Report of Commission.—And it is competent for the circuit court, in dealing with the issues raised by a petition of the commis-

37. Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543.

38. Taenzer & Co. *v.* Chicago, etc., R. Co., 191 Fed. 543, citing Railway Co. *v.* McCarthy, 96 U. S. 258, 24 L. Ed. 693; Davis *v.* Wakelee, 156 U. S. 680, 39 L. Ed. 578, 15 S. Ct. 555; Oakland Sugar Mill Co. *v.* Wolf Co., 55 C. C. A. 93, 118 Fed. 239; Snyder *v.* Supreme Ruler, 122 Tenn. 248, 122 S. W. 981; Cheek *v.* Merchants' Nat. Bank, 56 Tenn. (9 Heisk.) 490.

39. **Issues, proof and variance.**—United States *v.* Norfolk, etc., R. Co., 109 Fed. 831.

40. **Presumptions and burden of proof.**—Parsons *v.* Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887.

41. Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46.

42. Altschuler *v.* Atchison, etc., R. Co., 154 Wis. 146, 144 N. W. 294.

sion and the answers thereto, and for the circuit court of appeals on the appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the commission as prima facie evidence of the matters therein stated.[43]

Evidence Introduced before Commission.—It has been uniformly held by the several circuit courts and the circuit courts of appeal, in cases involving issues of fact that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.[44] In one case the supreme court said: "We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the commission, and first adduce it in the circuit court. The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the commission shall be regarded as prima facie evidence, that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved."[45]

§ 4208. Reference.—The final decree of a federal circuit court in the proceedings prosecuted under Act Feb. 4, 1887, § 16, after action by the interstate commerce commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made.[46]

§ 4209. Judgment and Orders.—On Finding of Commission.—The circuit court granted no relief prejudicial to the carrier on the original bill, but sent the parties to the interstate commerce commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the carrier, and this action of the commission, with its findings and conclusions, was presented to the circuit court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the commission was stipulated into the case, and the opinion of the court recites that, "with equal meritorious purpose, counsel for the respective parties, agreed that this would stand for and be the hearing for final decree in equity."[47]

Operation and Effect.—A decree which ordered the carrier to desist from charging a greater compensation for the lesser than for the longer haul, would

43. Evidence. — Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

44. Evidence introduced before commission.—Interstate Commerce Comm. *v.* Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45.

45. Cincinnati, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700.

46. Reference.—Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846, affirming 138 Fed. 753.

47. Judgment and orders.—Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846.

be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point.[48]

Restraining Order.—A restraining order that neither forbids nor commands the doing of any specific act, but simply repeats the general admonitions of the Interstate Commerce Act, should not be granted, since such an injunction does not give any additional sanction to the statute, but leaves all vital questions concerning violations of the law to be tried by proceedings for contempt, instead of being tried in the usual manner before a court and jury.[49]

§ 4210. Costs.—Where a proceeding to restrain certain carriers and shippers from giving and receiving rebates on interstate shipments was instituted at the direction of the attorney general, who retained special counsel nominated by the informing witness, and defendants made no application for a stay of proceedings in order to object to the appearance of such special counsel, they were not entitled to a dismissal on the ground that prosecutor had agreed with the attorney general to bear a deficiency in the expense of the prosecution after applying the balance of the attorney general's appropriation applicable to that purpose.[50] The provision in § 8 allowing against an offending initial carrier, to a shipper reasonable attorney's fees in an action for loss of goods, shipped in interstate trade, constitutes a valid regulation of interstate commerce.[51]

§ 4211. Stipulation of Parties.—There is nothing in the act which precludes the parties, after action by the commission declaring rates unreasonable, from stipulating in the proceedings prosecuted under § 16 that the court adjudge the amount of reparation. By the action of the commission the foundation for reparation, as provided in the Interstate Commerce Act, was established, and the inquiry submitted to the court was but of its amount, and had the natural and justifiable inducement to end all the controversies between the parties without carrying part of them to another tribunal. The objection that the reference is too broad is not of substance. What the court may award upon the coming in of the report of the master can not be known. Presumably it will make the reparation adequate for the injury, and award only the advance on the old rate and to those who are parties to the cause.[52]

§§ 4212-4217. Proceedings in Commerce Court—§ 4212. Statutory Provision.—The act creating the commerce court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical executions by the rulings of the interstate commerce commission, upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of the federal supreme court, and by adopting the provisions concerning the commerce court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the

48. **Operation and effect.**—Interstate Commerce Comm. *v.* Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687; East Tennessee, etc., R. Co. *v.* Interstate Commerce Comm., 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516.

49. **Restraining order.**—Southern Pac. Co. *v.* Colorado, etc., Iron Co., 42 C. C. A. 12, 101 Fed. 779.

50. **Costs.**—United States *v.* Milwaukee, etc., Trans. Co., 145 Fed. 1007.

51. Riverside Mills *v.* Atlantic, etc., R. Co., 168 Fed. 990.

52. **Stipulation of parties.**—Southern R. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 S. Ct. 709, 11 Am. & Eng. Ann. Cas. 846.

act to regulate commerce.[53] The first section of the act creating the commerce court, wherein is recited the jurisdiction of the commerce court, makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the interstate commerce commission and in conflict with the general jurisdiction vested in the courts of the United States, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the commission. The opening words of the section which make this result clear are as follows: It (the commerce court) shall "have the jurisdiction now possessed by the circuit courts of the United States and the judges thereof, over all cases of the following kinds," etc.[54] The declaration in the act that nothing in the fact that the existing power of the circuit courts as to the subjects of jurisdiction transferred to the new court should be deemed as an enlarging of those powers, and that nothing in the transfer of the enumerated powers to the commerce court should be considered as limiting or abridging the existing jurisdiction possessed by the circuit courts as to things and subject matters not embraced in the powers transferred, serve to make clear the legislative intent that the creation of a new body to exercise a portion of the existing judicial power should not in any way enlarge the power as existing or be implied as destroying or minimizing the general scope of the judicial power possessed by the circuit courts where such power was not embraced within the authority transferred to the new body.[55]

§ 4213. Jurisdiction in General.—If the claim of constitutional right concerned a subject which, from its very nature and effect, dominated the act to regulate commerce and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the commerce court, as it could not so be without violating the express reservation and restriction as to the general power of the circuit courts contained in the act. If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce, that question in the nature of things was subject to the precedent action of the commission on the subjects committed to it by the act to regulate commerce and as to which the court had jurisdiction alone to act in virtue of a prior affirmative order of the commission.[56] The commerce court has no jurisdiction to consider a question of car distribution in advance of action by the interstate commerce commission, on complaint of a shipper who claims that connecting carriers discriminate against him in refusing freight.[57]

§ 4214. Power to Enforce or Enjoin Orders of Commission.—The Act of June 18, 1910, confers on the commerce court jurisdiction previously pos-

53. Proceedings before commerce court.—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

"The authority conferred by congress upon the commerce court (act of June 18, 1910; 36 Stat. 539, c. 309; Judicial Code, § 207) with respect to enjoining or setting aside the orders of the commission, like the authority previously exercised by the federal circuit courts, was confined to determining whether there had been violations of the constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred." Kansas, etc., R. Co. *v.* United States, 231 U. S. 423, 34 S. Ct. 125, citing Interstate Commerce Comm. *v.* Illinois, etc., R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Comm. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108; Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

54. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

55. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

56. Jurisdiction in general.—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

57. Stony Fork Coal Co. *v.* Louisville, etc., R. Co., 195 Fed. 88.

sessed by the circuit courts of the United States of cases brought to enjoin, set aside, annul, or suspend any order of the interstate commerce commission, also authorizing the commerce court to exercise any and all powers of the circuit court of the United States so far as may be appropriate to the effective exercise of the jurisdiction conferred, and that nothing contained in the act shall be construed as enlarging the jurisdiction previously possessed by the courts thereby transferred to and vested in the commerce court; the jurisdiction so far as conferred, however, being exclusive, and so far as not conferred being reserved.[58] The words in this second subdivision are: "Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the interstate commerce commission." Giving to these words their natural significance, it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. They do not invest that court with jurisdiction to redress complaints based exclusively upon the conception that the interstate commerce commission, in a matter submitted to is judgment, and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands. In other words, the authority of the commerce court under the provision of the statute is confined to enforcing or restraining, as the case may require, affirmative orders of the commission, and it has no power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the commission to grant relief as an affirmative order and accordingly pass on its correctness. That this is the proper construction of the act is further made to appear by reading this second subdivision of § 207 in connection with the first. The first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the commission, and the second dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the commission such as are contemplated by the first paragraph. In other words, by the co-operation of the two paragraphs, authority is given on the one hand to enforce compliance with the orders of the commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order, which must, in the nature of things, mean an affirmative order as in the other case.[59]

Temporary Injunction.—The granting by the commerce court of an injunction pendente lite suspending, until final determination of the suit, an order of the interstate commerce commission, requiring certain carriers to desist from making further alleged discriminatory allowances, is not in excess of its power, under the Act of June 18, 1910, § 3, unless it was plainly unnecessary because of the obvious nature and character of the legal questions as to which the judgment of the court was invoked.[60]

Construction of Order.—The findings of the interstate commerce commission on which it bases an order requiring carriers to cease and desist from making certain charges as unreasonable and unjust, which are made prima facie evidence of the facts therein stated on the hearing of a petition by the commission asking a court to enjoin obedience to such order, will not, in view of the terms

58. **Power to enforce or enjoin orders of commission.**—Procter, etc., Co. *v.* United States, 188 Fed. 221.

59. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

60. **Temporary injunction.** — United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

of the statute and its remedial character, be given a narrow construction on the hearing of a demurrer to the petition on the ground that such findings do not sustain the order made.[61]

§ 4215. Power to Enforce or Enjoin Particular Orders of Commission. —Grant of Relief against Demurrage Charge.—The jurisdiction of the commerce court under the Judicial Code of March 3, 1911, of cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the interstate commerce commission, embraces only complaints of affirmative action by the commission, and does not confer the power to redress a complaint based solely upon the refusal of the commission to award the relief asked by a shipper against demurrage regulations, upon the ground that the federal statutes gave no right to the relief claimed. The commerce court has no right in such case to treat the order denying relief as an affirmative order and take jurisdiction of a petition filed in that court, making the United States, the interstate commerce commission, and the railroad parties defendant and praying the same relief which had been denied by the commission.[62] To give to this section of the statute a meaning contrary to that above stated and to recognize in the commerce court the existence of the power to interpret originally the administrative features of the act to regulate commerce, and to treat the refusal of the commission to grant relief prayed for as an affirmative order and renew it accordingly would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action was contemplated.[63]

Reduction of Rates.—The commerce court has no jurisdiction of a complaint by shippers of the refusal of the interstate commerce commission to reduce maximum rates to the full extent asked.[64]

Discrimination.—The commerce court may enjoin the performance of a contract offending the provisions of the Interstate Commerce Act, intended to prevent undue advantage or unlawful discrimination.[65]

Allowances to Shipper.—The commerce court has the right to entertain jurisdiction of a petition filed by an interstate carrier seeking to enjoin the enforcement of an affirmative order of the interstate commerce commission ordering said carrier to desist from making certain allowances to one shipper without making the same allowances to others for floatage, lighterage and terminal services rendered by such shippers to the carriers.[66]

61. **Construction of order.** — Interstate Commerce Comm. *v.* Chicago, etc., R. Co., 94 Fed. 272.

62. **Power to enforce or enjoin particular orders of commission.**—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

In determining whether the commerce court has jurisdiction of a petition to annul a ruling of the interstate commerce commission sustaining a carrier's demurrage rule, it is not material that suits in that court to enjoin, set aside, annul, or suspend any order of the commission are required to be brought against the United States, nor that under the law as it previously stood the venue of suits in the circuit courts of the United States against the commission to vacate its orders was fixed in each case in the district where the carrier against which the order was made had its principal operating office. Procter, etc., Co. *v.* United States, 188 Fed. 221.

63. Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761.

64. **Reduction of rates.**—Hooker *v.* Knapp, 225 U. S. 302, 56 L. Ed. 1099, 32 S. Ct. 769.

65. **Discrimination.**—United States *v.* Union Stockyards, etc., Co., 226 U. S. 286, 33 S. Ct. 83, modifying judgment Attorney General *v.* Union Stockyard, etc., Co., 192 Fed. 330.

66. **Allowances to shipper.**—The commerce court, in the exercise of its power under the Act of June 18, 1910 (36 Stat. at L. 542, ch. 309), § 3, to enjoin, set aside, annul or suspend any order of the interstate commerce commission, has jurisdiction to entertain a petition to enjoin an order of the commission requiring railway

Terminal Charges.—The commerce court also has power to allow a preliminary injunction against an affirmative order of the interstate commerce commission ordering a carrier to desist from discriminating in the matter of allowances for floatage, lighterage, and terminal services.[67]

Distribution of Cars.—The commerce court, in the exercise of its power, under the Act of June 18, 1910 (36 Stat. at L. 542, chap. 309), § 3, to enjoin, set aside, annul, or suspend any order of the interstate commerce commission, has jurisdiction to entertain a petition to enjoin an order of the commission requiring railway companies to cease charging lower rates for coal intended for railway consumption than is accorded to other shippers, and may enjoin such order if it considers that it will work irreparable injury, where the question presented by the petition is that the order of the commission was not merely administrative, but proceeded from a construction of certain sections of the act to regulate commerce as applicable to the conditions which affected the traffic in the different kinds of coal, and that the different charges for transportation constituted violations of those sections.[68]

Order Granting Reparation.—The commerce court has jurisdiction of a suit to annul an order of the interstate commerce commission which either awards or denies reparation to a complainant under the Interstate Commerce Act.[69] The jurisdiction of the commerce court, of cases to enjoin or set aside any order of the interstate commerce commission, does not confer jurisdiction to redress a complaint based on refusal of commission to award relief to a shipper against demurrage regulations.[70]

§ 4216. Power to Review Order of Commission.—Where the facts upon which an order of the interstate commerce commission is based are either admitted or undisputed, whether or not such facts show a violation of law by a carrier is a question of law, and a finding by the commission thereon is reviewable by the commerce court.[71] An order of the interstate commerce commission dismissing a complaint which is supported by substantial evidence and without errors of law can not be annulled by the commerce court.[72]

Order for Relief from Long and Short Haul Clause.—The limitation of the jurisdiction of the commerce court to that "now possessed" by the Circuit

companies to cease charging lower rates for coal intended for railway consumption than is accorded to other shippers. Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

67. **Terminal charges.**—That authority is conferred in express terms by § 3 (§ 208), 36 Stat. at L. 1149, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 217, 36 Stat. at L. 542, chap. 209), of the act. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

68. **Distribution of cars.**—Interstate Cemmerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

"The question presented by the petition is that the order of the commission was not merely administrative, but proceeded from a construction of §§ 2 and 3 as applicable to the conditions which affected the traffic in the different kinds of coal, and that the different charges for transportation constituted violations of those sections. The commerce court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the commerce court gives that court the power to 'enjoin, set aside, annul, or suspend any order of the interstate commerce commission, in a suit brought in the court against the United States.'" Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

69. **Order granting reparation.**—Arkansas Fertilizer Co. *v.* United States, 193 Fed. 667.

Under Act June 18, 1910, § 1, the commerce court has jurisdiction of a suit to annul an order of the interstate commerce commission awarding reparation in damages to a complainant made under Interstate Commerce Act, § 16, as amended by Act June 29, 1906. Southern R. Co. *v.* United States, 193 Fed. 664.

70. Procter, etc., Co. *v.* United States, 32 S. Ct. 761, 225 U. S. 282, 56 L. Ed. 1091, reversing judgment 188 Fed. 221.

71. **Power to review order of commission.**—Louisville, etc., R. Co. *v.* United States, 197 Fed. 58.

72. Chamber of Commerce *v.* United States, 197 Fed. 66.

Courts, did not prevent that court from reviewing an order of the interstate commerce commission on an application for relief from the short and long haul clause of that section.[73]

§ 4217. Procedure.—Mandamus.—An appeal will not lie to the commerce court to review the action of the interstate commerce commission in refusing to entertain a petition, on the ground that the subject matter was not within the scope of the commission's powers. The proper procedure is by mandamus to compel the commission to take jurisdiction and proceed according to law.[74]

Injunction.—Section 3 (208), provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the commission "shall not stay or suspend the operation of such order" but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order; that is, of course, an affirmative order, of the commission. The same section makes a finding that irreparable injury will result from the operation of an order sought to be enforced, essential to the granting of an order restraining or suspending its enforcement.[75] In this case it was urged on behalf of the United States and the interstate commerce commission that, wholly irrespective of the merits of the petition, the order granting the interlocutory injunction should be reversed because of what was insisted to be the express requirements of the act imposing the duty on the commerce court or a judge of that court, if a restraining order was granted under the conditions in the statute, to state the facts from which it was found that irreparable injury would arise if a restraining order were not allowed. Answering this contention, the court said: "Without ambiguity we think the statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the interstate commerce commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction pendente lite, which, to quote the words of the statute, may be granted by the court to 'restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit;' third, in the nature of things a perpetual injunction upon the entry of the final decree."[76]

Statement of Facts.—Only temporary restraining orders of the commerce court, issued conformably to the Act of June 18, 1910, staying in whole or in part the operation of an order of the interstate commerce commission for not more than sixty days, are affected by the requirements of that section respecting a statement of fact as to irreparable damage; they have no application to a preliminary injunction or injunction pendente lite.[77] The order in this case, made after notice and hearing, suspending the force and effect of the order of the commission until further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction pendente lite, and not of the power to allow a temporary restraining order embraced in the first of the classes stated. As we think it clear that the requirements of the statute relied upon

73. **Order for relief from long and short haul clause.**—An order of the interstate commerce commission refusing an application made by carriers under Act June 18, 1910, § 8, amending Act Feb. 4, 1887, § 4, for relief against the long and short haul clause of that section, is not excluded from the revisory power of the commerce court. United States *v.* Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986; United States *v.* Union Pac. R. Co., 234 U. S. 495, 34 S. Ct. 995.

74. **Procedure.**—Interstate Commerce Comm. *v.* Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

75. **Injunction.**—Procter, etc., Co. *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761; United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817; Interstate Commerce Comm. *v.* Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504.

76. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

77. **Statement of facts.**—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

respecting the statement of facts as to irreparable damages relate only to the first class of cases, that is, the power to issue a temporary restraining order, we hold the objection to be without merit.[78]

General Equity Rules.—Inasmuch as it appears from the act creating the commerce court and defining its powers and jurisdiction that the power of said court to issue a preliminary injunction was recognized and preserved so as to afford the court proper time for deliberation and consideration of the questions to be decided by the commission, instead of compelling said court, upon presentation of a petition, to reach a final conclusion eo instante, the general equity principle requiring courts of equity called upon to allow preliminary pendente lite injunctions, to determine whether on the face of the papers presented there is such an equitable cause of action presented as justifies the issue of the preliminary injunction prayed for, will not be applied.[79] "Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or pendente lite injunction, the duty arising requires it to be determined whether, on the face of the papers presented, there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit; that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true that where an appeal is allowed from an order granting a preliminary injunction the reviewing court is put to the duty of determining whether, on the face of the papers, the court below erred as a matter of law in granting the preliminary injunctions. Do these principles apply to the case before us is then the first consideration. The result of holding that they do, will inevitably cause the expunging from the act of the express authority conferred to issue a preliminary injunction, since, viewed under the general principles of equity, the criteria by which to determine the rightfulness of such an order in view of the nature and character of the jurisdiction of the commerce court is exactly and exclusively the same criteria by which the rightfulness of a final degree of that court, issuing a perpetual injunction in conformity to such decree, would require to be tested. Our duty, however, is not to destroy the law, but to enforce it; and in doing so to seek to discover the intention of the lawmaker, the wrong intended to be prevented, and the remedy designed to be afforded by the enactment of the statute. Coming to consider the statute for this purpose, we have pointed out in the Procter & Gamble Case that the great remedy intended to be accomplished was the concentration in a single court of the power to consider the rightfulness of enforcing or setting aside orders of the commission; that, to prevent unnecessary delays, the limitations as to restraining orders and their duration, and the hearing which is commanded as to irreparable injury, were enacted. It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the commission, instead of compelling that body virtually eo instante upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary, and unreasonable exercise of the power conferred. In other words, we think that the enlightened purpose of congress was that the court which it created, in the exercise of the important trusts confined to its authority, and where occasion required it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment, and that it was not intended to compel precipitate, and perhaps ill-considered, action."[80]

78. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

79. **General equity rules.**—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

80. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

Appeal.—The commerce court was created for the purpose, among other things, of interposing between the interstate commerce commission and the federal supreme court an intermediate tribunal having powers which the statute delegates to it, and it is the duty of the federal supreme court to uphold the lawful authority of the commerce court. Therefore, the federal supreme court will not reverse an order of the commerce court granting a preliminary injunction against an affirmative order of the interstate commerce commission, except in the case of a clear abuse of power, but will remand the case so that there may be an opportunity to dispose of it on the merits in the form selected by congress for that purpose.[81]

Order Granting Injunction.—The federal supreme court will not disturb on appeal the granting by the commerce court of an injunction pendente lite suspending, until final determination of the suit, an order of the interstate commerce commission, requiring certain carriers to desist from making further alleged discriminatory allowances, unless it was so unwarranted, arbitrary, and unreasonable as to amount to an abuse of discretion.[82] It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the commerce court must have been the desire to interpose between the action of the commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court without deviation, and yet without hesitancy, where there has been an abuse of discretion, to correct it in the completest way. But as this case manifests no such abuse, our duty is not to reverse the action of the court, but to remand the case, so that there may be an apportunity to dispose of it on the merits in the forum selected by congress for that purpose. Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly, in our judgment, appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits, or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court to do so.[83]

§ 4218. Proceedings in State Courts.—The interstate commerce law provides in § 9 that any person claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission, or may bring suit, in his own behalf, for the recovery of damages for which such carrier may be liable under the provisions of the act, in any district or circuit court of the United States of competent jurisdiction; but such person shall not have the right to pursue both remedies, and must in each case elect which one of the two methods of procedure he will adopt. The state courts have no jurisdiction of such a claim for damages.[84] But it has been expressly held in many of the states that the provisions of § 20 of the Interstate Commerce Act are

81. Appeal.—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

82. Order granting injunction.—United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

83. United States *v.* Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817.

84. Proceedings in state courts.—Copp *v.* Louisville, etc., R. Co., 43 La. Ann. 511, 9 So. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198.

Under Interstate Commerce Act, § 9, (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 382, U. S. Comp. St. 1901, p. 3159), conferring jurisdiction of an action for violation of the provision of the act on the federal circuit and district courts alone, and putting the party complaining to his election between that remedy and proceedings before the interstate commerce commission, also provided for by the act, a state court has no jurisdiction of such an action. Gulf, etc., R. Co. *v.* Moore, 98 Tex. 302, 83 S. W. 362, reversing 80 S. W. 426.

the subject of cognizance and enforcement by the state courts.[85] Except as to those things which the interstate commerce commission has defined and denounced as undue discrimination, a discrimination complained of may be dealt with by the state courts according to their own statute or the common law.[86] A shipper sued a carrier in the courts of a state to recover the excess of what it alleged to be an unjust and unreasonable charge on shipments of carloads of cotton seed. The defense was that the rates were charged according to the schedule of rates filed under the interstate commerce act, and that the court had no jurisdiction to grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the interstate commerce commission. It was held that the state courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published in advance of the action of the interstate commerce commission adjudging the rate unreasonable. And it was in effect held that reparation after such action for the excess above a reasonable rate must be by a proceeding before the commission, "because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one."[87]

Enjoining Filing of Rates.—A state court has no jurisdiction to enjoin a railroad engaged in interstate transportation from filing with the interstate commerce commission a schedule of its rates for transportation of coal from a point in the state to a point in another state on the ground that the rates are unfair and discriminatory.[88]

Review.—Where the defendant specially sets up a defense under the Interstate Commerce Act, which, if denied to him, is an adverse ruling of federal right which will warrant the bringing of the case to the supreme court of the United States from the highest court of a state.[89]

§ 4219. Election of Remedies.—Section 9 of the act provides that persons claiming to be damaged may make their complaint either to the commission in the manner provided in the act, or by bringing suit on their own behalf for the recovery of damages for which such carrier may be liable under the provisions of the act in any district or circuit court of competent jurisdiction; and such persons shall not have the right to pursue both of these remedies, and must elect which of the two methods of procedure herein provided for they will adopt.[90] Persons damaged may complain to commission or sue personally. But

85. Pittsburgh, etc., R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996, citing Murray *v.* Chicago, etc., Co., 62 Fed. 24; Midland Valley Co. *v.* Hoffman Co., 91 Ark. 180, 120 S. W. 380; St. Louis, etc., R. Co. *v.* Grayson, 89 Ark. 154, 115 S. W. 933; Southern Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865; Georgia Railroad *v.* Creety, 5 Ga. App. 424, 63 S. E. 528; Brantley Co. *v.* Ocean Steamship Co., 5 Ga. App. 844, 63 S. E. 1129; Pittsburgh, etc., Co. *v.* Wood (Ind. App.), 84 N. E. 1009; Galveston, etc., Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170; Chicago, etc., Co. *v.* Clements, 53 Tex. Civ. App. 143, 115 S. W. 664; Galveston, etc., Co. *v.* Piper, 52 Tex. Civ. App. 568, 115 S. W. 107.

86. Puritan Coal Min. Co. *v.* Pennsylvania R. Co., 237 Pa. 420, 85 Atl. 426.

87. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075.

88. Enjoining filing of rates.—Thacker, etc., Coke Co. *v.* Norfolk, etc., R. Co., 67 W. Va. 448, 68 S. E. 107, 28 L. R. A., N. S., 108.

89. Review.—Atchison, etc., R. Co. *v.* Robinson, 233 U. S. 173, 34 S. Ct. 556.

90. Election of remedies.—Atlantic, etc., R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159], providing that any person claiming to be damaged by violation of the act may make complaint to the commission thereby created, or bring suit to recover damages sustained, where plaintiff elected to proceed by a complaint to the commission, he was thereafter confined to the remedy provided by the act. Western New York, etc., R. Co. *v.* Penn Refin. Co., 137 Fed. 343, 70 C. C. A. 23, affirmed in 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

Where plaintiff sued an interstate carrier in a federal court to recover damages for alleged unreasonable charges, without having first presented its griev-

they can not have both remedies, and must elect between them.[91] Where a shipper claimed a right to recover aggregate excess freights alleged to have been paid on various interstate shipments, alleging that the rate charged consisted of the sum of local rates through a point of concentration, and that the rule that a shipper should only be entitled to the benefit of a lower through rate when the original bill did not state the ultimate destination, was unreasonable, a complaint charging that such condition had been previously submitted to the interstate commerce commission in another proceeding by different shippers against the defendant carrier, and had been found unreasonable and invalid, was insufficient to relieve plaintiff from the duty of submitting its claim to the commission before beginning suit in a federal court thereon.[92]

Cumulative Remedies.—The special remedies afforded by the Interstate Commerce Act to prevent the imposition of unjust or unreasonable rates were intended to supplement, and not to supplant, the existing remedies furnished by the common law.[93]

Proceeding by Mandamus.—An action in a federal court for a mandamus, under § 10 of the Act of March 2, 1889, amendatory of the interstate commerce act, which authorizes such action by a shipper against an interstate carrier to compel a compliance with the act, and further provides that "the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement," does not preclude the relator or others from proceeding in respect to the same matter by petition to the interstate commerce commission under § 13 of the original Act of Feb. 4, 1887, and the court in the mandamus suit is without power on an ancillary bill to enjoin such proceeding.[94] If congress had intended that the remedy afforded by § 23 was to be exclusive, it would have added a proviso similar to the one incorporated as a part of § 9, and not having done so it is manifest that it was the intention of Congress that the remedy provided by § 23 was not to be treated as exclusive, and especially inasmuch as it is expressly provided that the remedy granted therein shall be cumulative, and shall not be held to exclude or to interfere with other remedies granted by the act. Any other construction of this proviso would be in direct conflict with the plain provisions of the law, and, in view of this provision, we are of opinion that the court below was without power to restrain the appellant from proceeding before the interstate commerce commission under the provisions of § 13, and that the court did not have jurisdictions of the subject matter sought to be litigated in this proceeding.[95]

§§ 4220-4237. Criminal Liability of Carrier—§ 4220. In General.—Effect must be given, in construing a repealing act, to the general saving clause

ance to the interstate commerce commission, the complaint constituted an election to sue in a federal court, which had jurisdiction to determine whether it stated facts sufficient to constitute a cause of action under Interstate Commerce Act, §§ 1, 6, 8, 9, and 15. National Pole Co. *v.* Chicago, etc., R. Co., 211 Fed. 65.

91. Section 9 of the Interstate Commerce Act; Texas, etc., R. Co. *v.* Interstate Commerce Comm., 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666; Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.

92. National Pole Co. *v.* Chicago, etc., R. Co., 200 Fed. 185.

93. Cumulative remedies. — Tift *v.* Southern R. Co., 123 Fed. 789.

The special remedies provided by the Interstate Commerce Act are cumulative, and not exclusive, of the general remedies given by the Judiciary Act conferring jurisdiction of all suits and controversies arising under an act of congress, regardless of any diversity of citizenship between the parties. Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. 771.

94. Proceeding by mandamus.—Merchants' Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769.

95. Merchants' Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769.

in the Revised Statutes of the United States [96] prescribing the effect of repealing acts on existing penalties, forfeitures, and liabilities, unless, either by express declaration or necessary implication arising from the terms of the repealing law as a whole, it results that the legislative mind will be set at naught by giving effect to such saving clause. The exception from the operation of the provision repealing conflicting laws, which is made by the Act of June 29, 1906, in favor of causes pending in the federal courts, which shall be prosecuted to conclusion in the manner heretofore provided by law, was addressed solely to the procedure to be followed in pending cases, and such section, therefore, does not supersede the general provision of the Revised Statutes saving existing forfeitures, penalties, or liabilities from repeal, so as to prevent future criminal prosecutions for offenses against the Act of Feb. 19, 1903, committed prior to the adoption of the later statute.[97]

§ 4221. Discrimination and Undue Preference.—Statutory Provisions.—In so far as the Act of Feb. 19, 1903, provided for punishment of corporate carriers in granting, and corporate shippers in knowingly accepting, rebates or discrimination from legal rates and tariffs, it was not abrogated or repealed by the Act of June 29, 1906, but was preserved, and so far as it provided for the punishment of such acts when not knowingly done, it was repealed.[98] Therefore, intentionally accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates, which is forbidden by the Act of Feb. 19, 1903, is sufficient to sustain a conviction under that act, although such action may have been taken in good faith, under a claim of legal right.[99] The "undue preferences" clause of the Interstate Commerce Act is indefinite and uncertain, a conviction for its violation can not be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable.[1] The Act of Feb. 19, 1903, is not restricted in its provisions to departures from an establishment tariff rate, but is violated if any other advantage is given to a shipper whereby a discrimination is practiced.[2]

Where Rate Not Published by Carrier.—A carrier which gives rebates from a joint rate on file with the interstate commerce commission may, although it did not itself publish and file the rate, be convicted of violating the act which, inter alia, provides that the published rate shall be conclusively deemed, in any prosecution under the act, to be the legal rate as against the carrier who files the same or "participates in any rates so filed or published," and that any departure from such rate shall be deemed to be an offense under the act.[3] An interstate carrier may be prosecuted under the Elkins Act for the offense of rebating where it is a party to the joint rate although it has not filed and published the same itself. While it is usual for the initial carrier to file such joint tariffs, the fact that it was filed by another carrier participating therein is immaterial, since § 1 of the Elkins Law brings all the carriers who have participated in any rate filed or published within the terms of the act, as much so as if the tariff had been actually published and filed by such participating carrier, for the statute specifically provides that the published rate shall be conclusively deemed in any

96. **Criminal liability of carrier.**—U. S. Rev. Stat., § 13, U. S. Com. Stat. 1901, p. 6.

97. Great Northern R. Co. *v.* United States, 84 C. C. A. 93, 155 Fed. 945, judgment affirmed in 208 U. S. 452, 52 L. Ed. 567, 28 S. Ct. 313.

98. **Discrimination and undue preference.**—Great Northern R. Co. *v.* United States, 155 Fed. 945, 84 C. C. A. 93, judgment affirmed in 208 U. S. 452, 52 L. Ed. 567, 28 S. Ct. 313.

99. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

1. Tozer *v.* United States, 52 Fed. 917.

2. United States *v.* Vacuum Oil Co., 153 Fed. 598.

3. **Where rate not published by carrier.**—United States *v.* New York, etc., R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 S. Ct. 313, reversing 157 Fed. 293.

prosecution under the act to be the legal rate as against the carrier who files the same, or "participates in any rates so filed and published."[4]

As to Connecting Carriers.—The provisions of Interstate Commerce Act making it unlawful for any common carrier engaged in interstate commerce to give any undue or unreasonable preference or advantage to any particular shipper, or to subject any particular shipper to any undue or unreasonable prejudice or disadvantage in any respect whatever, if construed to apply to the affording of facilities for shipments, do not subject a railroad company to indictment under the act for its failure or refusal to furnish switch connections to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable.[5]

§ 4222. Rebates.—Statutory Provision.—The giving or receiving of a rebate or concession whereby property in interstate or foreign commerce is transported at less than the established rate is the essence of the offense denounced by the Act of Feb. 19, 1903.[6] Section 10 of the Act of June 29, 1906, relating to rates of interstate carriers, which provides that "all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," when construed in accordance with the rule prescribed by Rev. St., § 13, does not relieve offenders under § 1 of the Act of Feb. 19, 1903, from subsequent indictment and prosecution for such offenses, but merely relates to the mode of procedure to be followed in pending causes.[7] Under the clause of the interstate commerce act making it unlawful for a carrier, by means of false billing, classification, weighing, or by any other device or means, knowingly to assist or suffer any person to obtain transportation at less that the regular rate, an indictment will not lie for paying or receiving rebates.[8]

Separate and Continuing Offenses.—Where pursuant to a previous agreement, preceding transportation, a number of separate shipments are made and the full legal rate paid thereon, and afterwards claims of the shipper for the rebates stipulated in such agreement are presented at short intervals and paid by checks to the shipper, the offense is not a single and continuing one, but there is a complete and separate offense upon the making of each payment by the railroad company of the stipulated rebate.[9] Where defendant shipped oil at concession rates on prepaid shipping orders, making settlements with the carrier periodically, there were as many offenses committed on a settlement being made as there were separate transactions or transportations covered by such settlement.[10]

4. United States *v.* New York, etc., R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 S. Ct. 313.

5. **As to connecting carriers.**—United States *v.* Baltimore, etc., R. Co., 153 Fed. 997.

6. **Rebates.**—Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

A departure from an established and published interstate freight rate by a carrier in order to constitute a crime denounced by Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), must be willful. United States *v.* Atchison, etc., R. Co., 163 Fed. 111.

7. United States *v.* Chicago, etc., R. Co., 151 Fed. 84.

8. United States *v.* Hanley, 71 Fed. 672.

9. **Separate and continuing offenses.**—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

10. United States *v.* Standard Oil Co., 192 Fed. 438.

Intent.—In a prosecution of an interstate carrier for giving a rebate on an interstate shipment of lime, constituting a departure from the established and published rate, the intent of the carrier is of the essence of the offense.[11] But the use of the word "willful" in the Act of Feb. 19, 1903, to characterize offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely.[12]

Knowingly and Wilfully.—Where, in a prosecution of an interstate carrier for rebating, the defendant claimed that as soon as it discovered the error it collected from all but one of the shippers the full tariff rates, an instruction that the jury should regard the offense as consummated or not according as the defendant acted with or without knowledge of the facts held sufficiently favorable to it.[13]

Knowledge of Agent.—Where an interstate railroad company applied lower transit rates to shipments of lumber which were only entitled to local rates, the shipper's agents would be presumed to have knowledge of the rate applicable, which knowledge was imputable to the shipper.[14] But the fact that the agents who executed such outbound transactions did not know that the lumber was not entitled to the transit rate did not show that the defendant carrier did not knowingly make the rebates.[15]

Printing and Publishing Rates as Prerequisite.—The Act of Feb. 19, 1903, makes it unlawful for a carrier to grant a rebate from a joint tariff rate which it has filed with the interstate commerce commission or published, or in which it participates when filed or published by another carrier, but it does not make it a criminal offense to receive a rebate from a joint rate unless such rate has been both filed and published.[16] The act sets forth two entirely separate offenses, the first being the failure of a carrier, subject to the provisions of the interstate commerce act, to file and publish the tariffs required by said act or strictly to observe the same, and the second the soliciting, accepting, or receiving by such a carrier of any rebate whereby any property shall be transported at a less rate than that named in the tariffs published and filed by such carrier. In order to constitute an offense under the second provision, the tariff charged to have been violated must be one published or filed by the defendant charged, and it is not sufficient that in the case involved such defendant participated in a through rate published and filed by another carrier, where it had not itself published or filed it.[17]

Posting Schedule of Rates as Prerequisite.—But compliance with the provision of the act as to posting copies of schedules and tariffs is not essential to bring a tariff within the provision of the act making it a misdemeanor for a shipper to accept rebates.[18]

Justification of Rebate.—It is no defense to a prosecution for receiving a rebate that competing roads granted a like concession, and that the defendant

11. **Intent.**—Judgment, United States *v.* Atchison, etc., R. Co., 163 Fed. 111, reversed in 170 Fed. 250, 95 C. C. A. 446.

12. Judgment, United States *v.* Chicago, etc., R. Co., 151 Fed. 84, affirmed in 162 Fed. 835.

13. **Knowingly and wilfully.**—Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

14. **Knowledge of agent.**—Where a railroad company unlawfully applied transit rates to certain shipments of lumber, and certain of the defendant's agents knew that the lumber was not entitled to such rates, the defendant was chargeable with the agents' knowledge, and was guilty of knowingly accepting at rebate. Nichols, etc., Lumber Co. *v.* United States, 212 Fed. 588.

15. Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

16. **Printing and publishing rates as prerequisite.**—United States *v.* Wood, 145 Fed. 405.

17. United States *v.* New York, etc., R. Co., 157 Fed. 293.

18. **Posting schedule of rates as prerequisite.**—United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323, reversing judgment, 187 Fed. 375.

was compelled to do the same in order to secure its fair share of the business, or that it treated all shippers alike, or that the concession was made by its officers in good faith and in the honest belief that it was lawful.[19] A contract between a carrier and the shipper to transport the latter's goods in interstate or foreign commerce, at the then established rates, for a definite time, constitutes no defense to the charge of giving or receiving a rebate from the filed and published rates.[20]

Refunded to Person Other than Shipper.—The mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed.[21]

Refunded to Agent of Carrier.—The carrier has a right to employ persons to solicit business, just as it has a right to employ clerks and employees of all kinds to do the business, and any payments for such a purpose can not constitute a rebate, concession, or discrimination within the meaning of the act.[22]

§ 4223. Failure to File and Publish Rates.—By the Interstate Commerce Act transportation of interstate commerce by a carrier which has not filed its rates for such service is a misdemeanor.[23]

§ 4224. Departure from Publishing Rates.—Section 6 of the Act of Feb. 4, 1887, as amended by the Act of June 29, 1906, makes it a misdemeanor for a carrier to charge a different rate from that fixed by its schedule.[24] The

19. **Justification of rebate.**—Chicago, etc., R. Co. *v.* United States, 162 Fed. 835.

20. Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

21. **Refunded to person other than shipper.**—United States *v.* Delaware, etc., R. Co., 152 Fed. 269.

An indictment against a carrier, alleging that P. was the duly authorized agent of the S. Company and vested by it with the sole and exclusive power and authority to determine over which line any shipment by it should be made; that defendant entered into an unlawful agreement with P. whereby it was agreed that P., as such agent should cause S. to make large shipments over defendant's road, and S. should pay defendant the lawful rate for such shipments, and thereafter P. should present claims to defendant for a rebate on such shipments, under the guise of claims for services; and that such scheme was carried out, and defendant made payments to P. by way of rebate—charges a payment of rebates in violation of the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]); the fact that the rebate is paid to another than the shipper being immaterial, though a payment which is but a commission for obtaining business for the carrier is not within the statute. United States *v.* Delaware, etc., R. Co., 152 Fed. 269.

22. **Refunded to agent of carrier.**—United States *v.* Delaware, etc., R. Co., 152 Fed. 269.

23. **Failure to file and publish rates.**—United States *v.* Illinois Terminal R. Co., 168 Fed. 546.

24. **Departure from publishing rates.**—A count under section 6 of the act, charging that on a day named defendant, as agent, etc., charged and collected of another railroad company a less rate of compensation for carrying goods between Hannibal and Helper than 46 cents per 100 pounds, which rate had been "established and published" between those points prior to the day named, and that said rate was "in force on that day," negatives a reduction by defendant's company prior to or on the day in question. United States *v.* Tozer, 37 Fed. 635, 2 L. R. A. 444.

Where a railroad company which has fixed a rate of 20 cents per hundred for freight from Chicago to New York, and 22 cents per hundred for freight from points west of Chicago to New York, of which latter rate said company receives 18 cents, making an arrangement with a Chicago firm to ship its freight from Chicago to New York at 22 cents under bills of lading purporting to come from Western points, and to return to them 4 cents under pretense of paying it to the road bringing the freight into Chicago, it is guilty of violation of the provision of the interstate commerce act of February 4, 1887, which makes it a misdemeanor for a common carrier to charge different rates from those fixed in its schedule. United States *v.* Michigan Cent. R. Co., 43 Fed. 26.

An indictment against a railroad com-

acceptance by a railroad company in settlements with a coal company for interstate shipments of coal of notes of the shipper for a part of its freight charges, in accordance with an agreement and understanding between them, constitutes a willful failure to strictly observe its tariffs.[25] An arrangement between a railway company and a construction company for reduced-rate transportation of men and materials required by the company in grading an extension, when entered into in good faith, is not obnoxious to the provisions of laws prohibiting departure from published tariffs.[26]

Necessity for Actual Acceptance of Rate.—Under the provisions of the Interstate Commerce Act that no carrier shall charge, demand, collect, or receive a greater or less compensation for service than the rates, fares, and charges specified in the tariff filed and in effect at the time, a willful demand of more than the tariff rates by a carrier is of equal criminality with an actual collection thereof.[27]

§ 4225. False Billing of Goods.—The fixing of the value of property in a bill of lading at less than its actual value for the purpose of limiting the amount of the carrier's liability in case of loss is not a false billing in violation of the Interstate Commerce Act.[28]

§ 4226. Liability for Act of Agent.—It is true that there are some crimes, which in their nature can not be committed by corporations. But there is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes corporations may be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.[29]

Constitutionality of Provision.—There can be no question as to the power of congress to control those who are conducting interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises, and such provision of the statute is not unconstitutional upon the theory that it attributes the act of the agent to his principal, thereby making one person responsible for the crime of another, and thus depriving him of due process of law and of the presumption of innocence which the law raises in his favor.[30] Even if this section of the act were

pany for violation of the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as supplemented by the Elkins act (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), alleged that defendant published a sugar schedule for the transportation of sugar from New York to Cleveland at the rate of 21 cents per 100 pounds; that on a specified day the American Sugar Refining Company induced defendant to make an unlawful agreement to allow a rebate of 6 cents on sugar shipped by it to Cleveland for reconsignment, and 4 cents on sugar shipped to Cleveland as its ultimate destination; that the sugar company thereafter shipped various consignments, paid the schedule rate, and afterwards made claims on the railroad company, and was paid a rebate. Held, that such facts sufficiently showed a violation of the provisions of the act prohibiting deviations from the published rates. United States *v.* New York, etc., R. Co., 146 Fed. 298.

Not in terms declared offense.—While carrying goods at a less or different rate than the tariff rate is not in terms declared an offense or penalized, it is punishable as a failure strictly to observe such tariff. Hocking Valley R. Co. *v.* United States, 210 Fed. 735; Sunday Creek Co. *v.* United States, 210 Fed. 747.

25. United States *v.* Hocking Valley R. Co., 194 Fed. 234.

26. Santa Fé, etc., R. Co. *v.* Grant Bros. Constr. Co., 33 S. Ct. 474, 228 U. S. 177, 46 L. R. A., N. S., 148, reversing judgment, 108 Pac. 467, 13 Ariz. 186.

27. Necessity for actual acceptance of rate.—United States *v.* Texas, etc., R. Co., 185 Fed. 820.

28. False billing of goods.—Pierce Co. *v.* Wells Fargo & Co., 189 Fed. 561, 110 C. C. A. 645.

29. Liability for act of agent.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

30. Constitutionality of provision.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

Due process of law is not denied by the provisions of the Elkins Act of Feb-

unconstitutional as applied to individuals engaged in the business of interstate carriage, it must still be sustained as to corporate carriers, since every act is to be construed so as to maintain its constitutionality if possible, and the valid provisions thereof upheld unless they are so interblended with the invalid ones that the whole must stand or fall together, and in this case there can be no question that congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations.[31]

Act of Agent in Making Rates.—The act of the agent of a corporation engaged in interstate commerce while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.[32]

§§ 4227-4237. Criminal Proceedings against Carrier—§ 4227. Jurisdiction and Venue.—The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by the Elkins Act of February 19, 1903, is made triable in any federal district through which such transportation is had, by the provision of that act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted.[33] The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by U. S. Const., Sixth Amendment, is not violated by the provision of the Elkins Act of February 19, 1903, under which the offense of obtaining transportation of goods at less than the carrier's published rates may be tried in any federal district through which such transportation was conducted.[34]

§ 4228. Initiation of Proceedings.—See elsewhere.[35]

§ 4229. Parties.—Both the corporation and its agents may be joined in an indictment for violating the provisions of the Act of Feb. 19, 1903, against rebates, under which the commission by corporate officers or agents, acting within the scope of their employment, of criminal violations of the provisions of that act, is imputed to the corporation, and the corporation subjected to criminal prosecution therefor.[36]

§§ 4230-4234. Indictment—§ 4230. For Failure to File Rates.—An indictment of a carrier for failure to file its tariff of rates for petroleum, es-

ruary 19, 1903 (32 Stat at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), under which the commission by corporate officers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor. New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

31. New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304, citing Berea College *v.* Commonwealth, 211 U. S. 45, 53 L. Ed. 81, 29 S. Ct. 33, and The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

32. Act of agent in making rates.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304.

33. Jurisdiction and venue.—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

The giving or receiving of a rebate whereby property in interstate or foreign commerce is transported at a less rate than that legally published, denounced by Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], is a continuous crime within the jurisdiction of any United States court having jurisdiction of crimes through whose district the transportation is conducted. Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400.

34. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

35. Initiation of proceedings.—See ante, "Particular Powers," § 4154.

36. Parties.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304, affirming 146 Fed. 298.

tablished under a common arrangement for interstate shipment, alleged the establishment of a rate for carrying petroleum between intrastate terminals under a common arrangement for a continuous interstate shipment, and that each of the shipments under such rate were under shipping orders, transfer slips, and waybills, showing that the commodity was to be transported from the point of shipment to destination by a continuous route without unloading or transshipment. The indictment sufficiently charged a common arrangement between the various carriers for a through interstate shipment under a joint tariff.[37]

§ 4231. For Departure from Published Rate.—An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of the Act of Feb. 19, 1903, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.[38] An indictment against a railroad company for a failure to observe its published tariffs by extending credit to a shipper under joint rates for a part of the freight due is not insufficient because it does not exclude the possibility that it received in cash its own share of such freights.[39]

§ 4232. For Discrimination and Preference.—The offense of the unjust discrimination, under § 2 of the Interstate Commerce Act, is not confined to discrimination by means of some device, as by a special rate, rebate, or drawback, but is committed by directly giving different rates to different persons; and an indictment under that section need not aver by what particular device the discrimination was accomplished.[40] An indictment under § 2 of the Interstate Commerce Act, which fully and amply alleges all the details of time, place, distance, amount, and kind of freight transported for one shipper and then charges that the service was for a less compensation than was received from another shipper for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, sufficiently describes the services rendered for the other shipper.[41] Under § 3 of the act, making it unlawful for a carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality in any respect whatever or to subject any particular person or company to any undue or unreasonable prejudice or disadvantage, a count in an indictment is sufficient if it shows with requisite certainty that the defendant has committed an act giving one shipper or class of shippers an advantage, or subjecting others to a disadvantage; and it need not allege that the discrimination was committed under substantially similar circumstances and conditions, as required under § 4, containing the long and short haul clause.[42]

Establishment of Joint Rate.—An indictment against an interstate carrier for discrimination alleging that, under a common arrangement between the connecting carriers, the commodity which was contained in tank cars was transported without stoppage or interruption and was accompanied by written shipping orders, waybills, and transfer slips indicating a through transportation, the

37. **Indictment.**—United States *v.* New York, etc., R. Co., 153 Fed. 630.

38. **For departure from published rate.**—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

39. United States *v.* Hocking Valley R. Co., 194 Fed. 234.

40. **For discrimination and preference.**—United States *v.* Tozer, 37 Fed. 635, 2 L. R. A. 444.

41. United States *v.* De Coursey, 82 Fed. 302.

42. United States *v.* Tozer, 37 Fed. 635, 2 L. R. A. 444.

rate and place of destination, sufficiently alleged prima facie a common arrangement between the carriers for a through shipment.[43] Where in a prosecution against a carrier for discrimination, the indictment alleges that a common arrangement existed between the defendant and three other connecting carriers named for a continuous forwarding of property, in interstate commerce, between two specified points, and that the defendant kept open for public inspection its printed tariff of rates, and filed the same as required by law, with the allegation that the shipment in question was accompanied by written shipping orders, waybills, and transfer slips showing a continuous shipment between such points, it sufficiently charges the establishment of a joint tariff of rates for the commodity in question, without alleging that all the connecting carriers concurred in such joint rate, or that it was filed with the interstate commerce commission by their joint action.[44]

§ 4233. For Granting Rebate or Concession.—In view of the provisions § 1025 of the Revised Statutes of the United States, which provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. An indictment under the Act of Feb. 19, 1903, which specifically states the elements of the offense charged with sufficient particularity to fully advise the defendant of the crime charged to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution of the same offense is sufficient. It is only substantial defects that are available to reverse a judgment of conviction.[45] An indictment which states that a carrier gave a rebate to one shipper without stating any instance in which the carrier refused a like rebate to any other shipper is defective, as not showing discrimination.[46] The indictment need not use the word "concession" in describing the offense.[47]

Time Shipment Made.—Under that clause of the Interstate Commerce Act which forbids carriers collecting greater or less compensation than is specified in their published schedules, an indictment which charges that defendants were officers of a railroad company which was a common carrier between designated points in different states; that a certain rate was in force between such points; that defendants, during a certain period of time, received such rate from a certain shipper; and that, at a certain time, they unlawfully and willfully paid such shipper a certain rebate, is good, even though it does not state the day or days where the shipments were made.[48]

43. Establishment of joint rate.—United States *v.* Pennsylvania R. Co., 153 Fed. 625.

44. United States *v.* Pennsylvania R. Co., 153 Fed. 625.

Where an interstate carrier was indicted for charging a lower rate than that established by a filed joint tariff over a specified route for transportation of petroleum between the same termini over a different route, the indictment was not defective for failure to allege that the lower rate over the latter route was not scheduled and filed as required by Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158]. United States *v.* Pennsylvania R. Co., 153 Fed. 625.

45. For granting rebate or concession.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304; S. C., 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309; Connors *v.* United States, 158 U. S. 408, 39 L. Ed. 1033, 15 S. Ct. 951.

46. United States *v.* Hanley, 71 Fed. 672.

47. Need not use word "concession."—Under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), making the willful giving of concessions by interstate carriers from the established and published tariff rates an offense, an indictment alleging that the established and punished rate per car for bulk lime between two points was $70 per car of 40,000 pounds minimum, and that defendant charged and received for a specified car the sum of $64.75 and no more, sufficiently charged that defendant granted a "concession" prohibited by the statute, though the count did not use the word "concession" to describe the alleged rebate. United States *v.* Atchison, etc., R. Co., 163 Fed. 111.

48. Time shipment made. — United States *v.* Hanley, 71 Fed. 672.

Matters of Defense.—In an indictment charging an interstate carrier with the giving of rebates, where it is averred that defendant received the legal rate, and granted and paid to the shipper a certain rebate or concession, whereby it transported the property shipped at less than the legal rate, it is not necessary to allege a prior agreement for such rebate, nor need the indictment negative the existence of conditions or circumstances which might render the payment legal; that being a matter of defense.[49]

Device by Which Obtained.—The device by which a rebate is brought about is not an essential element of the crime, and it is unnecessary to plead it in the indictment.[50]

Reasonableness of Published Rate.—An indictment for giving or receiving rebates, need not allege that the carrier's published rate was a reasonable rate, nor set out its tariffs in full, it being sufficient to aver that a certain named rate was in force between designated points as shown by the published tariffs.[51]

Establishment of Joint Through Rate.—An indictment charging an interstate carrier with giving a concession whereby a shipper secured through transportation of property between two points at less than the lawful rate is not insufficient because it does not aver the through rate, where it states the amount of the concession and that it was given from the lawful rate over a certain part of the route, which rate is also given.[52] An indictment which charges that there was an arrangement between several carriers having connecting lines for the continuous transportation of property over such lines between certain points, and that the lowest total rate as shown by the published tariffs of said several carriers was a certain sum per hundred pounds on a particular product, but that such product was transported for defendant at a lower rate, is bad, in that it does not negative the existence of a joint through rate lower than the total of the local rate.[53]

Knowledge and Intent.—An indictment against a carrier for receiving a rebate is sufficient, although it does not allege that the carrier, when the shipment was made, intended to charge less than the schedule rate.[54] An indictment against a railroad company and the agent of certain shippers, alleging that full schedule rates were first paid by the railroad company for the transportation of certain freight, and that thereafter a certain sum was paid to the shipper's agent by way of rebates and concessions in respect to the transportation of freight under a previously made unlawful agreement, sufficiently charged that the payment of the rebate was a willful failure to observe the published tariff, and therefore stated a violation of the interstate commerce act.[55]

Shipments in Carload Lots.—Because an indictment for receiving a concession from the published rate on an interstate shipment of property alleges that such shipment was made in car load lots, or in cars not owned by the carrier, it does not follow as matter of law that such fact justified the departure from the published rate so as to render the indictment demurrable.[56]

49. **Matters of defense.**—United States *v.* Chicago, etc., R. Co., 151 Fed. 84.

50. **Device by which obtained.**—Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400. An indictment against a railroad company for granting rebates in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), need not set out a particular description of the device resorted to, but is sufficient where it avers the kind of property shipped, the time and place when and where shipped, the consignee, the existing legal tariff for such shipment, the payment thereof by the shipper, the subsequent payment of the rebate by the carrier to the shipper, and the time and amount of such payment. Judgment, United States *v.* Chicago, etc., R. Co., 151 Fed. 84, affirmed in 162 Fed. 835.

51. **Reasonableness of published rate.**—United States *v.* Standard Oil Co., 148 Fed. 719.

52. **Establishment of joint through rate.**—Chicago, etc., R. Co. *v.* United States, 157 Fed. 830, judgment affirmed in 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439.

53. United States *v.* Standard Oil Co., 148 Fed. 719.

54. **Knowledge and intent.**—United States *v.* Hanley, 71 Fed. 672.

55. United States *v.* New York, etc., R. Co., 146 Fed. 298.

56. **Shipments in car load lots.**—United States *v.* Vacuum Oil Co., 153 Fed. 598.

Variance between Allegations and Proof.—In a prosecution for rebating in the application of transit rates to certain local shipments of lumber, evidence that one of the cars was sold to a railroad company and transported over its own line for a part of the outgoing distance, and the charges for such portion of the distance absorbed by it, did not constitute a fatal variance.[57] Where a carrier was charged with rebating in applying a transit tariff to local shipments, the fact that the indictment charged the giving of a rebate on the outbound shipment while the proof showed that it was given on the inbound shipment if at all, and that the indictment averred violations of the local tariffs while the proof showed violations of the transit tariffs, was not a fatal variance.[58]

Number of Offenses Charged.—In a prosecution of an interstate carrier for rebating in applying transit rates to fourteen separate local shipments of lumber, the court properly held that there were fourteen separate offenses, though there were only ten separate refunds.[59]

Setting Out Method or Device.—An indictment against an interstate carrier for rebating need not set out the method or device resorted to to avoid the law.[60]

§ 4234. Indictment against Express Company.—An indictment which charges that an express company is a corporation and common carrier engaged in the transportation of property by railroad from one state to other states, but which does not show that such company is a mere adjunct or bureau of a railroad company or combination of railroad companies, does not bring such express company within the purview of said act.[61]

§ 4235. Burden of Proof.—In a prosecution of an interstate carrier for charging a less rate for the transportation of petroleum between two specified termini in different states than that scheduled in a filed joint tariff, in violation of the Interstate Commerce Act the burden is on the government to show a common arrangement for a continuous carriage between the points mentioned in the filed joint tariff.[62]

§ 4236. Evidence.—Where a carrier was charged with rebating in applying transit rates to certain so-called outbound local shipments, evidence of the carrier's acts concerning inbound shipments, disclosing a scheme calculated to conceal and carry out the offense charged in the indictment, is admissible.[63] Where an interstate carrier was indicted for rebating in applying lower transit rates to certain local shipments of lumber, evidence concerning all other transit shipments made by the shippers during the months in which such shipments were made is properly excluded.[64]

§ 4237. Instructions.—Submitting to the jury on a prosecution against a shipper for accepting rebates in violation of the Act of Feb. 19, 1903, the question whether or not there was a device to avoid the operation of the act and to obtain the transportation at less than the carrier's published rates, did not prejudice the accused, where, under that act, no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense, any means by which transportation by a concession from the established rate was had being sufficient to work a conviction.[65]

57. **Variance between allegations and proof.** — Nichols, etc., Lumber Co. *v.* United States, 212 Fed. 588.

58. Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

59. **Number of offenses charged.**—Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

60. **Setting out method or device.**—Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

61. **Indictment against express company.**—United States *v.* Morsman, 42 Fed. 448.

62. **Burden of proof.**—United States *v.* Pennsylvania R. Co., 153 Fed. 625.

63. **Evidence.**—Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

64. Grand Rapids, etc., R. Co. *v.* United States, 212 Fed. 577.

65. **Instructions.**—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed.

Province of Court and Jury.—Instructing on trial of a carrier for giving rebates to take into consideration the absence of a certain witness and the nonproduction of books in which entries were made concerning the transactions in question is not prejudicial error, where the jurors are left to attach such weight to these circumstances as they see fit, and are further instructed that there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce any paper for which the government asked.[66] In considering the sufficiency of an indictment for receiving an unjust discrimination in rates from a carrier on an interstate shipment of property any doubts as to the correct construction of the statute should be resolved in favor of the evident intention of Congress that equality among shippers should be maintained, and unjust discrimination and favoritism of all kinds condemned, leaving the question whether the existing conditions justified the difference in rates charged to be determined as one of fact on the trial.[67]

§ 4238. **Criminal Liability of Officers and Agents.**—Where a carrier is a corporation, not only the carrier itself, but the officers individually, are subject to indictment for violation of the Interstate Commerce Act.[68] Where an unlawful arrangement was made by the assistant general freight agent, the fact that the local freight agent, and the agent who made out the bills of lading, knew that there was something unusual and out of the ordinary course of business in such shipments, is not sufficient notice to them that the company was violating said act to make them criminally liable therefor.[69]

A receiver, not being bound to continue contracts made before his appointment, is not criminally liable, under § 6 of the Interstate Commerce Act, for the violation of a joint tariff previously established by the railroad company of which he is receiver and another company, and which he has not ratified, adopted, or recognized in any way.[70]

Violation of Long and Short Haul Clause.—An agent of a railroad, who merely collects freights, and has nothing to do with fixing them, is not indictable for a violation of the long and short haul clause of the Interstate Commerce Act.[71]

Indictment.—Under § 10 of the Act of Feb. 4, 1887, making any agent of a railroad company subject to the provisions of the act amenable to its penalties, who willfully does any of the prohibited acts, an allegation that defendant, at the time the offense was committed, was agent of a certain railway company, and had general charge of its freight office at Hannibal, sufficiently shows that the offense was committed under color of his office or agency; and it is not necessary to allege or prove that the particular act complained of was done under the direction or authority of the principal.[72]

§§ 4239-4244. **Criminal Liability of Shipper—§ 4239. Inducing Carrier to Discriminate.**—The interstate commerce law makes it unlawful for a carrier to issue bills of lading at rates different from those established and filed with the commission, or to demand or receive freight charges variant from such established rates. The act makes it penal for any person to knowingly obtain transportation at less than the regular rates in force at the time. It is not in the

681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

66. Province of court and jury.—New York, etc., R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304, affirming 146 Fed. 298.

67. United States *v.* Vacuum Oil Co., 153 Fed. 598.

68. Criminal liability of officers and agents.—In re Pooling Freights, 115 Fed. 588.

69. United States *v.* Michigan Cent. R. Co., 43 Fed. 26.

70. United States *v.* De Coursey, 82 Fed. 302.

71. Violation of long and short haul clause.—United States *v.* Mellen, 53 Fed. 229.

72. Indictment.—United States *v.* Tozer, 37 Fed. 635, 2 L. R. A. 444.

contemplation of the act that persons dealing with common carriers should be held to know their published schedules of rates. The consignee can recover the value of goods held by the carrier for the collection of the joint schedule rate instead of the contract rate, where it does not appear that he or the consignor knew of such rate.[73] A shipper is guilty of accepting transportation at less than the carrier's published rates, in violation of the act, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.[74] A shipper is not responsible for the act of the carrier in fixing the rate at less than that required by the interstate commerce commission, in the absence of knowledge that the rate fixed is illegal.[75]

Necessity for Posting Schedule of Rates.—Compliance with the requirements of the Act of June 29, 1906, that copies of schedules and tariffs for the use of the public shall be "posted" in two public and conspicuous places in every depot, so as to be readily accessible to the public, is not essential to bring a tariff within the provision of such act making it a misdemeanor for any shipper knowingly to solicit, accept, or receive a rebate or concession whereby property is transported in interstate commerce at a less rate than that named in the tariffs "published and filed" by such carrier, as publication is a step in establishing rates, while posting is a duty arising from the fact that they have been established.[76]

Necessity for Device or Contrivance.—A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating the Elkins Act of February 19, 1903, making it a criminal offense for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced.[77]

Shipment to Foreign Country.—Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of the Act of Feb. 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.[78]

73. Inducing carrier to discriminate.—Defendant agreed to carry goods from C., Ill., and deliver them to plaintiff at a point in Alabama on the line of the M. & B. R. R., with which road defendant had a joint tariff. The bill of lading called for $5.44 freight charges, but the M. & B. road refused to deliver the goods except on payment of $29.30, the schedule rate. Held, that plaintiff could recover the value of the goods, since it did not appear that he or the consignor knew of the schedule rate. Mobile, etc., R. Co. *v.* Dismukes, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113.

74. Elkins Act February 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880); Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

75. Southern Kansas R. Co. *v.* Burgess Co. (Tex. Civ. App.), 90 S. W. 189.

76. Necessity for posting schedule of rates.—United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 S. Ct. 323. See, also, Texas, etc., R. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 S. Ct. 358; Kansas, etc., R. Co. *v.* Albers Comm. Co., 223 U. S. 573, 56 L. Ed. 556, 32 S. Ct. 316.

77. Necessity for device or contrivance.—Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439, affirming judgment, 157 Fed. 830.

78. Shipment to foreign country.—Armour Packing Co. *v.* United States, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment, 157 Fed. 830.

Shipments under Prior Contract.—A shipper is guilty of accepting transportation at less than the carrier's published rates, where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.[79]

Liability for Acts of Servants.—The shippers of the lumber may be convicted of procuring an illegal rate, if their servants procured an unlawful discrimination in rates, provided they knew of such unlawful acts, permitted them to continue, and received, directly or indirectly, the benefit of them; for it was their duty to see that the law was not violated by their subordinates by reason of their own negligence.[80]

Conspiracy to Induce Discrimination.—Where an indictment, charges a conspiracy between lumber merchants and their servants and an employee of a railroad company to procure less than the established rates by falsely weighing the lumber shipped, such weighing being done by the railroad employee, the jury, in order to convict, must find an agreement between two or more of defendants for the purpose named, and also, as an overt act, the actual false weighing of lumber by such employee.[81]

§ 4240. Receiving Rebates.—The Act of Feb. 19, 1903, prohibits any person or corporation from receiving any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, etc., and declares that every person or corporation who shall accept or receive any such rebates or concession shall be guilty of a misdemeanor, and on conviction be fined. The gist of the offense was the receipt of a concession, irrespective of whether the property involved was train loads, car loads, or pounds, and consisted of the "transaction," which was not completed until the shipper received a rate different from the established rate, without reference to the size of the shipment.[82]

Necessity for Established Rate.—The defendant as shipper made an agreement with a transit company, which was a carrier by water only on the Great Lakes, by which the transit company agreed to protect a rate on a shipment of iron pipe from Philadelphia to Winnipeg. The transit company routed the shipment over a railroad to a port on Lake Erie, thence over its own water line to West Superior, and from there over two railroads to Winnipeg. The shipment was made on through bills of lading issued by the receiving railroad carrier, in which a certain rate was charged, being the sum of its own published through rate to West Superior and the published rates of the other two railroad companies from there to Winnipeg, and such rate was paid by defendant. From the portion of such rate received by the transit company it refunded a certain part to the defendant. The transit company had not published nor filed any schedule of rates under the interstate commerce law. The transit company's participation in the transportation of the property under the through bills of lading and in the rate charged therein was not under a common arrangement between the carriers

79. **Shipment under prior contract.**—Armour Packing Co. *v.* United States, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment, 157 Fed. 830.

80. **Liability for acts of servants.**—United States *v.* Howell, 56 Fed. 21.

81. **Conspiracy to induce discrimination.** — United States *v.* Howell, 56 Fed. 21.

82. **Receiving rebates.** — Judgment, United States *v.* Standard Oil Co., 155 Fed. 305, reversed in 164 Fed. 376.

A suit by a railroad shipper for loss of goods, on a policy of insurance issued to the carrier, after receipt of the limited value fixed on such goods by the carrier's schedules and bills of lading, held in violation of section 6 of the Interstate Commerce Act, as amended by Act June 29, 1906, § 2, as soliciting a rebate or concession, and not maintainable. Duplan Silk Co. *v.* American, etc., Marine Ins. Co., 205 Fed. 724, 124 C. C. A. 18.

with respect to such shipment within the meaning of the act so as to make such rate the lawful rate as against the shipper, nor to render the latter subject to criminal prosecution for receiving a rebate.[83]

Necessity for Posting Schedule.—In a prosecution of a shipper for rebating in knowingly accepting a transit rate applied to certain shipments, which were only entitled to higher local rates, it was no defense that the carrier did not keep two printed copies of its rate sheet posted in two public and conspicuous places in its depot, as required by the interstate commerce law.[84]

Necessity for Device or Contrivance.—A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating the Act of Feb. 19, 1903, making it a criminal offense for any person or corporation to offer, grant, solicit, give or to accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced.[85]

Knowledge and Intent.—A shipper can not be convicted of accepting a concession from the lawfully published rate without proof of knowledge of what such rate in fact was: and hence evidence that the shipper had no knowledge of the published rate, and could only have ascertained the same by construction of several tariff sheets, the application of which was questionable, was admissible.[86]

Persons Liable.—The act provides that it shall be unlawful for any person, persons, or corporations to solicit, accept, or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by the carrier, and that it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration. A refrigerator company organized for the purpose of controlling the interstate transportation of a brewing company, having entered into a contract for rebates with certain railroads, was a "party interested in the traffic," and was therefore subject to the provisions of such act.[87] The fact alone that a defendant is a stockholder in a corporation which has accepted rebates in violation of law does not render him subject to the penalty imposed by the statute therefor.[88] The fact that a shipper who contracts for and receives a rebate in violation of the statute personally receives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability.[89] A consignee, no less than the consignor, is chargeable with a violation of § 1 of the Act of Feb. 19, 1903, by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination which form a part of the tariffs as so published.[90]

Excuses for Receiving Rebate.—On the trial of a shipper charged with having obtained a concession from the lawful published rate on interstate shipments in violation of the federal statute, the facts that another railroad may have

83. Necessity for established rate. — Judgment, United States *v.* Camden Iron Works, 150 Fed. 214, reversed in 158 Fed. 561, 85 C. C. A. 585.

84. Necessity for posting schedule.— Nichols, etc., Lumber Co. *v.* United States, 212 Fed. 588. But see United States *v.* Standard Oil Co., 170 Fed. 988.

85. Necessity for device or contrivance. —Armour Packing Co. *v.* United States, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment, 157 Fed. 830.

86. Knowledge and intent.—Judgment, United States *v.* Standard Oil Co., 153 Fed. 305, reversed in 164 Fed. 376.

87. Persons liable.—United States *v.* Milwaukee, etc., Trans. Co., 145 Fed. 1007.

88. United States *v.* Wood, 145 Fed. 405.

89. United States *v.* Wood, 145 Fed. 405.

90. United States *v.* Standard Oil Co., 148 Fed. 719.

had a published rate approximately as low as that received is immaterial.[91]

Number of Offenses Committed.—It has been held that where a shipper has been continuously receiving concessions from the lawful rate from a railroad company, the government is not limited to a prosecution for a single offense,[92] nor will the obtaining of a concession to remain in force for a year render all shipments made thereunder one offense nor the rendering of monthly freight bills reduce the number of offenses to the number of such bills, but each shipment made at the illegal rate constitutes a separate offense, and where the published rate is on car lots, and the reduced rate is granted on the same basis and a separate charge made for each car, in the absence of evidence showing to the contrary, each car constitutes a separate shipment.[93] The circuit court of appeals, however, reversed the case on the ground that the fine was excessive.[94] In a prosecution against a shipper for receiving concessions from the published rates of a railroad company in violation of the Act of Feb. 19, 1903, which involves continuous shipments covering a number of years, there can be no greater number of offenses than there were payments of freight, in which concessions were granted and received, such receipt being the completion of the transaction which constitutes the offense.[95] To warrant a conviction of a shipper for receiving rebates, the fact of the payment of such rebate by or on behalf of the carrier, and its receipt by or on behalf of defendant, must be proved, and each payment constitutes but one offense, although it may cover more than one shipment.[96]

§ 4241. False Billing of Goods.—Where a shipping order describing the contents of a car was so worded as to intentionally conceal its true character, and induce the carrier to apply a less rate than was legally applicable, the shippers were guilty of a false representation, for which they were subject to prosecution under Interstate Commerce Act.[97] A contention that a shipper, innocent at the time, and ignorant of any classification or difference in rate, who shipped a race horse and paid the freight charged by the agent without being informed of the valuation made, is guilty of an offense under the statute, because he sues for injuries to the horse and seeks to recover the true value of the horse regardless of the rating, is self-refutatory.[98]

91. **Excuses for receiving rebate.** — United States *v.* Standard Oil Co., 155 Fed. 305.

92. **Number of offenses committed.**— United States *v.* Standard Oil Co., 155 Fed. 305.

93. United States *v.* Standard Oil Co., 155 Fed. 305.

94. Defendant, Standard Oil Company of Indiana, was found guilty on 1,462 counts of an indictment for receiving concessions from a railroad company on shipments of oil, in violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, § 1 (U. S. Comp. St. Supp. 1907, p. 880). Defendant's capital stock was $1,000,000, and there was no evidence that its assets were in excess of that sum, nor did it appear that defendant had ever been guilty of a similar offense. A majority of defendant's capital stock was owned by the Standard Oil Company of New Jersey, which was no party to the prosecution, whose capital stock was $100,000,000. This corporation was a holding company, and its net earnings for the period during which the concessions were received the court investigated before passing sentence. Held, that the assessment of fine of $29,240,000, which was the maximum punishment on each count, based on a finding that such amount was less than one-third of the net revenues of the Standard Oil Company of New Jersey during the period of violation, the effect of which would be to bankrupt the defendant, was excessive, and an abuse of discretion. Judgment, United States *v.* Standard Oil Co., 155 Fed. 305, reversed in 164 Fed. 376.

95. United States *v.* Standard Oil Co., 170 Fed. 988.

Where defendant was indicted for receiving a concession, rebate, and discrimination on twenty shipments of lumber, but it appeared that there were only six rebate settlements with the carrier, defendant was guilty of but six offenses. United States *v.* Stearns, etc., Lumber Co., 165 Fed. 735.

96. United States *v.* Bunch, 165 Fed. 736.

97. **False billing of goods.**—United States *v.* Sterling Salt Co., 200 Fed. 593.

98. Kessenger *v.* Fitzgerald, 67 S. E. 588, 152 N. C. 247.

§ 4242. Indictment.—An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of the Act of Feb. 19, 1903, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.[99] An indictment under the Act of Feb. 8, 1897, charging the defendant with having deposited with an express company, for carriage to another state, "an article designed and intended for the prevention of conception," which charges that such article was contained in a package deposited with an express company named, at a place and on a date named, addressed to a particular person at a designated place in another state, is sufficiently specific, and need not more specifically describe the article.[1]

Alleging Publication of Rate.—An indictment charging a shipper with having received a rebate or concession from the joint rate published and filed by a carrier for the transportation of property between points in different states, is not defective because it does not specifically charge that such rate was required to be filed by the statute, where it alleges that it was published and filed as required by law.[2]

Alleging Soliciting of Rebate.—An indictment charging a shipper with having received a rebate or concession from the joint rate published and filed by a carrier for the transportation of property between points in different states, is not defective because it does not specifically charge that the defendant solicited the concession.[3]

Alleging That Other Shipper Charged Published Rate.—An indictment charging a shipper with having received a rebate or concession from the joint rate published and filed by the carrier for the transportation of property between points in different states, is not defective because it does not specifically name any other shipper who has been charged and paid the higher rate as is required where a discrimination is charged or that any shipment was actually made by the published rate.[4]

Alleging Common Control or Arrangement.—An information for receiving rebates on an interstate or foreign shipment made partly by railroad and partly by water, need not expressly aver that the connecting carriers are used under a common control, management, or arrangement for a continuous service, so as to bring them within the terms of the interstate commerce law where it sets out facts which show that such was the case in respect to the shipment in question.[5]

§ 4243. Issues, Proof and Variance.—In an indictment charging a shipper with having received a concession whereby oil was transported for it in interstate commerce at a less rate than that named in the tariffs published and filed by the railroad company, an averment that such company established, published, and filed a rate on oil between Chicago and St. Louis is not sustained by proof that its schedules named only the rate over its own line from Chicago to East St. Louis, and that the tariff on connecting lines between East St. Louis and St. Louis was a certain amount.[6]

99. **Indictment.**—Armour Packing Co. *v.* United States, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; Chicago, etc., R. Co. *v.* United States, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment, 157 Fed. 830.

1. United States *v.* Popper, 98 Fed. 423.

2. **Alleging publication of rate.**—United States *v.* Vacuum Oil Co., 153 Fed. 598.

3. **Alleging soliciting of rebate.** — United States *v.* Vacuum Oil Co., 153 Fed. 598.

4. **Alleging that other shipper charged published rate.**—United States *v.* Vacuum Oil Co., 153 Fed. 598.

5. **Alleging common control or arrangement.**—United States *v.* Camden Iron Works, 150 Fed. 214.

6. **Issues, proof and variance.**—United States *v.* Standard Oil Co., 170 Fed. 988.

Variance.—In a prosecution for receiving rebates on a shipment of property alleged to have been made from Philadelphia, as the initial point, to Winnipeg, it is immaterial that the shipment in fact originated in Camden, where the property was lightered across the river to Philadelphia and there delivered to the carriers named in the information.[7]

§ 4244. Evidence.—Published Schedule of Rates.—The provision of the Act of Feb. 19, 1903, that in a prosecution of a carrier thereunder for giving a rebate any rate filed by it with the interstate commerce commission, or in which it participates, "shall be conclusively deemed to be the legal rate" as against such carrier, its officers, or agents, merely prescribes the effect to be given such rate as evidence against the carrier, and does not affect its admissibility against a shipper who is being tried for receiving a rebate, and in such case it may properly be received as evidence that the carrier giving, the alleged rebate was subject to the provisions of the act.[8]

Of Common Control or Management.—In a prosecution for receiving rebates from carriers on an interstate or foreign shipment of property over the lines of more than one carrier, any evidence tending to show that the shipment was made under a through bill of lading or upon a contract for continuous carriage by the several carriers is admissible for the purpose of proving that such carriers were used for the purpose of the shipment under a common control, management, or arrangement for a continuous carriage, and the schedules of rates filed with the interstate commerce commission by the several carriers are admissible for the purpose of showing the lawful rate on such shipment.[9]

7. **Variance.**—United States *v.* Camden Iron Works, 150 Fed. 214.

8. **Evidence.**—United States *v.* Camden Iron Works, 150 Fed. 214.

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PART VII.

CARRIERS BY WATER.

CHAPTER XXXVIII.

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§ 4245. General Considerations.—Carriers by Water Common Carriers.—A carrier by water, whether by inland navigation or coastwise, from port to port, or to and from foreign countries, is a common carrier.[1] If the shipowner directly and publicly offers to carry for all persons indiscriminately, or by his conduct and manner of business holds himself out as ready to carry for all on such trips as the boat makes, he is a common carrier.[2] If he has not offered to carry for all persons indiscriminately, etc., but merely carries in pursuance of special employment, he is not a common carrier.[3] The law is that a ship chartered for a special cargo or to a special person, is merely an ordinary bailee for hire, and not a common carrier.[4] Under the rule of the American courts of admiralty a lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a "common carrier" with respect to such goods, but a "private carrier," and liable only as a bailee for hire.[5]

Control and Regulation.—As to control and regulation of common carriers, see ante, "Control and Regulation," Chapter 2.

Rules and Regulations of Carriers.—For a general treatment of the rules and regulations of carriers, see ante, "Rules and Regulations of Carriers," Chapter 3.

Duty to Receive and Carry—Duty in General.—Generally as to the duty of a common carrier to receive and carry for all alike, see ante, "Duty to Receive and Carry," Chapter 4. The common-law obligation of a carrier by sea is to receive goods which it is able and accustomed to carry, in the order of their tender, without preference to any shipper.[6] And the carrier is liable for any loss or injury resulting from the wrongful refusal to receive and carry goods properly offered for shipment.[7] A navigation company, whose charter confers no power of eminent domain, nor imposes any public duties, is not a public or quasi public corporation, and is not bound to provide sufficient facilities to carry all goods offered, but may decline to receive goods in excess of its transportation facilities.[8]

1. **Common carriers.**—Hastings *v.* Pepper (Mass.), 11 Pick. 41.
As to who are common carriers, see ante, "Who Are Common Carriers," Chapter 1.

2. **Holding out to public alike.**—Bassett *v.* Aberdeen Coal, etc., Co., 120 Ky. 728, 27 Ky. L. Rep. 1122, 88 S. W. 318.

3. **Special employment.**—Bassett *v.* Aberdeen Coal, etc., Co., 120 Ky. 728, 27 Ky. L. Rep. 1122, 88 S. W. 318.

4. **Ordinary bailee.**—Sumner *v.* Caswell, 20 Fed. 249; The Dan, 40 Fed. 691; The Fri, 154 Fed. 333, 83 C. C. A. 205; The Wildenfels, 161 Fed. 864.

5. **Lighter hired exclusively.**—The Wildenfels, 161 Fed. 864.

6. **Failure to receive and carry.**—Ocean Steamship Co. *v.* Savannah, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

7. **Liability for loss, etc., resulting.**—A steamboat carrier is liable for the loss by theft of goods temporarily stored in its warehouse, upon its wrongful refusal to receive them for shipment; the shipper having had no reasonable opportunity to make a safer disposition of the goods. Seasongood *v.* Tennessee, etc., Transp. Co., 54 S. W. 193, 21 Ky. L. Rep. 1142, 49 L. R. A. 270.

8. **Duty as to providing facilities.**—Ocean Steamship Co. *v.* Savannah, etc.,

But a carrier by sea can not reject goods which it professes to carry and thereafter receive other goods where at the time of tender there is room in the vessel for the goods, and the vessel's safety will in no wise be imperiled.[9]

Privilege of Booking Ahead.—The common-law obligation of a common carrier by sea to serve the public impartially in the receipt and transportation of goods does not inhibit a carrier from making "bookings" of freight—that is, from making specific arrangements for the transportation of goods by a particular vessel in advance of its sailing day, provided this privilege is extended to all, or if the grant of this privilege to shippers of one commodity does not interfere with the carrier's duty to shippers of other commodities.[10] But where a carrier by sea, by "booking" cotton going foreign, contracts away its space in advance and declines to receive lumber tendered for shipment before arrival of the booked cotton for transportation, because of its prior booking contracts, and refuses lumber dealers the privilege of booking their commodity solely because it is a domestic shipment, this is an unjust discrimination, for the reason that the booking of cotton going foreign prevents the carrier from discharging its common-law obligation of impartially serving the public.[11]

As Dependent on Quality of Goods.—Cotton does not possess such inherent qualities as to permit a preference to be given to that commodity over all other articles which a steamship customarily carries.[12]

Commodity for Foreign Shipment.—The fact that a commodity is destined to a foreign port can not justify a carrier by sea in giving a preference to it over another commodity because the latter may be a domestic shipment.[13]

Authority of Agent.—Where one, whom a steamboat carrier had permitted to act as its agent in receiving freight for such a length of time as to justify the belief that he was an authorized agent, wrongfully refused to receive freight offered, the carrier can not escape liability on the ground that he had no authority to receive freight for shipment.[14]

Stipulation as to Amount or Value of Cargo Shipped.—The owner of a line of lake steamers can lawfully make a special contract with the shipper not to place more than a specified number of dollars worth of goods on any one of the vessels at one time, and having made such contract, he is bound to perform the same, notwithstanding his common-law duty as a carrier to forward all goods as received.[15]

When Liability Commences.—As to the commencement of the carrier's liability for goods shipped, see ante, "When Liability Commences," Chapter 5.

Special Contracts.—As to special contracts made by carriers for the transportation of goods, see ante, "Special Contracts," Chapter 8.

§§ 4246-4265. Contracts of Affreightment—§ 4246. Defined, Classified and Distinguished.—The object of this treatment is to consider contracts of affreightment as distinguished from contracts chartering a vessel for a voyage, a certain period of time, or a particular purpose, in which the liability is shifted

Supply Co., 63 S. E. 577, 131 Ga. 831, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

9. **Must carry for all alike.**—Ocean Steamship Co. *v.* Savannah, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

10. **Privilege of booking ahead.**—Ocean Steamship Co. *v.* Savannah, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

11. **Prevention of impartial service.**—Merchants', etc., Transp. Co. *v.* Granger, 63 S. E. 700, 132 Ga. 167.

12. **As dependent on quality of goods.**—Ocean Steamship Co. *v.* Savannah, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

13. **Commodity for foreign shipment.**—Ocean Steamship Co. *v.* Savannah, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 15 Am. & Eng. Ann. Cas. 1044.

14. **Authority of agent.**—Seasongood *v.* Tennessee, etc., Transp. Co., 54 S. W. 193, 21 Ky. L. Rep. 1142, 49 L. R. A. 270.

15. **Amount or value of cargo.**—Hood Rubber Co. *v.* Rutland Trans. Co., 161 Fed. 790.

to the charterer. And in order that this distinction may be more thoroughly understood at the outset, it may be well to consider the two classes together for a while. A charter party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places.[16] A contract of affreightment is a contract with a shipowner to hire his ship, or part of it, for the carriage of goods or other property.[17] And such contracts are distinguished from towage contracts, in that towage service is aid rendered in the propulsion of a vessel. It is the employment of one vessel to expedite the voyage of another vessel.[18]

Classification of Charter Parties.—Charter may be divided into two general classes, a demise of the vessel or a simple contract of affreightment.[19] Shipping agreements are also classified according to their difference in the objects and purposes for which they are made. Thus, there is a class of shipping agreements which amount to a demise of the vessel, the charterer being deemed the owner for the time being even so far as third persons are concerned.[20] Where the possession, command and navigation of the vessel is retained by the general owner, contracting to convey the cargo for the voyage, the charterer has not the legal responsibility or the character of ownership. Such an agreement is a mere contract of affreightment.[21] And in the absence of a plainly manifested intention

16. Definition.—Vandewater *v.* Mills (U. S.), 19 How. 82, 15 L. Ed. 554; Ward *v.* Thompson (U. S.), 22 How. 330, 16 L. Ed. 249. See Spring *v.* Gray (U. S.), 6 Pet. 151, 8 L. Ed. 352.

Partnership contract.—A contract whereby certain parties joined together to carry on and advertise in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, etc.—and there was to be a community of profits on a fixed ratio, is not a charter party but a partnership contract of which a court of admiralty has no jurisdiction. Ward *v.* Thompson (U. S.), 22 How. 330, 16 L. Ed. 249.

An agreement between owners of vessels to form a line for carrying passengers and freight between New York and San Francisco, is but a contract for a limited partnership, and the remedy for a breach of it is in the common-law courts. Vandewater *v.* Mills (U. S.), 19 How. 82, 15 L. Ed. 554.

17. Contract of affreightment.—The Nettie Quill, 124 Fed. 667.

The owner and master of a steamer engaged in making regular trips between river ports contracted to transport from one of such ports to another, for a stated charge, a locomotive engine. The barge owned and used by him on such trips not being suitable, it was agreed that the owner of the engine should furnish a barge on which to load the same, which was to be returned by the steamer. The steamer issued a bill of lading in the usual form for the barge and engine, and lashed the barge to her side for the voyage. Held, that the contract was one of affreightment, and not of towage. The Nettie Quill, 124 Fed. 667.

18. Towage service.—The Nettie Quill, 124 Fed. 667; McConnochie *v.* Kerr, 9 Fed. 50.

19. Classification of charter parties.—United States *v.* Shea, 152 U. S. 178, 38 L. Ed. 403, 14 S. Ct. 519; McIntyre *v.* Bowne (N. Y.), 1 John's 229.

20. Agreement amounting to demise.—*English.*—Frazer *v.* Marsh, 13 East. 238.

United States.—Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. Ed. 481.

California.—Oakland Cotton Mfg. Co. *v.* Jennings, 46 Cal. 175, 13 Am. Rep. 209.

Massachusetts.—Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

Michigan.—First Nat. Bank *v.* Stewart, 26 Mich. 83.

New York.—Hagar *v.* Clark, 78 N. Y. 45.

North Carolina.—White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489.

South Carolina.—Ross *v.* Charleston, etc., Transp. Co., 42 S. C. 447, 20 S. E. 285.

Wisconsin.—Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

Miscellaneous cases testing nature of agreement.—Baunwall, etc., Co. *v.* Furness (Eng.), 1 Q. B. 253, affirmed in Appeals 8 ; The Erie, Fed. Cas. No. 4512, 3 Ware 225; Certain Logs of Mahogany, Fed. Cas. No. 2559, 2 Sumn. 589; Urann *v.* Fletcher (Mass.), 1 Gray 125; The India, 14 Fed. 476.

21. Mere contract of affreightment.—*United States.*—Leary *v.* United States, 14 Wall. 607, 20 L. Ed. 756; Shaw *v.* United States, 93 U. S. 235, 23 L. Ed. 880.

Louisiana.—Slark *v.* Broom, 7 La. Ann. 337.

Missouri.—Adams *v.* Homeyer, 45 Mo. 545, 100 Am. Dec. 391.

New York.—Hagar *v.* Clark, 78 N. Y. 45.

Where space reserved by owner.—Swift *v.* Tatner, 80 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

to transfer the possession and ownership to the charterer, such an agreement will not be treated as a demise of the vessel, but will be considered as a mere contract of affreightment.[22] Again, there are cases where a master hiring a vessel on shares may become the owner pro hac vice during the period which the contract exists; as where he agrees to man the vessel and employ her at his own discretion, having the possession and command of the vessel, and not being subject to the orders or directions of the owner of the vessel.[23] However, this rule is not applied in some jurisdictions and the master in such cases is not considered as the owner pro hac vice.[24] But where a part owner of a vessel takes it under such a contract he should be deemed the owner pro hac vice, he being in no sense the agent of his co-owners.[25] There is another class of charter parties known as time charter. They are made for a certain length of time,[26] or, as is usually the case, to cover such period as may be required for a certain voyage or number of voyages.[27] In a time charter a month will be held to mean a calendar month unless it is otherwise stipulated,[28] and where a charter is made without any time limit it will be held to be an hiring for all voyages undertaken prior to notice by the owner of his intention to end the contract.[29] Where vessels are chartered by the government, the government has the same rights, and is subject to the same rules and liabilities as other charterers.[30]

Releting Vessels by Charterer.—Where it is so provided by the charter party, the charterer may relet the vessel and such subcontracts made by him are binding upon the vessel.[31]

§ 4247. Persons Who May Make.—A contract of affreightment may be executed by the parties themselves or by duly authorized agents acting for and in their behalf, provided there is a sufficient meeting of the minds.[32] Thus, it may be executed by the managing owners,[33] the ship's husband, whether he be a part owner of the vessel or not,[34] or the master of the vessel in a foreign part,

22. Presumption against demise.—Urann *v.* Fletcher (Mass.), 1 Gray 125; Ross *v.* Charleston, etc., Transp. Co., 42 S. C. 447, 20 S. E. 285; Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220; Hagar *v.* Clark, 78 N. Y. 45.

23. When master owner pro hac vice.—Thomas *v.* Osborn (U. S.), 19 How. 22, 15 L. Ed. 534; Thorp *v.* Hammond (U. S.), 12 Wall. 408, 20 L. Ed. 419; Marshall *v.* Boardman, 89 Me. 87, 35 Atl. 1024, 56 Am. St. Rep. 392; Tucker *v.* Stimson (Mass.), 12 Gray 487.

24. Rule not applied.—Steel *v.* Lester (Eng.), C. P. Div. 121; McCready *v.* Thorn (N. Y.), 49 Barb. 438.

25. Rule applied to part owner.—Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743. See the case of Fox *v.* Holt, Fed. Cas. No. 5012, 36 Conn. 558, 4 Ben. 278.

26. Time charters.—Reeve *v.* Davis (Eng.), 1 Ab. & El. 312, 28 E. C. L. 95; Winter *v.* Simonton, 3 Cranch C. C. 104, Fed. Cas. No. 17,894; Swift *v.* Tatner, 80 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101; Hunt *v.* Metcalf, 47 Fed. 73.

27. Voyage charters.—Leary *v.* United States (U. S.), 14 Wall. 607, 20 L. Ed. 756; Mactier *v.* Wirgman (Md.), 4 Har. & J. 568; Cutler *v.* Lennox, 137 Mass 506.

28. Month defined.—Jolly *v.* Young (Eng.), 1 Esp. N. P. 186.

29. No limit specified.—Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103, citing Cutler *v.* Winsor (Mass.), 6 Pick. 335, 17 Am. Dec. 385.

30. Government charters.—White *v.* United States, 154 U. S. 661, 26 L. Ed. 178, 14 S. Ct. 1192; Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220.

31. Releting vessels by charter.—The T. A. Goddard, 12 Fed. 174.

32. Who may execute.—Prentice *v.* United States, etc., Steamship Co., 58 Fed. 702; Terry *v.* Brightman, 132 Mass. 318.

Authority given an agent by a shipowner, who was a nonresident, to "look after" certain barges employed in the general carrying trade, to make contracts for their services, collect freight, etc., is not to be so narrowly construed as to render invalid a charter for the carrying of five cargoes by two of the barges, to be performed within two months, which was accepted and acted upon by the charterer in good faith. The S. L. Watson, 118 Fed. 945, 55 C. C. A. 439.

Where minds meet and agree.—Compania, etc., Navegacion *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. 142; Starr & Co. *v.* Galgate Ship Co., 68 Fed. 234.

33. By managing owners.—Bangs *v.* Lowber, 2 Cliff. 157, Fed. Cas. No. 840.

34. Ships husband.—Darby *v.* Baines (Eng.), 21 L. J., N. S., Ch. 801.

unless there is an authorized agent of the owner at that point.[35] But neither a part owner of a vessel nor the master of the vessel in the home port can make a binding charter party without authority for that purpose.[36] Contracts of affreightment entered into by the master, within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel; and whether the master be the agent of the general or special owner—and this upon the principle that the general owner must be presumed to consent when he lets the vessel that the master may make such contracts, which operate as a tacit hypothecation of the vessel.[37]

Owner Pro Hac Vice.—If the general owner has allowed a third person to have the entire control, management and employment of the vessel, and thus become owner pro hac vice, the general owner must be deemed to consent that the special owner or his master may create liens binding on the interest of the general owner in the vessel, as security for the performance of such contracts of affreightment.[38] Though in such a case the special owner would be estopped, in favor of a bona fide holder of the bill of lading, from proving that no property was shipped, yet the general owner is not estopped.[39] But no such implication arises in reference to bills of lading for property not shipped, designed to be instruments of fraud; and they create no lien on the interest of the general owner, although the special owner was the perpetrator of the fraud.[40]

Agent Changing Contract without Authority.—Where the terms and conditions upon which horses were to be carried on a vessel had been fully agreed upon by the shipper and vessel owner, a subsequent contract signed when the horses were loaded, at the instance of the carrier, by the shipper's head teamster without authority from the shipper, and differing materially in its terms from the previous agreements, was void.[41]

§§ 4248-4249. Contents, Form and Requisites—§ 4248. In General.—A contract of affreightment generally takes the form of a charter party or of a bill of lading.[42]

§ 4249. Requisites of Contract.—No Particular Form Required.—No technical form is essential to create a demise or contract of affreightment.[43] As no particular form or solemnity of execution is required for a contract of a common carrier to transport goods, it may be by parol, or it may be in writing; in either case it is equally binding.[44] A charter party may be made by parol.[45]

35. **Master of vessel in foreign port.**—Hurry *v.* Hurry, Fed. Cas. No. 6922, 2 Wash. C. C. 145; Ward *v.* Green (N. Y.), 6 Cow. 173.

36. **Part owners.**—Broadie *v.* Howard (Eng.), 17 C. B. 109; The A. M. Bliss, 2 Lowell 103, Fed. Cas. No. 274; Kimball *v.* Tucker, 10 Mass. 192.

Master in home court.—The Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171.

37. **Master owner pro hac vice.**—Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; Thomas *v.* Osborn (U. S.), 19 How. 22, 15 L. Ed. 534.

38. Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341.

39. **Estoppel to deny shipment of goods.**—Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341. See, also, post, "Delivery to Carrier," § 4323.

40. **Bills of lading designed as implement of fraud.**—Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341.

41. **Power of agent to make new contract.**—The Olympia, 156 Fed. 252.

42. The Nettie Quill, 124 Fed. 667; Mande & P. Merc. Shipp. 227; Smith's Merc. Law, 295; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

43. Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 634, 5 L. Ed. 696; Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47; United States *v.* Shea, 152 U. S. 178, 38 L. Ed. 403, 14 S. Ct. 519.

"**The contract of affreightment,** like any other contract, is the creature of the will of the parties. It may be varied to infinity, and easily adapted to the exigencies of either party or of any trade. It is only where the express contract is silent, that the implied contract can arise." Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47; Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 634, 5 L. Ed. 696.

44. **Form—Necessity of writing.**—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566.

45. **Charter party.**—Thomas *v.* Osborn

In Form of Bill of Lading.—Where it takes the form of a bill of lading it is evidenced by a receipt for the property shipped, and a promise or undertaking to transport and deliver the same as therein stipulated.[46] The bill of lading usually sets forth the time of the contract, and shows the duty assumed by the vessel.[47]

Marginal Notes.—A marginal note placed on a bill of lading by the shipper is no part of the bill.[48]

Ship Bill—Memorandum by Carrier.—A memorandum found at the foot of the ship bill which is not upon those delivered to the shipper, is no part of the contract.[49]

Acceptance—Meeting of Minds.—The minds of the parties must meet as to its terms before a charter party or an affreightment contract can become a binding agreement. If there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity, as to all its clauses.[50] If

(U. S.), 19 How. 22, 15 L. Ed. 534. So held where the master in command of a barque contracted with the owners to take her on what is termed "a lay," there not appearing to be any written contract of affreightment between them.

46. The Nettie Quill, 124 Fed. 667.

47. Vandewater *v.* Mills (U. S.), 19 How. 82, 15 L. Ed. 554.

48. Marginal note placed on bill by shipper.—A marginal note put by the quartermaster's department on bills of lading of vessels chartered by them, "that if on the arrival of the vessel at the port of destination the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," does not make a part of the contract entered into by the vessel; and if her port of destination be plainly expressed in the body of the bill, the consignee can not, in virtue of the marginal memorandum, order her to go forward to another port. United States *v.* Kimbal (U. S.), 13 Wall. 636, 20 L. Ed. 503, 7 Ct. Cl. 234.

49. The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804.

50. Compania, etc., Navegacion *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. 142, citing Eliason *v.* Henshaw (U. S.), 4 Wheat. 225, 4 L. Ed. 556; Insurance Co. *v.* Young (U. S.), 23 Wall. 85, 23 L. Ed. 152; Tilley *v.* Cook, 103 U. S. 155, 26 L. Ed. 374; and Minneapolis, etc., R. Co. *v.* Columbus Rolling-Mill, 119 U. S. 149, 30 L. Ed. 376, 7 S. Ct. 168.

A contract is void for want of mutuality. Dorsey *v.* Packwood (U. S.), 12 How. 126, 13 L. Ed. 921; American Cotton Oil Co. *v.* Kirk, 15 C. C. A. 540, 68 Fed. 791; Richardson *v.* Hardwick, 106 U. S. 252, 1 S. Ct. 213, 27 L. Ed. 145; Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474.

Where the charterer never promised to make or pay for alterations required to fit up the tanks of a vessel to carry petroleum in bulk. The owner of the vessel is not entitled to recover from the charterer any part of the expense of such alterations. Compania, etc., Navegacion *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. 142.

Receipt for post of consignment by person in charge of deck.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

A writing, delivered by defendant steamship company to plaintiff, reciting: "New York, 2/28/1907. Per steamer Kaiser Wilhelm der Grosse. Engaged from W. N. White & Co. Delivery March 4th. Goods: 6 cars Fr. Apples. Destination, Hamburg. North German Lloyd S. S. Company. * * * Receiving Clerk, North German Lloyd Piers, Hoboken: Receive for shipment per German steamship Kaiser Wilhelm der Grosse, on March 4th, the following goods for account of W. N. White & Co.: 1 car Fr. Apples. * * * Notice. Ship's receipt must be surrendered and bills of lading procured at the company's office"—did not amount to a contract creating the relation of carrier and shipper, but was no more than a mere offer to receive the apples on board the vessel, and lacked the requisite mutuality; and hence, where plaintiffs delayed delivery to the vessel, they could not recover damages for refusal of defendant to receive the apples on account of the vessel having been loaded to its full capacity. White *v.* North German Lloyd Steamship Co., 113 N. Y. S. 805, 61 Misc. Rep. 268.

The agent of the owner made a conditional sale of a raft of timber, retaining title until payment of the price, and with his consent the purchaser towed it alongside a vessel and obtained from the mate in charge an "alongside receipt" in the agent's name. Being refused to draw a draft on a proposed consignee with bill of lading attached, with the consent of the agent he returned the receipt to the mate, who accepted it and removed the timber to a wharf at some distance, where its return was accepted by the agent of the owner. Later, without the knowledge of either, the vessel loaded the timber on board. No contract of affreightment

a shipowner seeks to enforce part of a charter party, he must rely on the instrument as a whole; he can not affirm it for one purpose and repudiate it for another.[51]

Unilateral Contract.—It is only when the contract has been executed, and the defendant thereby benefited, that he can be held bound by such a unilateral contract.[52]

Shipping Permits.—Permits, which are mere instrumentalities of convenience, employed by a steamship company to facilitate the classification, distribution, and loading of the cargo, obligate the carrier in no way. They can be revoked at any time before the offer of goods for shipment. Until that time there can be no certainty on the part of the steamship company as to whether the goods will arrive or not, and it has no assurance that, if it should reserve space for them to the exclusion of other freight and thus be obliged to leave port without a full cargo, it would be reimbursed for its loss.[53] At most the permit constitutes an offer by the steamship company to receive the goods on board its steamer, but does not bind the shipper to deliver them. It therefore lacks the element of mutuality and can not bind the carrier.[54]

§§ 4250-4260. Interpretation, Operation and Effect—§§ 4250-4256. Rules of Construction—§ 4250. General Rules—Charter Parties.—The general rule adopted, in the construction of charter parties and contracts of affreightment, is that the construction should be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates.[55] In construing shipping contracts

therefor was made by any one with the ship. Held, that under such facts the taking of the timber was wrongful, and that the vessel was liable for its conversion. The Norman Prince, 185 Fed. 169.

Delivery of vessel to charterer.—Where the owner refuses to agree to certain clauses in the charter party, a delivery of the vessel to the charterer and her acceptance of the latter is a waiver of the former's objection to the charter party. The legal effect of the transaction is the adoption by the owner of the existing charter party, and not in acceptance or hiring of the vessel, by the charterer, with the omission of the clauses without which he had always and consistently refused to accept. Compania, etc., Navegacion *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. 142.

51. Compania, etc., Navegacion *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 36 L. Ed. 1054, 13 S. Ct. 142.

Provisions deliberately omitted.—The court is bound to give effect to the stipulation of a charter party, but not to provisions which the parties deliberately omitted to insert after attention had been directed to them, e. g., provisions as to time and as to cancellation. Culliford *v.* Gomila, 128 U. S. 135, 32 L. Ed. 381, 9 S. Ct. 50.

52. Unilateral contracts.—Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474.

53. Permits.—Zambetti *v.* Garton, 113 N. Y. S. 804.

The fact that defendant received one car load of the apples did not render it liable for its refusal to receive the balance of the shipment. White *v.* North German Lloyd Steamship Co., 113 N. Y. S. 805, 61 Misc. Rep. 268.

54. Permit a mere offer.—Zambetti *v.* Garton, 113 N. Y. S. 804.

To this effect are Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240, and a long line of decisions in which that case is cited with approval. Zambetti *v.* Garton, 113 N. Y. S. 804.

The appellate division of the second department, in Pomeroy *v.* Newell, 117 App. Div. 800, 102 N. Y. S. 1098, holds that such an offer, being without consideration, may be withdrawn at any time. In that case it was held that an option, unsupported by a consideration, to sell real estate, would be withdrawn by a sale of the property to another purchaser during the period of the option. It cites as authority, among other cases, that of Dickinson *v.* Dodds (Eng.), L. R. 2 Ch. Div. 463, a leading English case. Zambetti *v.* Garton, 113 N. Y. S. 804.

55. Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47. See, also, Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768.

The charter party, like many mercantile instruments in common use, is drawn up in brief and disjointed sentences; and must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself. Crossman *v.* Burrill, 179 U. S. 100, 45 L. Ed. 106, 21 S. Ct. 38.

Such "contracts ought to be construed according to their plain meaning, to men

the whole contract should be taken together and given a reasonable construction, carrying out as nearly as possible the intention of the parties.[56] Every clause, as every word of a contract, must be given effect, if possible, and, where the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the object and purposes they had in view. Furthermore, the words of the contract will be given a reasonable construction where that is possible, rather than an unreasonable one.[57]

§ 4251. What Law Governs.—Contracts of Carriers in General.—The general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.[58] A contract made in one of the United States for the carriage of goods from there to a

of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them." Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768.

Where a charter party stipulated that a vessel should receive "a full cargo," the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers. Ogden *v.* Parsons (U. S.), 23 How. 167, 16 L. Ed. 410.

Liberal construction.—It is said that charter parties (and contract even less formal than a charter party) should have a liberal construction, such as mercantile instruments usually receive, in furtherance of the real intention of the parties and the usage of trade. Disney *v.* Furness, etc., Co., 79 Fed. 810.

The contract of affreightment is governed by the same principles as the other special contracts. There are none to which the principles are more stringently applied. The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629.

As to lading included.—There were three points along a river course, the highest A, the next B, the last C. Held, that a contract to transport goods from B to C and to and from all points between them, when the transportation was to be by water, was not a contract to transport from A to C, although such transportation necessarily involved (as a greater includes a less) a transportation between B and C. And the carrier was not entitled to recover damage from the shipper for freight for goods transported from A to C by vessels belonging to a third party. Scott *v.* United States (U. S.), 12 Wall. 443, 20 L. Ed. 438.

56. Whole contract taken together.—Defendant had contracted with certain millmen for the sawing and delivery, by a specified time, of a quantity of lumber, said lumber to be delivered on board of scows to be furnished by defendant. He thereon entered into a written contract with plaintiffs for the removal of said lumber; the substance of said two contracts being recited therein. Plaintiffs were to furnish men, lighters, and everything necessary for the work, at a specified price, to be paid by defendant for every 1,000 feet so removed, and to convey said lumber upon their scows from the point of delivery to defendant's docks as fast as it should be received, "provided it should be sawed so fast, by said millowners." Held that, taking the whole contract together, it was clearly implied that the stipulations were subject to the implied condition that millowners should first saw and deliver the lumber under their contracts. Hunter *v.* New York, etc., Salt Co., 14 Mich. 98.

57. Balfour, etc., Co. *v.* Portland, etc., Steamship Co., 167 Fed. 1010.

58. Contracts of carriers in general.—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; London Assur. *v.* Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. Ed. 113, 17 S. Ct. 785; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91; Manchester Liners *v.* Virginia-Carolina Chemical Co., 194 Fed. 463; Adler *v.* Galbraith, etc., Co., 156 Fed. 259.

Illustrations.—A contract of affreightment made in the United States between citizens or residents thereof, the performance of which begins here, will be governed by the laws of the United States unless the parties when contracting clearly manifest an intention that the contract be governed by the laws of some other country. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

A contract of charter party and affreightment made in Louisiana is not governed necessarily by the Louisiana law as to the question of construction of the

point in another state is governed by the laws of the former unless a different intention clearly appears.[59]

Stipulation as to Law Controlling.—A stipulation in a bill of lading that all questions arising thereunder against the ship or her owners should be determined by the laws of the country to which the ship belongs is valid and such laws govern a libel in admiralty for the loss of property under such bill of lading by the shipper, who is a resident of another country.[60]

Stipulations Limiting Liability.—See post, "Limitation of Liability," Chapter 40.

What Constitutes Delivery.—What would be an effectual delivery, so as to terminate the liability of the carrier, in the absense of express stipulation on that subject, is ordinarily governed by the law or usage of the port of discharge.[61]

Interpretation of Contract.—A contract of charter party and affreightment is not necessarily construed by the law of the place where made.[62] Where different portions of a contract of affreightment and shipment are performable in different countries, some portions at the home port, some at the foreign port, and some at the return port, the law of the place where each portion is performable, governs its interpretation.[63]

Contracts of Agents.—Every authority given to an agent or attorney to transact business for his principal must, in the absence of any counter proof, be construed to be, to transact it according to the laws of the place where it is to be done.[64]

Extent of Authority of Master of Vessel.—What extent the owners of a schooner are liable to the shippers for a nonfulfillment of a contract of shipment of the master—whether they incur an absolute or a limited liability, must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law where the ship and her owners belong.[65]

§ 4252. Qualifications Imposed by Law.—Where the contract was the foundation of the claim, and though not fulfilled according to its letter, either as

contract or as a question of judicial remedy. Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91.

Presumption.—American and Englishmen, entering into a charter party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed. Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

Delivery in foreign country—Payment of freight in foreign currency.—That the goods in a contract of affreightment made in the United States were to be delivered in Liverpool, and the freight and primage were payable there in sterling currency, does not make the contract an English contract, but it is governed by the American law—the place of making. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

Place of stranding immaterial.—A contract of affreightment made in the United States to carry freight to Liverpool between an American and an English steamboat companies, is an American contract and not an English contract, and the obligation to carry goods is to be governed by the American law and not the municipal or maritime law of any other country, and the fact of the stranding on the English coast does not change the result. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

59. Contract for interstate shipment.—The Henry B. Hyde, 82 Fed. 681, affirming 90 Fed. 114, 32 C. C. A. 534.

60. Stipulation as to law controlling.—Decree 24 Fed. 922, affirmed in The Oranmore, 92 Fed. 396.

61. What constitutes a delivery.—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

62. Interpretation of contracts of carriers.—Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91.

A contract of charter party and affreightment made in Louisiana is not necessarily construed by the law of Louisiana. Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91.

63. Contracts performable partly in one country and partly in another.—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

64. Power of agent to contract.—Owings *v.* Hull (U. S.), 9 Pet. 607, 9 L. Ed. 246.

65. Master's authority.—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

to the time or place of delivery, yet, with the qualifications which the law under such circumstances imposes, it determined the respective liabilities of the parties, and the plaintiffs could not recover more than the contract price, and the recoupment of the defendants was governed by its requirements on the part of the plaintiffs.[66]

§ 4253. Knowledge of Course of Trade.—The master of a vessel must be held to have made his contract with a full knowledge of the course of trade, and be governed by it.[67] In construing a contract for the carriage of goods by steamer, the usual course of business in such transportation must be considered.[68]

§§ 4254-4255. Aids to Construction—§ 4254. Admissibility of Parol Evidence.—The general rule as to the admissibility of parol evidence to explain, contradict or vary the terms of a written contract apply to charter parties.[69] The contract if unconditional and unambiguous can not be destroyed by parol evidence.[70] Hence evidence of an oral agreement made at the time the contract was made, to vary and contradict it, is incompetent.[71] It is true though that the contract may be read in the light of surrounding circumstances for the purpose of arriving at the meaning and intent of the writing. It is as an aid to interpretation that the surrounding circumstances may be looked to but never for the purpose of adding a new term, or contradicting or varying the writing.[72] And parol evidence is admissible to show that the contract never went into effect and hence that there was no contract at all.[73] But a contract by

66. Railroad Co. *v.* Lindsay (U. S.), 4 Wall. 650, 18 L. Ed. 328.

67. The Convoy's Wheat (U. S.), 3 Wall. 225, 18 L. Ed. 194.

68. Usual course of business considered.—Blitz *v.* Union Steamboat Co., 51 Mich. 558, 17 N. W. 55.

69. Parol evidence.—The John H. Pearson, 121 U. S. 469, 30 L. Ed. 979, 7 S. Ct. 1008; The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453, 11 S. Ct. 794.

Meaning of "northern passage" may be shown by parol. The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453, 11 S. Ct. 794.

70. Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62; Bast *v.* Bank, 101 U. S. 93, 25 L. Ed. 794; DeWitt *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896; Seitz *v.* Brewers', etc., Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837; Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880; Corse *v.* Peck, 102 N. Y. 513, 7 N. E. 810; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961.

71. Oral agreement incompetent to vary contract.—Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474; Willard *v.* Tayloe (U. S.), 8 Wall. 557, 19 L. Ed. 501; Forsythe *v.* Kimball, 91 U. S. 291, 23 L. Ed. 352; Maryland *v.* Railroad Co. (U. S.), 22 Wall. 105, 22 L. Ed. 713; Thompson *v.* Insurance Co., 104 U. S. 252, 26 L. Ed. 765; Union Stock Yards, etc., Co. *v.* Western Land, etc., Co., 7 C. C. A. 660, 59 Fed. 49.

A contract reciting that the parties of the second part "were desirous to ship by vessel certain lots of hardwood lumber," and by which the party of the first part agreed to carry on his vessels "any and all of this lumber as may be desired" by the parties of the second part, can not be construed as a proposition by the first party which might become a binding contract on its subsequent acceptance by the second parties, since it was executed by both parties, and purported to be a completed agreement, the terms of which would be varied by a subsequent agreement by the second parties to ship all their lumber by the vessels of the party of the first part. Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520.

Light of surrounding circumstances.—Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474; Railroad Co. *v.* Maryland (U. S.), 20 Wall. 643, 22 L. Ed. 446; Willard *v.* Tayloe (U. S.), 8 Wall. 557, 19 L. Ed. 501; Greenfield, Ev. § 277; Union Stock Yards, etc., Co. *v.* Western Land, etc., Co., 7 C. C. A. 660, 59 Fed. 49.

In the case last cited, Judge Jenkins, speaking for the seventh circuit court of appeals, said: "But resort to surrounding circumstances is not allowed for the purpose of adding a new and distinct undertaking. Maryland *v.* Railroad Co. (U. S.), 22 Wall. 105, 22 L. Ed. 713. The circumstances surrounding the making of a contract is one thing. The parol negotiations leading up to the written agreement is another and different thing. Parol evidence may be received of the existence of an independent oral agreement, not inconsistent with the stipulations of the written contract, in respect to a matter to which the writing does not speak, but not to contradict the contract." Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474.

73. To show that contract never went into effect.—Morris *v.* Chesapeake, etc., Steamship Co., 148 Fed. 11, 78 C. C. A. 179.

which a steamship company agreed to furnish to a shipper space for a shipment of cattle on each of a number of named ships sailing in different months is an entire contract, and not a separate one for each vessel, and therefore not subject to modification by parol evidence to except one vessel on the ground that as to such vessel it never went into effect, because of the nonfulfillment of an unexpressed condition precedent.[74]

Contract Partly Oral.—There may be instances in which a contract is partly in writing and partly oral, and the two together constitute the contract; so there may be a question of fact as to whether the written agreement is or is not the entire agreement.[75]

§ 4255. Opinion Evidence.—See ante, "General Rules," § 4250.

§ 4256. Construction of Particular Words, Phrases, etc.—When the word "ton" is used alone, in a contract of affreightment, a dead weight ton is meant and in foreign trade long tons of 2,240 pounds.[76]

§§ 4257-4260. Conditions Precedent and Independent Covenants, Representations and Warranties—§ 4257. In General.—Whether particular stipulations are to be considered conditions precedent or not, must, in all cases, solely depend upon that intention, as it is gathered from the instrument itself.[77]

Stipulation as to Vessel to Be Used.—The contract of affreightment obliges the carrier, in the absence of a legal excuse, to carry the freight to the destined port in the very vessel stipulated in the bill of lading. It is a right resulting from the contract that the transportation shall be in the chosen vessel. It is not permissible to speculate as to the reasonableness of the choice. The owner of the freight can not be questioned as to his reasons.[78]

§ 4258. Stipulations as to Time and Place of Shipment.—A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.[79] A contract by a steamship company for the car-

74. **Rule not applicable to part of entire contract.**—Decree 125 Fed. 62, affirmed in Morris *v.* Chesapeake, etc., Steamship Co., 148 Fed. 11, 78 C. C. A. 179.

75. **Contract party oral.**—Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474.

Illustrations of such cases are afforded by the cases of Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527, and Bank *v.* Cooper, 137 U. S. 473, 11 S. Ct. 160, 34 L. Ed. 759, where the question was whether a bill of lading constituted the entire contract. Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474.

A shipment of a number of horses from Nome to Seattle held to have been made under a contract made by the parties partly by correspondence and partly by oral conversations, all of which must be taken into account to ascertain its terms, and, as so construed, to have required the shipowner to construct stalls for the horses between decks, and slings for use in rough weather, the failure to provide which rendered the vessel liable for injury to the horses during the voyage. The Olympia, 156 Fed. 252.

76. **Construction of particular words, phrases, etc.**—Where a freight contract engaged steamship room between New York and Rio de Janeiro for "approximately 1500/2000 tons," electrical machinery and apparatus, and also contained the schedule fixing dead weight and space rates at the steamer's option, the word "ton" should be construed to mean a dead weight long ton, notwithstanding an option authorizing the ship to charge freight at space rates. Herr *v.* Tweedie Trading Co., 181 Fed. 483.

77. Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768; Davison *v.* Von Lingen, 113 U. S. 40, 28 L. Ed. 885, 5 S. Ct. 346.

78. **Effect of stipulation as to vessel to be used.**—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

79. Filley *v.* Pope, 115 U. S. 213, 29 L. Ed. 372, 6 S. Ct. 19; Norrington *v.* Wright, 115 U. S. 188, 29 L. Ed. 366, 6 S. Ct. 12, citing Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768, and Davison *v.* Von Lingen, 113 U. S. 40, 28 L. Ed. 885, 5 S. Ct. 346.

Stipulation in charter party, that vessel is "now sailed" or about to sail.—See Dav-

riage of cattle on certain specified vessels, "all sailing" during certain months, imports a warranty that all the vessels named will sail during such months.[80]

Charterers Knowing Recital to Be False.—A recital in the charter that the vessel is at a designated place is not a warranty or contract, where the charterers knew certainly that the vessel was not there; of course they were not deceived or misled by the recital, which was probably part of a printed form that attracted no attention.[81]

§ 4259. Stipulations as to Tonnage or Measurement.—Statements as to registered tonnage or measurement, unless clearly intended as such a statement as to the registered tonnage of a ship, is not a warranty or condition precedent.[82]

§ 4260. Warranty of Seaworthiness.—A warranty in a charter party that a vessel is seaworthy is satisfied if the vessel was accounted seaworthy when delivered into possession of the charters under the charter.[83] The owner is liable for the breach of his contract, but the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter money. If he uses her, he must pay for the use to the extent to which it goes.[84]

§ 4261. Cancellation, Modification and Release.—Canceling Date of Charter Party.—Where the canceling date of the charter party was not filled in but its insertion waived by the charterers, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time, the charterer by waiving the insertion of such date, abandoned all claims to insist upon the right to cancel the charter party if the vessel should not be ready to load by a day specified so as to enable them to comply with the requirements in this contract with a third party for the shipment of the cargo.[85]

By Master or Agent.—A charter party can not be modified or canceled even in a foreign port, by the master of the vessel or any agent either of the owner or the charterer.[86]

Under Clause Limiting Liability.—A clause exempting a carrier from liability for loss or damage occasioned "by arrest or restraint of princes, rulers, or people" in a contract of affreightment by a neutral to carry contraband of war, made when conditions of war exist and are known to both parties, must be construed as intended to apply only to actual arrest or seizure and confiscation and affords no ground for repudiation of the contract by the carrier because of the danger of seizure.[87]

ison *v.* Von Lingen, 113 U. S. 40, 28 L. Ed. 885, 5 S. Ct. 346; Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768.

Will proceed "with all possible dispatch."—See Lowber *v.* Bangs (U. S.), 2 Wall. 728, 17 L. Ed. 768.

80. Time of sailing.—Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62, decree affirmed in 148 Fed. 11, 78 C. C. A. 179.

81. Lovell *v.* Davis, 101 U. S. 541, 25 L. Ed. 944.

82. Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406, 6 S. Ct. 91; Pine River Logging Co. *v.* United States, 186 U. S. 279, 289, 46 L. Ed. 1164, 22 S. Ct. 920. See, also, Brawley *v.* United States, 96 U. S. 168, 24 L. Ed. 622, 13 Ct. Cl. 521; Norrington *v.* Wright, 115 U. S. 188, 29 L. Ed. 366, 6 S. Ct. 12.

83. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

84. Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012.

85. Culliford *v.* Gomila, 128 U. S. 135, 32 L. Ed. 381, 9 S. Ct. 50. So held where the owner of the vessel guaranteed that the vessel would carry a specified quantity but did not have her ready to load by a day which would enable the charterers to comply with their contract with a third party.

86. Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 634, 5 L. Ed. 696.

In Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 5 L. Ed. 696, the question came before the federal supreme court, whether the charterer and the master could, by a contract made with a shipper who acted in good faith, destroy the lien of the owner on the goods shipped, for the freight due under the charter party. It was held they could not; and the decision is placed upon the ground of want of authority to do the act. Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341.

87. Under cause limiting liability.—Balfour, etc., Co. *v.* Portland, etc., Steamship Co., 167 Fed. 1010.

Existence of War—Contraband.—Where the charter party has been entered into prior to the prevalence of war conditions affecting the port of delivery, there can be but little question that the carrier can legitimately decline to carry out the contract.[88] However, a citizen of a neutral may lawfully contract to carry contraband of war, and his undertaking will be enforced by the courts of the neutral state. While, by international law, trade by neutrals in contraband of war with belligerents is inhibited, and subjects the unlawful commerce to seizure and condemnation by a belligerent, and while neutral states recognize the right of imposing this restriction upon the action of its subjects, yet it has been judicially determined that this law is not inconsistent with the right of neutrals to trade in contraband with citizens of belligerent states, and to make contracts to that end, and to have the same enforced.[89] The conditions must, from the very nature of things, be different where the owner, notwithstanding his discretion to refuse to carry contraband where, in the interest of the ship and of the cargo, it would be dangerous to do so under conditions of war subsequently arising, deliberately enters into a contract to carry that class of cargo when the war conditions are actually present.[90]

Right of Shipper to Cancel—Branch of Implied Representations.—In a contract to transport cattle, it is implied that there shall be sufficient ventilation; and if there is not, so that insurance can not be procured upon the cattle, the shipper may refuse to ship, and recover for breach of the contract.[91] But the fact that a single underwriter refused to insure cattle for the voyage because of alleged insufficiency of ventilation does not, of itself, prove a breach of contract on the vessel's part, warranting refusal to ship the cattle.[92]

Readiness for Shipment.—Where the contract stipulates that the ship be, in her equipment and condition, reasonably ready for a grain cargo, if the shipper so require, the readiness required is a reasonable readiness, and not a special readiness to gratify particular requirements established by the shipper.[93] And the lack of specific preparations, which are not usually required or desirable, and, if used at all, are better put in while the cargo is being loaded, is not, in the absence of a specified notice that they are required, a defect in readiness, authorizing the canceling of the contract.[94] Obviously, a practice peculiar to the port, requiring battening when not needed, and merely out of abundant caution, could not, without previous notice, give ground for canceling the contract.[95] A provision giving the shippers the right to cancel the contract for shipment of a cargo of grain if the ship be not ready on a given date requires a practical and substantial readiness to receive the cargo such as would insure the underwriters' in-

88. Balfour, etc., Co. *v.* Portland, etc., Steamship Co., 167 Fed. 1010.

The case of The Styria, 101 Fed. 728, 41 C. C. A. 639, and again decided on appeal in The Styria *v.* Morgan, 186 U. S. 1, 22 S. Ct. 731, 46 L. Ed. 1027, is one which upon the facts, save that the contract was entered into before war conditions arose, bears a strong analogy to the present. The case of Nobel's Explosives Co. *v.* Jenkins (Eng.), L. R. 1896, 2 Q. B. 326, cited by the supreme court, is also quite analogous.

89. Balfour, etc., Co. *v.* Portland, etc., Steamship Co., 167 Fed. 1010. So it has been held by the supreme court, in The Santissima Trinidad (U. S.), 7 Wheat. 283, 5 L. Ed. 454.

90. Balfour, etc., Co. *v.* Portland, etc., Steamship Co., 167 Fed. 1010.

91. **Branch of implied representations.**—The Alvah, 77 Fed. 315, 23 C. C. A 181.

92. **Refusal of insurance by single underwriter.**—The Alvah, 77 Fed. 315, 23 C. C. A. 181.

93. Disney *v.* Furness, etc., Co., 79 Fed. 810.

94. Disney *v.* Furness, etc., Co., 79 Fed. 810.

Failure of the ship to have up the top board of the shifting boards, where the board and the slots for receiving it are fitted and prepared, is not a want of readiness to receive grain cargo, such as would authorize the cancellation of the contract of affreightment. Nor is cancellation authorized by failure to have up the shifting boards in the hatch combings, as these, if used at all, are better put in when the cargo is partly loaded. Disney *v.* Furness, etc., Co., 79 Fed. 810.

95. Disney *v.* Furness, etc., Co., 79 Fed. 810.

spector's approval, and obtain his pass, and would gratify the usual and reasonable requirements for avoiding injury to the commercial value of the grain.[96]

The failure of the shipowner to perform his obligation, under the charter party to keep the vessel in proper condition and fit for use, discharges the charterer or gives him the option to rescind his contract.[97]

Waiver of Right to Rescind.—A shipper who contracted with a steamship company for the transportation from New York to London of 100 tons of hay on each of the company's weekly steamers for a year, and who was entitled to rescind the contract because of the frequent failure of the company to take the required quantity which was tendered, waived such right by electing to treat the contract as still in force, and making subsequent shipments thereunder, and could not thereafter rescind because of such past defaults.[98]

§§ 4262-4263. Performance, Discharge or Breach—§ 4262. In General.—If what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not release the parties from the obligations of the contract. It must be shown that the thing can not by any means be affected.[99] But where the circumstances are such that the contract can not be carried out, and through no fault or negligence of the parties, they are absolved from liability for the failure to perform.[1] Where the owner of a vessel plying between two ports agreed to carry freight for plaintiff during the season ensuing, and within the time the owner offered on two or three occasions to take freight, but plaintiff did not furnish it, the owner's refusal on one trip to go a few miles up the river to take on freight was not a breach of the contract, the vessel being then deeply laden, and it not being safe and proper to make the attempt.[2]

Failure to Receive All Freight for Shipment.—Where the carrier refuses to receive all of the goods, according to the contract of affreightment, he is liable for a breach of the contract, unless the performance of the contract has been rendered impossible through no fault of his own or unless the terms of the contract have been changed.[3] A shipper of corn agreed to deliver it on board a ves-

96. Readiness contemplated.—Disney *v.* Furness, etc., Co., 79 Fed. 810.

97. Strong *v.* United States, 154 U. S. 632, 24 L. Ed. 664, 14 S. Ct. 1182.

98. Waiver of right to rescind.—Bloomingdale *v.* Wilsons, etc., Line, 105 Fed. 384, citing McNaughter *v.* Cassally, Fed. Cas. No. 8911, 4 McLean 530.

99. The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629.

Where libelant contracted to transport a pile of lumber, which his agent had inspected, from Cheboygan to Chicago, by a steamer and certain barges, under an entire contract, and carried only a proportion of the amount, and the amount carried was less than the carrying capacity of the steamer and any one of the barges owned by libelant, it was no defense to libelant's breach of contract that one of the barges was disabled by the loss of a mast, and that the lumber consisted partly of strips and partly of boards, instead of being all boards. Edward Hines Lumber Co. *v.* Chamberlain, 118 Fed. 716, 55 C. C. A. 236.

1. Parties absolved.—Plaintiff contracted to transport certain merchandise for defendant, water permitting, and insure safe delivery of the same to defendant or his consignees at a particular place. The contract provided for deductions to be made from the compensation for merchandise lost in transportation by reason of the sinking of the boats used in the transportation. Held that, if the condition of the navigation was such that the merchandise could not be transported, plaintiff was absolved from the obligation to transport, and defendant was absolved from the obligation to deliver the goods for transportation. White *v.* Toncray, 46 Va. (5 Gratt.) 179.

2. Refusal to go after freight—Dangers of the river.—Thurston *v.* Foster, 11 Me. 74.

3. Failure to receive all freight for shipment.—Libelant and respondent entered into a verbal contract that one of respondent's steamers should load and transport a quantity of marble from Spezia, Italy, to New York. The marble was delivered, as agreed, alongside the steamer, which made the voyage with only a part of the cargo, insisting subsequently that libelant's agent should sign a bill of lading for the whole, describing the omitted portion as "short shipped," which bill the agent signed under protest. Held, that libelant was en-

sel with no unreasonable delay. The captain of the vessel applied for it on a Sunday, and, no person being ready to deliver it, would not wait till Monday, but went to sea without it. The shipowner was not entitled to dead freight on the quantity not shipped, but, on the contrary, was bound to make compensation to the other party for the loss sustained in consequence of the captain's not taking the full quantity on board.[4]

Boat Other than That Stipulated.—Where a shipper of goods delivered them to the clerk of the steamer "C," with a bill of lading filled out in which was inserted the name of the steamer "S," belonging to the same carrier, it did not amount to a rescission of that clause of the contract providing for carriage by the "S."; it not appearing that the agent to whom the goods were delivered was not the agent of the carrier to receive goods for the "S." [5] Where a shipper of goods delivered to the steamer "C.," with a bill of lading, conditioned for the shipment on the steamer "S.," belonging to the same carrier, it did not amount to a waiver of the condition for carriage by the "S." [6]

Carrying Contrary to Provision of Contract.—The owner of a line of lake steamers can lawfully make a special contract with the shipper not to place more than a specified number of dollars worth of goods on any one of the vessels at one time, and having made such contract, he is bound to perform the same, and liable for any damages incurred by the shipping through his breach of the provision of the contract.[7]

Abandonment of Vessel by Shipowner.—The justifiable abandonment of a vessel in consequence of the damages of the seas is such a renunciation of the contract of affreightment as entitles the cargo owners to refuse to go on with the voyage, at least, where the master has not rejoined the ship before anyone else has taken possession, or has not obtained the vessel and cargo from the salvors before the cargo owners have announced their decision.[8]

Failure of Shipper to Tender Goods for Shipment.—In an action for damages against a steamship company for failure to carry shipments of lumber and machinery which it had contracted to carry on or about two dates specified, the fact that plaintiff did not tender shipment on one of the dates specified is not ground for granting a nonsuit, where defendant was not ready to receive the material if tendered,[9] or where other fault of the defendant caused the delay of tender of the goods by the plaintiff.[10]

Plaintiff Shipping Part of Goods by Other Ship.—In an action against a steamship company for breach of a contract to carry shipments of freight on its ships sailing on or about two dates specified, the fact that plaintiff shipped part of the material which defendant had agreed to carry upon another ship could not

titled to recover from the steamer the damages suffered by reason of the refusal to take the remainder of the cargo. The Citta Di Palermo, 153 Fed. 378.

4. **Failure to wait for entire shipment.**—Dunbar *v.* Buck, 20 Va. (6 Munf.) 34.

5. **Boat other than that stipulated.**—Louisville, etc., Packet Co. *v.* Rogers, 49 N. E. 970, 20 Ind. App. 594.

6. **Waiver of terms of contract.**—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

7. **Carrying contrary to contract.**—Hood Rubber Co. *v.* Rutland Trans. Co., 161 Fed. 790.

Defendant having contracted not to place more than $100,000 worth of plaintiff's goods on any one of its vessels for transportation at one time, and with knowledge that plaintiff's insurance was limited to $100,000 worth of goods on any one steamer at any time in violation of the contract loaded an assembled shipment valued at $349,426.70 without plaintiff's knowledge on a single vessel, which shipment sustained a damage of $85,996.70. Held that, since the insurance company was only liable for such a proportion of the loss as $100,000 bore to the whole value of the goods shipped, defendant was responsible for breach of contract for the balance of the loss. Hood Rubber Co. *v.* Rutland Trans. Co., 161 Fed. 790.

8. **Right of cargo to refuse to go on with voyage.**—The Eliza Lines, 199 U. S. 119, 26 S. Ct. 8, 50 L. Ed. 115, 4 Am. & Eng. Ann. Cas. 406.

9. **Failure of shipper to tender goods for shipment.**—Revett *v.* Globe Nav. Co., 56 Wash. 550, 106 Pac. 176.

10. **Failure of defendant to direct switching cars.**—Revett *v.* Globe Nav. Co., 56 Wash. 550, 106 Pac. 176.

be pleaded in bar of a recovery of general damages, the contract not having been rescinded: but the freight money lost, if allowable at all, would only be an offset to plaintiff's damages.[11]

§ 4263. Who Liable on Contract.—An engagement of cargo space from a steamship line for a shipment at an agreed rate of freight, made by a company operating a connecting line, constitutes a contract, which binds the latter to furnish the cargo, or respond in damages, although it was in fact made in behalf of a third party intending to make a through shipment over both lines, where such fact was not disclosed.[12]

§ 4264. Abandonment of Contract.—Neither party is at liberty to abandon the contract without the consent of the other, or without legal cause.[13]

Effect of Abandonment.—Where a contract of affreightment is abandoned, the carrier in such contract can not be held liable for damages to the shipper for losses arising out of a shipment of the same freight under another contract with another carrier.[14]

§ 4265. Assignment of Contract.—A contract for the carriage of cattle on certain vessels is assignable by the shipper, and the assignment vests the assignee with the right to sue thereon in his own name, notwithstanding a provision therein that no part of the space contracted for shall be sublet without the consent of the shipowner.[15] The difference between subletting and assigning is material. In the one case, the lessee claims the whole or a part of the premises he is entitled to occupy. In the other, he transfers all his right in a contract and the assignee acquires all the rights and assumes all the liability of the assignor.[16]

§§ 4266-4275. Bill of Lading—§ 4266. Definition.—In commercial law, a bill of lading is legal evidence of title to property in transit, and the rights of the parties may be governed by its terms.[17] As restricted to transportation by water, a bill of lading may be said to be a written acknowledgment, signed by the master of a vessel, that he has received the goods therein described from the shipper,

11. **Plaintiff shipping part of goods by other ship.**—Revett *v.* Globe Nav. Co., 56 Wash. 550, 106 Pac. 176.

Breach of contract not shown.—In an action against a steamship company for breach of contract to carry shipments of freight on two dates specified, evidence held not to show a breach of the contract by the shipper by shipping a part of the freight which he had contracted to send over defendant's line by another ship. Revett *v.* Globe Nav. Co., 56 Wash. 550, 106 Pac. 176.

12. **Who liable on contract.**—Baltimore Steam-Packet Co. *v.* Patterson, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193, affirming decree, 101 Fed. 296.

13. Reed *v.* United States (U. S.), 11 Wall. 591, 606, 20 L. Ed. 220.

14. **Effect of abandonment.**—Plaintiff made an oral contract with defendants to ship his sawmill and laborers on the steamer Monarch from Eagle to Fairbanks. When the Monarch reached Eagle she was loaded, and refused to take them. Defendants telegraphed to the Oil City, another steamer, and she took them, but was delayed on the way. Plaintiff paid the Oil City the usual rate for both freight and passengers and defendants nothing. Held, that the contract with defendants for the services of the Monarch was abandoned, and that there was no consideration to support plaintiffs claim for damages against defendant caused by the delay of the Oil City. Johanson *v.* Sondheim, 2 Alaska 556.

15. **Assignment of contract.**—Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62, decree affirmed in 148 Fed. 11, 78 C. C. A. 179.

16. Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62; Lynde *v.* Hough (N. Y.), 27 Barb. 415; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394, 27 How. Prac. 422; Field *v.* Mills, 33 N. J. L. 254.

17. **Definition, etc.**—The Prussia, 100 Fed. 484; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892. See ante, "Definition and Nature Generally," § 413.

A bill of lading is a commercial document of title, which represents the goods, and which the master by the general maritime law and expressly by § 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), in the case of vessels in the foreign trade, is bound to give to the shipper. Equi Valley Marble Co. *v.* Becker, 91 C. C. A. 592, 165 Fed. 437.

to be transported, on the terms therein expressed, to a described place or destination, and there to be delivered to the consignee or the parties therein designated.[18]

What Constitutes.—A document purporting on its face to be a bill of purchase by a vessel of certain stone, and signed by her master, the stone being delivered to her as cargo, has none of the elements of a bill of lading and can not be interpreted as such. Nor is the vessel holden for stone purchased by her master as cargo.[19]

§ 4267. Form and Contents.—For a treatment of the form and contents of a bill of lading, see ante, "Form and Contents," §§ 414-424.

Stipulations Stamped on Face.—Stipulations stamped on the face of a bill of lading before its delivery to the shipper, and by express terms included therein, become a part of the contract.[20]

§ 4268. Issuance and Acceptance.—Although a bill of lading is the proper and customary shipping document, and should be made out according to every requirement, yet there is no rule of the common law requiring the carrier to issue it to the consignor.[21] But in some instances common carriers are required by statute to issue bills of lading, memoranda in writing, etc., to the consingor of freight received.[22] And it has been held that a shipper of goods is entitled to a bill of lading therefor as a matter of right.[23] And in this connection it was said that where the master claims, demurrage for delay in loading, he has the right to give notice of the claim in, or by indorsement upon, such bill, so as to charge a transferee with such notice.[24]

Duty of Consignor to Require Bill of Lading.—It has been held that a shipper should in all cases require a bill of lading.[25] Where there is no evidence that the contract of shipment was out of the usual course, or that the plaintiffs could have made any better one, at the "lowest rate of freight," according to the terms of the order, it was correct to instruct the jury that it was the duty of the plaintiffs to have taken a bill of lading in a proper and usual form.[26] But there is a rule of law requiring a consignor to take out a bill of lading and forward it to the consignee.[27]

Time of Issuance.—A bill of lading should be signed and issued when the goods noted therein for shipment have been received.[28] When different parcels, packages, etc., going to make up the consignment are received at different times, receipts for them are or should be given, upon the return of which, when the entire consignment is received, a bill of lading will be issued.[29]

18. **Restricted to water transportation.**—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

19. **What constitutes.**—The Skylark, Fed. Cas. No. 12,930.

20. **Stipulations stamped on face.**—The Henry B. Hyde, 82 Fed. 681, decree affirmed in 90 Fed. 114, 32 C. C. A. 534. See ante, "Form and Contents," §§ 414-424.

21. **No rule requiring carrier to give bill of lading.**—The Peytona, 2 Curt. 21, Fed. Cas. No. 11,058; Johnson *v.* Stoddard, 100 Mass. 306. Generally, as to the necessity for issuing bills of lading, see ante, "Necessity for Issuance," § 425.

22. **Necessity for issuance under statute.**—Tex. Civ. Stat. 1895, art. 322. As to duty to issue bills of lading, see ante, "Duty to Issue," § 443.

23. **Duty to issue.**—Watt *v.* Cargo, 161 Fed. 104.

24. **Right to give notice of claim in bill.**—Watt *v.* Cargo, 161 Fed. 104.

25. **Shipper should require bill of lading.**—Johnson *v.* Stoddard, 100 Mass. 306; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

26. **Duty to take bill of lading.**—Field *v.* Banker (N. Y.), 9 Bosw. 467. See ante, "Necessity for Issuance," § 425.

27. **No rule of law requiring it.**—Johnson *v.* Stoddard, 100 Mass. 306.

28. **Time of issuance.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 607.

Statutes forbidding issuance prior to receipt.—1 Rev. Stat. Mo. 1889, ch. 18, § 739; 3 N. Y. Rev. Stat., p. 2259 (17 Ed.); Act of Pa. 1866, § 2, P. L. 1363; Louisiana Statute construed, see The Idaho, 93 U. S. 575, 23 L. Ed. 978.

29. **Shipping receipts.**—The Delaware

Authority to Issue.—As to authority of particular agents, employees, etc., to issue bills of lading, see ante, "Agents and Employees," §§ 426-428. The general rule, under the decisions in the federal courts, and some of the state courts, is that the master of a vessel has no power to bind the owners of the ship by a false bill of lading.[30] Some of the cases, though, limit the rule to cases where there is no intent to defraud.[31] Various state courts hold that common carriers are estopped from denying their liability upon a false bill of lading given by the master or agent.[32] But this is not the rule in the federal courts. Most of the cases in which the rule has been applied have been cases in which either no goods were shipped, or a less amount was shipped than that stated in the bill of lading; but the rule is based on the principle that a master has no implied authority to give a false bill of lading of any kind.[33] And it seems that the principle would have the same application to a bill of lading which is false in the date as to one which is false in the amount.[34]

Receipt of Goods as Prerequisite to Issuance.—As to receipt of goods as prerequisite to issuance of bills of lading, see ante, "Receipt of Goods as Prerequisite to Issuance," §§ 429-442. Under the rule of the federal courts a master has no power to bind the owners or the ship by a false bill of lading, whether the falsity is in relation to the amount of goods shipped on the date of the shipment, except where the rule is changed by statute. The act of congress known as the Harter Act subjects a person guilty of a violation of its provisions respecting bills of lading to a fine, which is made a lien on the vessel, but does not make the vessel liable for the damages occasioned thereby.[35]

The true construction of the provisions of the Harter Act in regard to bills of lading is that the rule previously established in the federal courts that a false bill of lading is not binding on the owner or the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy of the party injured in such a case is an action against the person who actually issued the false bill of lading.[36]

(U. S.), 14 Wall. 579, 20 L. Ed. 779; The Mercantile, etc., Co. *v.* Chase (N. Y.), 1 E. D. Smith 115; Keyser *v.* Harbeck (N. Y.), 3 Duer. 373.

30. False bill of lading.—The Isola Di Procida, 124 Fed. 942; Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; The Loon, 7 Blatchf. 244, Fed. Cas. No. 8,499; Robinson, etc., Co. *v.* Memphis, etc., R. Co., 9 Fed. 129; S. C., 16 Fed. 57; American Sugar Refin. Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 14 S. Ct. 990, 38 L. Ed. 944.

31. Intent to defraud.—When the cargo specified in a bill of lading was never received by the carrier, the original consignee cannot hold the carrier liable for the loss of the cargo, unless it appears that the bill of lading was issued with intent to defraud. McIntyre Bros. & Co. *v.* South Atlantic Steamship Line, 12 Ga. App. 399, 78 S. E. 347.

32. State courts.—The Isola Di Procida, 124 Fed. 942; Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Brooke *v.* New York, etc., R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Wichita Sav. Bank *v.* Atchison, etc., R. Co., 20 Kan. 519; Sioux City, etc., R. Co. *v.* First Nat. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488.

33. Rule in federal court.—The Isola Di Procida, 124 Fed. 942.

A steamship carrier can not be held liable for nondelivery of goods not actually received for shipment, although it issued bills of lading therefor upon receipts purporting to have been signed by its shipping clerks at the wharf, but which were in fact forged. Clark *v.* Clyde Steamship Co., 148 Fed. 243.

34. The Isola Di Procida, 124 Fed. 942.

35. Power of master—False bill of lading.—The Isola Di Procida, 124 Fed. 942.

The rule is not changed by the Harter Act of Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946].

36. The Isola Di Procida, 124 Fed. 942; Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; Stumore *v.* Breen, 12 App. Cas. 698; Relyea *v.* New Haven Rolling-Mill Co., 42 Conn. 579, 75 Fed. 420.

Issuance in Duplicate.—As to issuance of bills of lading in duplicate, see ante, "Issuance in Duplicate," § 444.

Acceptance and Assent to Provisions.—The general rule is that when goods are delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is bound to examine it and ascertain its contents; and if he accepts it without objection, he is bound by the terms, and resort can not be had to parol negotiations to vary them.[37] In speaking of the legal effect of a bill of lading, and why, upon transportation, such an instrument is binding upon the shipper it has been said[38] that "it is the rule, rather than the exception, for carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know such custom, * * * and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulation contained in such bill of lading." However, it may be laid down as a general proposition that, when goods have been received by a carrier under a prior contract such contract is not merged in a bill of lading subsequently issued, unless it is shown that the shipper assented to the terms contained therein.[39] And it is said that where a bill of lading presented by the carrier to the shipper for signature, after the shipment has been made, does not conform to the original contract, but includes cargo not taken by the vessel as agreed, it is a proper course for the shipper to sign the same un-

37. **Acceptance and assent to purchasers.**—The Arctic Bird, 109 Fed. 167; Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; McMillan *v.* Michigan, etc., Railroad, 16 Mich. 79, 93 Am. Dec. 208.

The shipper of a cargo of fruit took a bill of lading containing permission to the vessel to call at any port or ports. One port, at which the ship was accustomed to call, was known to all parties to be quarantined. Evidence was given that the agent of the ship let the shipper understand that the vessel would not call at the quarantined port. The shipper thereafter accepted the bill of lading without objection. The ship did so call, and was detained in quarantine, and the fruit was damaged. Held, that the bill of lading governed, and that the shipper could not recover. The Sidonian, 34 Fed. 805.

As to acceptance and assent to provisions as requisite to making a binding contract by way of the bill of lading or in substitution of an original parol oral contract, see ante, "Acceptance and Assent to Provisions," §§ 445-450.

38. The Henry B. Hyde, 82 Fed. 681, quoted in The Arctic Bird, 109 Fed. 167.

39. **Goods received under prior contract.**—The Arctic Bird, 109 Fed. 167; Gaines *v.* Union Transp., etc., Ins. Co., 28 O. St. 418; Park *v.* Preston, 108 N. Y. 343, 15 N. E. 705; King *v.* Woodridge, 30 Vt. 565.

Where goods were delivered to and laden upon a vessel for shipment, and a receipt given therefor, under a written contract for their carriage between the shipper and carrier, the terms of such contract can not be changed, and new conditions and limitations favorable to the carrier added, by a bill of lading subsequently delivered by it to the shipper, and accepted by him without reading, unless it is shown that his attention was called to such changes, so that he may be presumed to have assented thereto. The Arctic Bird, 109 Fed. 167.

Where a bill of lading does not conform to the original contract of shipment, it must yield, in the absence of proof that the parties intended thereby to create a new agreement. The Citta Di Palermo, 153 Fed. 378.

A parol contract for the shipment of goods, pursuant to which they were laden on board, may be shown to affect the construction of bills of lading signed and delivered after the goods were loaded and when the vessel was about to sail, and, in order that provisions of such bills shall override the prior agreement, the burden rests on the carrier to show that they were called to the attention of the shipper and assented to by him. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

der protest, and such protest will preserve its rights.[40] Of course it is competent for the parties to modify the prior contract by the introduction of additional terms, or by the substitution of the contract contained in the bill of lading, but the circumstances under which the bill of lading is delivered must show that it was the intention of the parties that the prior contract was to be merged in, and the freight carried subject to the conditions and exceptions named in the bill of lading.[41] In some later cases in New York it seems to be held that the doctrine just stated is applicable only to the cases where the evidence shows that at the time of the delivery of the bill of lading the goods were actually in transit to their place of destination, and for that reason could not have been reclaimed by the shipper.[42] But the Federal District Court, in holding that the rule could not be so limited, said that when the claim is made that a contract under which goods were accepted has been superseded by a bill of lading subsequently delivered, it is reasonable to require, in support of such claim, proof of the actual assent of the shipper to the terms contained in the bill of lading.[43] And it is also held by that court that proof of the delivery of the bill of lading, and its acceptance by the shipper without dissent, will not be sufficient to show his actual assent, but that it must be shown in addition thereto, that he had notice that such bill of lading was delivered to him by the carrier as the contract under which his goods were to be carried.[44] And there are many cases which so hold.[45] A contract for the carriage of goods by sea may doubtless exist without a bill of lading, and when the parties have made such a contract the ship owner can not, without the shipper's consent vary its terms for inserting new provisions in a bill of lading, and the shipper may decline to assent to the modifications, and insist upon his right to have the goods carried under the original contract.[46]

No Previous Contract.—Of course, if no previous contract has been made between the parties, the bill of lading will be conclusive evidence as to the character of the contract.[47] The bill of lading is often given by the shipowner, and accepted by the shipper, as expressing the terms of the agreement between them, and when this is the case both parties are bound by its provisions.[48]

§ 4269. Validity of Bills of Lading.—As to the validity of bills of lading as affected by fraud, mistake, forgery, no delivery of goods, and partial invalidity, see ante, "Validity," §§ 451-454.

Validity of Particular Stipulations.—A stipulation in a bill of lading that "the ship is warranted seaworthy only to the extent that the owners shall exer-

40. Proper to receive bill under protest.—The Citta Di Palermo, 153 Fed. 378.

41. Merger of original contract.—The Arctic Bird, 109 Fed. 167, in this case it was held that the prior contract was not superseded by the bill of lading. And the case of Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712 is a similar case.

42. New York cases.—Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Long *v.* New York Cent. R. Co., 50 N. Y. 76.

43. Actual assent required.—The Arctic Bird, 109 Fed. 167.

44. The Arctic Bird, 109 Fed. 167.

45. Missouri Pac. R. Co. *v.* Beeson, 30 Kan. 289, 2 Pac. 496; Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564.

In The Caledonia, 43 Fed. 681, 50 Fed. 567, affirmed in 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, the court held upon the particular facts before it that a prior written memorandum was merged in a subsequent bill of lading, but the rule was recognized that a prior contract for the carriage of goods could not be changed, by a subsequent bill of lading, without the assent of the shipper.

46. The Caledonia, 43 Fed. 681, 50 Fed. 567; Jones *v.* Hough (Eng.), 5 Exch. Div. 115; Crooks *v.* Allen (Eng.), 5 Q. B. Div. 38, 40, 41; Sewell *v.* Burdick, 10 App. Cas. 79, 105.

47. No previous contract.—Missouri Pac. R. Co. *v.* Beeson, 30 Kan. 289, 2 Pac. 496.

48. The Caledonia, 43 Fed. 681, 50 Fed. 567.

cise due diligence to make it so," being ambiguous and uncertain in its meaning, can have no effect.[49]

§ 4270. Construction, Operation and Effect.—General Rules of Construction.—The constructions of bills of lading must be governed by the law and by all the circumstances by which the parties intended to be bound.[50] In the construction of a bill of lading, as in construing other instruments, the obvious and plain meaning should be accepted rather than the obscure and hidden.[51] A bill of lading is a contract of great importance in commerce, and is to be construed according to its terms, the subject matter, the nature of the business to which it relates, and the usages under which such business is generally conducted.[52]

Evidence of the usage and custom of trade is admissible in mercantile contracts to prove that the words in which they are expressed in a particular trade to which the contract refers are used in a particular sense, and different from the sense that they ordinarily import, and in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent; but it is never admitted to make a contract or to add a new element to the terms of the contract previously made by the parties.[53] Usage may be admitted to explain what is ambiguous, but not to vary a contract which is plain. It can not control or vary the positive stipulations of the bill of lading.[54]

Dual Character as Contract and as Receipt.—As to dual character as a contract and as a receipt of bills of lading, see ante, "Dual Character as Contract and as Receipt," §§ 466-479.

As Contract Generally.—A bill of lading, when signed by the carrier, and delivered to and accepted by the shipper without objection, in the absence of fraud, constitutes the contract of carriage, and binds the shipper, though not signed by him.[55]

Substitution of Bill of Lading for Original Contract.—The bill of lading can not be said to have taken the place of the original contract of affreightment, where the bill as it is made out was signed and accepted by the shipper, under protest, in order to obtain this usual document of title.[56]

49. **Validity of particular stipulations.**—Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

50. **Construction governed by law and circumstances.**—Lind *v.* United States, 44 Ct. Cl. 558.

In construing and giving effect to the provisions of a bill of lading, the conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it are to be taken into consideration. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625. Generally as to construction, operation and effect of bills of lading, see ante, "Construction, Operation and Effect," §§ 455-513.

51. **Obvious meaning accepted.**—A provision in a bill of lading for a cargo of coal to be delivered at Portland, Me., which required the consignee "to tow vessel in and out of Back Bay free," is not a contract to pay for the towage merely, but to provide the same. Winslow *v.* Thompson, 134 Fed. 546, 67 C. C. A. 470, affirming decree, 130 Fed. 1001; S. C., 128 Fed. 73. See ante, "General Rules of Construction," § 455.

52. **Rules of construction.**—Shepherd *v.* Naylor (Mass.), 5 Gray 591.

53. **Evidence of usage or custom.**—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

54. **To explain ambiguous.**—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Belfast, 40 Ala. 184, 88 Am. Dec. 761, and authorities there cited; Benson *v.* Gray, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262.

55. **As contract generally.**—The Henry B. Hyde, 82 Fed. 681, decree affirmed in 90 Fed. 114, 32 C. C. A. 534. As to operation and effect of bills of lading as contract for carriage, see ante, "As Contract of Carriage," §§ 480-481.

56. **Substitution of bill for contract of affreightment.**—See ante, "Issuance and Acceptance," § 4268.

Where, after a vessel had sailed with part only of the cargo, the shipper signed, under a verbal protest, a bill of lading covering the entire quantity, as the only means of obtaining any bill of lading, such bill did not supersede the original contract, and the shipper is entitled to recover back the freight paid on the cargo

Effect on Charter Party.—When the charterer of a vessel is the shipper of a cargo, a bill of lading given by the master operates merely as a receipt for the goods and a document of title, and never, as between the shipowner and charterer, affects the terms of the charter party.[57]

As Evidence of Contract.—In the absence of a charter party, the bills of lading delivered to the shipper are taken as the best evidence of the contract of carriage.[58]

Operation as Evidence of Receipt and Acceptance of Goods.—See ante, "As Evidence of Fact and Time of Receipt and Acceptance of Shipment," §§ 482-483.

Evidence of Receipt on Board.—A bill of lading issued by the master of a ship is prima facie evidence of, and, in the absence of proof to the contrary, establishes, the receipt on board of the goods therein described.[59]

Destination or Place of Delivery.—See ante, "Destination or Place of Delivery," § 484.

Person to Whom Delivery Authorized.—If the document specifies that the merchandise is to be delivered at the place of destination to a consignee named, it will be the duty of the carrier to deliver to the person named as consignee.[60]

Delivery to Holder.—If the document specifies that delivery is to be made to the holder, a mere delivery of the bill of lading will be effective to transfer the title, and the carrier will be bound to require production of the bill of lading, and to deliver the merchandise to the holder, and to no one else.[61]

Operation of Bill of Lading as Vesting Property in Consignee.—As to the operation and effect of bills of lading as vesting the property in the consignee, see ante, "Effect as Vesting Property in Consignee," §§ 499-510. If the bill of lading contain the names of the consignor, and specifies that the property is to be delivered to order, and is sent forward attached to a draft, the carrier will not be authorized to deliver the property, if the drawee refuses to accept the draft.[62] Where, in receiving and transporting, the carrier is the agent of the consignor, and the only contract for which the ship becomes liable is the contract contained in the bill of lading, to which the consignee is not a party, the consignee does not have any right to enforce it, or to collect damages for its violation, where the document does not come into possession. If the contract by the consignor for sale and delivery of the goods shipped is violated, the remedy of the purchaser is in a personal action for damages against the vendor.[63]

not taken, as well as damages resulting from the failure to take it. Decree, The Citta Di Palermo, 153 Fed. 378, affirmed in Equi Valley Marble Co. *v.* Becker, 165 Fed. 437, 91 C. C. A. 592.

57. Effect on charter party.—Decree, 140 Fed. 123, reversed in The Fri, 154 Fed. 333, 83 C. C. A. 205.

58. As evidence of contract.—The Eva D. Rose, 151 Fed. 704, decree modified on rehearing, 153 Fed. 912.

59. Evidence of receipt on board.—Decree, 124 Fed. 975, affirmed in The Titania, 131 Fed. 229, 65 C. C. A. 215.

60. Person to whom delivery authorized.—The Prussia, 100 Fed. 484.

Persons to whom delivery authorized.—See ante, "Persons to Whom Delivery Authorized," §§ 485-487.

61. Delivery to holder.—The Prussia, 100 Fed. 484.

62. Effect as vesting property in consignee.—The Prussia, 100 Fed. 484; Grove *v.* Brien (U. S.), 8 How. 429, 12 L. Ed. 1142, and note; National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

63. The Prussia, 100 Fed. 484.

Where, by a contract for the sale of lumber to be delivered at a distant port, a part of the price was to be paid on delivery, and on shipment of the lumber a bill of lading was issued, by the terms of which delivery was to be made to the consignor or order, and such bill was forwarded, with a draft for the price attached, which was not paid by the purchaser, and the lumber was therefore not delivered to him, he never became the owner of the consignment, so as to sustain any contract relation with the carrier which would support a suit in rem against the vessel for a breach of the contract of affreightment contained in the bill of lading. The Prussia, 100 Fed. 484.

Effect as Warranty of Quality, Quantity, Condition, etc.—In general, the interior condition of goods, packed as usual, and necessarily so, for shipping, can not be known to the shipmaster receiving them for carriage, and therefore the words "in good order and condition" must be limited to their apparently good order and external condition. It is not unusual to insert in the bill of lading "contents unknown," or some saving clause of like effect.[64]

Effect of Warrant of Quantity—In General.—Where a master, who is also owner of a vessel, gives a shipper a bill of lading, reciting receipt of a certain amount of iron, and agreement to deliver it to the consignees, he is liable for damages to the consignees, who, relying on the correctness of the recital, pay the shipper for more iron than was actually on board.[65]

Operation as Evidence of Quantity, Quality, etc.—As to operation of bill of lading as evidence of quantity, quality, conditions, etc., see ante, "As Evidence of Quantity, Quality or Condition of Goods," §§ 492-494. A bill of lading for a specified number of tons of scrap iron, "marked and numbered as per margin," and concluding "weight unknown to" the master, binds the shipowner to deliver only so much as is actually shipped.[66] The ambiguity, if there be any, is a patent one, and must be removed by taking every clause and word in

64. **Effect as warranty of quality, condition, etc.**—Shepherd *v.* Naylor (Mass.), 5 Gray 591. As to operation and effect of bill of lading as warranty, quantity, etc., see ante, "Effect as Warranty or Quantity, etc.," §§ 488-491.

But in Barrett *v.* Rogers, 7 Mass. 297, 5 Am. Dec. 45, the court held that such must be the reasonable construction, where no such words were used, and therefore held that the receipt and undertaking expressed in a bill of lading are prima facie evidence of the quantity, quality and condition of goods received for carriage, but are not conclusive. See, also, Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Haddow *v.* Perry (Eng.), 3 Taunt. 303; Shepherd *v.* Naylor (Mass.), 5 Gray 591.

65. **Effect as warrant of quantity.**—Relyea *v.* New Haven Rolling-Mill Co., 42 Conn. 579, 75 Fed. 420.

66. **As evidence of quantity or weight.**—Shepherd *v.* Naylor (Mass.), 5 Gray 591. See Sears *v.* Wingate (Mass.), 3 Allen 108; Hall *v.* Mayo (Mass.), 7 Allen 455.

In Law *v.* Botsford, 26 Fed. 651, the vessel took on board at Port Huron a cargo of wheat for Buffalo, and the measurement at the port of delivery was less than that called for by the bills of lading. The court said: "It can not be too well understood that a vessel has discharged her entire duty when she has delivered all she has received. This is not only the dictate of common sense, but is also the law, as laid down in Shepherd *v.* Naylor (Mass.), 5 Gray 591, and Kelley *v.* Bowker (Mass.), 11 Gray 428, 71 Am. Dec. 725. So that, while the fact that the vessel did not tally as much at Buffalo as Port Huron cast upon the master the burden of proving that she delivered all that she received, he fully satisfied this requirement, and hence, I think, is exonerated from liability in that particular. In this view, it is not necessary for me to solve the question which in its nature is insoluble, viz, whether the cargo was correctly weighed at Port Huron or at Buffalo. It is impossible for us to tell at this time where the mistake occurred. There was a mistake in measuring this cargo, either inboard or outboard. If the mistake occurred at Buffalo, then the vessel is entitled to her freight upon the amount of the bill of lading. If the mistake occurred at Port Huron, she is entitled to her freight upon the Buffalo weight." Waydell *v.* Adams, 46 N. Y. S. 240.

Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859, was an action against the consignee of a cargo of wheat, under the bills of lading providing: "All deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The court, without questioning the rule laid down in Ellis *v.* Willard, 9 N. Y. 529, Seld. Notes 242; Abbe *v.* Eaton, 51 N. Y. 410; Meyer *v.* Peck, 28 N. Y. 590; and similar cases—that "an ordinary bill of lading is not conclusive as between the original parties, either as to the shipment of the goods or the quantity," and that, "as to those matters, it operates merely as a receipt, and is open to explanation on the trial by parol evidence"—said: "This case is distinguishable in its facts from those considered in the cases referred to. Here the parties have provided by express language for the particular contingency under this contract. * * * The provisions fixing the quantity of grain received, and providing a mode by which any deficiency or excess in quantity shall be dealt with, do not seem susceptible of any other effect than to prescribe a rule by which the

the contract, as they apply to the subject matter; they are to be construed together, and reconciled as far as possible, so as to extract from them the true meaning and intent of the parties.[67] Bills of lading, which, although containing formal recitals of the weight of a commodity received, also contain a clause, "Weight, measure and contents unknown," are not conclusive against the vessel as to the exact weight; and the uncontradicted testimony of the master and mate that the commodity was not weighed when taken on board, and that all that was actually received was delivered, is sufficient to exonerate the ship from liability for a prima facie shortage.[68]

In Actions for Freight.—The estimated weight of a cargo stated in bills of lading prepared by the shipper and signed by the master constitutes an agreement binding on the parties for the purpose of computing freight, unless impeached by proof of a difference in the actual weight.[69] In an action by the charterers of a vessel against the shippers of the cargo for freight, a bill of lading, given by the charterers to parties from whom the shippers purchased the cargo, and who placed it on board, is not conclusive as to the amount of goods carried.[70]

Freight—Refunding Unearned Freight.—Bills of lading in the ordinary form, which show prepayment of the freight, in connection with the established rules of law, constitute a completed contract, binding the carrier to refund the freight, if not earned; and, in the absence of fraud or mistake, parol evidence is not admissible to change the conditions of such contract.[71]

Operative as Evidence or Warranty of Title or Ownership.—See ante, "As Evidence or Warranty of Title or Ownership," §§ 496-498.

Effect of Understating Quantity.—See ante, "Effect of Understating Quantity," § 495.

Stipulations as to Value.—As to stipulations and bills of lading as to value, see ante, "Stipulations as to Value," § 511.

Freight and Demurrage.—See ante, "Freight and Demurrage," § 512.

Operation as Evidence of Carrier's Liability as Warehouseman.—As to operation and effect of bills of lading for evidence of liability of carriers as warehousemen, see ante, "As Evidence of Caarrier's Liability as Warehouseman," § 513.

§ 4271. Transfer.—Negotiability.—As to negotiability of bills of lading, see ante, "Negotiability," §§ 514-518.

Transferability and Assignability.—See ante, "Transferability and Assignability," § 519.

Mode of Transfer.—As to the mode of transferring bills of lading, see ante, "Mode of Transfer," §§ 520-536.

Person Who May Make Transfer.—As to who may transfer bills of lading, see ante, "Persons Who May Make Transfer," §§ 537-539.

Consideration.—See ante, "Consideration," § 540.

consignee can determine the amount of freight and charges payable by him to the carrier." Waydell *v.* Adams, 46 N. Y. S. 240.

67. Shepherd *v.* Naylor (Mass.), 5 Gray 591.

68. **Conflicting recitals.**—The Seefahrer, 133 Fed. 793.

69. **Statements as to weight—Computing freight.**—Symons *v.* 10,466 Barrels of Cement, 195 Fed. 1017.

70. **Conclusiveness in action for freight.**—Waydell *v.* Adams, 46 N. Y. S. 240. See ante, "In General," § 493.

When the cargo of a vessel has been put on board by persons from whom the shippers have purchased it, and who are accordingly, for this purpose, the shipper's agents, and the charterers of the vessels have given a bill of lading for a certain quantity of merchandise, but specially stamped on its face, "Weights and measurement unknown," such charterers are not estopped from disputing the statement of the bill of lading as to the amount of merchandise, though the shippers have settled with the vendors thereof on the basis of the quantity so stated. Waydell *v.* Adams, 46 N. Y. S. 240.

71. **Freight — Refunding unearned freight.**—De Sola *v.* Pomares, 119 Fed. 373.

Effect of Transfer.—As to operation and effect of transfer of bills of lading, see ante, "Effect of Transfer," §§ 541-576.

Effect of Statutes.—The Pennsylvania Act of Septemer 24, 1866, declaring bills of lading negotiable, is not limited merely to bills representing goods in transit to warehousemen or persons in like business.[72] But aside altogether from statute, bills of lading may be so far negotiable that, by the indorsement thereof by the consignees, the title to the goods is transferable to a bona fide purchaser or pledgee for value.[73] By the well-settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a bona fide purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee in such case be the buyer of the goods, or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading.[74] The principle that, where one of two persons equally innocent of actual fraud must suffer from the tortious act of a third, he who gave the wrongdoer the means of perpetrating the wrong must bear the consequences of the act, has often been enforced by the courts against a party who, by documentary evidence of title or otherwise, has clothed his agent or any other person with the apparant absolute ownership of personal property, and thus enable him to deal with it as if he were the owner.[75]

Breach, Mortgage or Collateral Security.—See ante, "Pledge, Mortgage or Collateral Security," § 577.

Purchase or Discount of Draft with Bill of Lading Attached.—As to purchasing or discounting drafts with bill of lading attached, see ante, "Purchase or Discount of Draft with Bill of Lading Attached," §§ 578-587.

Deposit of Draft with Bill of Lading Attached for Collection.—As to depositing draft with bill of lading attached for collection, see ante, "Deposit of Draft with Bill of Lading Attached for Collection," § 588.

Duplicate and Triplicate Bills.—As to duplicate and triplicate bills of lading, see ante, "Duplicate and Triplicate Bills," § 589.

§ 4272. Effect on Connecting Carrier.—As to operation and effect, a bill of lading as binding intermediate and terminal carriers, see ante, "Effect as Binding Intermediate and Terminal Carrier," § 590.

72. **Effect of statutes.**—Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545. See Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892.

73. Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545.

Plaintiffs, in Paris, advanced money upon goods in transit to this country, taking a trust receipt, whereby the consignees agreed to hold the merchandise on storage as plaintiffs' property until the loan was repaid or otherwise provided for. Plaintiffs thereafter voluntarily put the bills of lading, indorsed in blank, into the hands of persons who obtained advances on them from defendants, in Philadelphia, who were ignorant of plaintiffs' claim. Held that, independently of statute, the bill of lading were so far negotiable that defendants were entitled to hold the goods as against the claim of plaintiffs. Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545, writ of error dismissed by stipulation 79 Fed. 999, 24 C. C. A. 685.

74. Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545.

75. Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545; Calais Steamboat Co. *v.* Scudder (U. S.), 2 Black 372, 17 L. Ed. 282; Pennsylvania R. Co.'s Appeal, 86 Pa. 80; Robertson *v.* Hay, 91 Pa. 242; Miller *v.* Browarsky, 130 Pa. 372, 18 Atl. 643.

In the case of Pollard *v.* Reardon, 13 C. C. A. 171, 65 Fed. 848, it was said by Judge Putman: "There is every reason found in the law of equitable estoppel and in sound public policy for holding and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

§ 4273. Modification or Rescission.—As to modifying or rescinding bills of lading, see ante, "Modification or Rescission," § 591.

§ 4274. Surrender, Discharge or Release.—As to surrendering, discharging or releasing bills of lading, see ante, "Surrender, Discharge or Release," § 592.

§ 4275. Actions on Bills of Lading.—As to actions to enforce rights arising under bills of lading, see ante, "Actions," §§ 593-602.

§§ 4276-4337. Transportation and Delivery—§§ 4276-4277. General Consideration—§ 4276. Title, Custody and Control of Goods.—Title and Rights of Consignor, Consignee or Third Person—Right to Maintain Action against Carrier.—See ante, "Title, Custody and Control of Goods," chapter 9; post, "In General," § 4313.

Title and Rights of Carrier—Right to Maintain Action Respecting Property Transported.—See ante, "Title, Custody and Control of Goods," chapter 9; post, "By Carrier," § 4312.

§ 4277. Liability as Warehouseman.[76]—In the case of a carrier by water, where the time of the arrival of the goods is uncertain the ship remains liable as a carrier until the consignee has had a reasonable time after notice to remove the goods.[77] A steamship company, which, on the arrival of its vessel, placed the cargo of a shipper in a warehouse on the wharf, which it had the right to use, and from there made delivery to the shipper, the goods not having been stored for the account and risk of the shipper, remained responsible therefor until delivery and is liable for a shortage due to some of the goods having been stolen from the warehouse.[78] Where freight had been landed on the wharf, and the consignees were notified of its arrival, paid the freight, and removed part of the goods, the carrier's responsibility was terminated, and any obligation that remained with reference to goods not removed was that of a warehouseman or wharfinger.[79] And where a vessel is detained, after the expiration of time for unloading, by the act of the consignee, she is liable as a warehouseman only.[80] Where, by the provision of a bill of lading, merchandise is to be delivered "from the ship's tackles where the ship's responsibility shall cease," her liability, after the goods are discharged, is that of a bailee, charged with the duty to take ordinary care of the property for a reasonable length of time, and not to abandon it, or negligently expose it to injury.[81] Where a bill of lading provided that, on arriving at destination, the master should hold the cargo for a specified number of days or less and to receive therefor a specified sum, it was held that the carrier's liability as a carrier ceased on the arrival of the boat with its cargo in good order and ready for delivery on notice of arrival to the consignee and his election not to remove the cargo.[82]

76. **Liability as warehouseman.**—See ante, "Carrier as Warehouseman," Chapter, 13; post, "Negligence in Discharging or in Caring for Goods after Discharge," § 4306.

77. **Reasonable time after notice.**—See ante, "Express Companies and General Carriers by Water," § 1093.

Where a carrier did not give proper notice to the consignee to appear and take charge of the freight, and allow reasonable time thereafter for him to do so, but unloaded the freight upon a pier, which collapsed, so as to injure the goods, the carrier was liable, irrespective of the question whether it was guilty of negligence in failing to exercise reasonable care in selecting a safe place to unload. Rosenstein *v.* Vogemann, 184 N. Y. 325, 77 N. E. 625, affirming 92 N. Y. S. 86, 102 App. Div. 39.

78. Evans *v.* New York, etc., Steamship Co., 163 Fed. 405.

79. **Payment of freight and removal of part of goods.**—Stone *v.* Clyde Steamship Co., 139 N. C. 193, 51 S. E. 894.

80. **Vessel detained by consignee.**—The M. C. Currie, 132 Fed. 125.

81. Smith *v.* Britain Steamship Co., 123 Fed. 176.

82. Putnam *v.* Furnam, 71 N. Y. 590.

§§ 4278-4288. Duties and Liabilities as to Transportation and Delivery—§ 4278. In General.—See ante, "Duties as to Transportation in General," § 812.

Duty to Carry in Vessel Specified in Contract.—The contract of affreightment obliges the carrier, in the absence of a legal excuse, to carry the freight to the destined port in the very vessel stipulated in the bill of lading;[83] and it is no defense, in an action for breach of the contract, that the shipowners offered to carry the goods on another vessel at no additional risk or cost.[84]

§ 4279. Loading Goods.—Time for Loading.—Where a charter party fixes no time for the loading by the shipper to begin or end, the law will presume that a reasonable time under all the circumstances known to the parties or presumed to have been within their contemplation was intended, and a provision for such reasonable time will be considered as agreed to by the parties.[85]

Consignment of Vessel to Third Person for Loading.—In the absence of some agreement to the contrary between owner and charterer or some evidence showing a contrary intent, the party who is to load the vessel will be deemed the agent of the charterer, and, when the charterer consigns the vessel to another for loading, it makes itself responsible for the acts or omissions of such consignee the same as though it had directed the vessel consigned to itself at the same place.[86]

Liability for Overestimating Amount Loaded.—Vessel owners can not be held liable to a shipper for the amount of an overpayment made by him to miners for a cargo of stone furnished him for loading the vessel because the master overestimated the amount loaded and the shipper accepted his estimate as the basis for making such payment, where it does not appear that the master acted fraudulently.[87]

§§ 4280-4281. Deviation and Delay—§ 4280. Deviation.—It is the duty of the owner of a vessel receiving a cargo for transportation to proceed without unnecessary deviation in the course, agreed upon in the contract,[88] or if none be designated, in the customary and usual route to the port of delivery.[89] In every contract of affreightment, unless otherwise expressly provided, the carrier's undertaking is that he will diligently carry the goods on the agreed voyage without any unnecessary deviation.[90] So, if a carrier would secure the right to deviate from the usual course he should stipulate for it in the bill of lading.[91] The words "with liberty * * * to make deviation," in a bill of lading, give the carrier the right to make only such departures from the voyage as are necessary and reasonable.[92] Where the vessel is destined for several ports and places, the master should proceed to them in the order in which

83. Duty to carry in vessel specified in contract.—Harrison *v.* Steward, Fed. Cas. No. 6,145, Taney 485; Cox *v.* Foscue, 37 Ala. 505, 79 Am. Dec. 69; Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970. See ante, "Duties as to Transportation in General," § 812; post, "Transshipping and Forwarding," § 4288.

84. Harrison *v.* Steward, Fed. Cas. No. 6,145, Taney 485.

85. Time for loading.—Peck *v.* United States, 152 Fed. 524.

86. Consignment of vessel to third person for unloading.—Peck *v.* United States, 152 Fed. 524.

87. Overestimating amount loaded.—Barber *v.* Vlasto, 104 Fed. 101.

88. Deviation—Duty to proceed upon agreed course.—The Indrapura, 171 Fed. 929.

Receipt for goods designating route.—A receipt for goods "for Baltimore, via Chesapeake & Delaware Canal," is a contract to carry the goods through that canal to Baltimore. Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

89. Customary and usual route.—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The Citta Di Messina, 169 Fed. 472; The Indrapura, 171 Fed. 929; Powers *v.* Davenport (Ind.), 7 Blackf. 497, 43 Am. Dec. 100.

90. Globe Nav. Co. *v.* Russ Lumber, etc., Co., 167 Fed. 228.

91. Lawrence *v.* McGregor (O.), Wright 193.

92. Swift & Co. *v.* Furness, etc., Co., 87 Fed. 345.

they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage.[93]

What Constitutes Deviation.—"Deviation" is defined, generally speaking, to be a voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage.[94] It means a departure from the usual course of the voyage, or from the usual manner of prosecuting it.[95] Whether there has been a deviation is, upon conceded facts, a question for the court.[96] For a vessel after arriving at the port of delivery to return to the port of shipment, and thence make a second voyage to the port of delivery, is not a deviation.[97] An alteration of a voyage requiring the vessel to proceed by sea instead of through a canal,[98] the placing of a vessel in dry dock after she had received cargo on board for the voyage, for the purpose of painting her bottom when that was not a maritime necessity,[99] or for a steamer to take in tow a four-masted schooner belonging to the same owners,[1] constitutes a deviation. Where it appeared that the usual route of vessels from between two points was through Long Island Sound in summer and winter, that in a certain winter the navigation of the sound was obstructed by ice for a longer period than usual, and that in February, during that period, a vessel departed from such usual route, and performed her voyage in the open sea, on the south side of Long Island, it was held, that this was a deviation, without reasonable necessity.[2] Where goods were consigned from Savannah to a port of Spain, under bill of lading reciting that the vessel was bound for that port, and the vessel went first, without necessity or reasonable cause, to a port in Italy not in the usual course of vessels bound from Savannah to the Spanish port, thus subjecting the goods, when delivered at that port, to an extra duty under the law of Spain, this was such a deviation as would authorize the consignors to recover in an action against the owner of the ship for loss thus occasioned.[3]

93. Vessel destined for several ports.—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

94. What constitutes deviation.—Pacific Coast Co. *v.* Yukon Independent Transp. Co., 83 C. C. A. 625, 155 Fed. 29; Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1.

95. Globe Nav. Co. *v.* Russ Lumber, etc., Co., 167 Fed. 228.

96. Question for court.—Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

97. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 83 C. C. A. 625, 155 Fed. 29.

Breach of contract of affreightment—Provision for deviation.—Libelant contracted with respondent for the carriage of goods from Seattle to St. Michaels, Alaska. It was fully understood that libelant intended to market the goods along the Yukon river as soon as the ice went out, and that it had a vessel awaiting at St. Michaels for the purpose. It was agreed that the goods should be taken on the first trip of respondent's vessel north, and should be delivered as soon as the ice was out of the harbor at St. Michaels, which was known to be usually about the 1st of July. Libelant refused to ship without such agreement. The bills of lading, which were issued after the cargo was on board, provided that in case the vessel should be prevented by stress of weather or otherwise from entering the port of delivery, the carrier might convey the property to the nearest or other port, and thence return it to the port of delivery by the same or other vessel, subject to the contract for the original voyage and at the risk of the owner. The vessel reached St. Michaels June 20th, and, finding the harbor filled with ice, returned to Nome, and there tendered delivery at ship's tackle, which being refused she returned to Seattle, and delivered the goods at St. Michaels on her next trip on July 19th. The ice went out of the harbor about July 1st. Held, that the vessel was bound by the contract of affreightment to wait until the ice went out or to transship the goods at Nome to be delivered at St. Michaels as soon as the harbor was free, at her own expense, and that she was liable for the damages caused by her breach of contract. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

98. Going by sea instead of canal.—Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

99. Placing vessel in dry dock.—The Indrapura, 171 Fed. 929.

1. Taking vessel in tow.—Globe Nav. Co. *v.* Russ Lumber, etc., Co., 167 Fed. 228.

2. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

3. Robinson *v.* Holst, 96 Ga. 19, 23 S. E. 76.

Excuses for Deviation.—A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, for the purpose of obtaining necessary supplies, or for the purpose of assisting another vessel in distress.[4] But an ordinary or temporary obstruction of the prescribed route will not justify a deviation therefrom.[5]

Deviation Usual or Customary.—See ante, "Necessity and Justification," § 833.

Delay as Deviation.—Delay of a vessel, even upon the route prescribed by a policy or bill of lading, may amount to deviation.[6]

§ 4281. Delay.[7]—It is the duty of the carrier by water receiving a cargo for transportation, in the absence of any stipulation as to the period of sailing, to commence the voyage within a reasonable time, without delay, and as soon as the wind, weather, and tide will permit,[8] proceed without unnecessary delay,[9] and transport the goods within a reasonable time to the point of destination.[10] And where shipowners fail to deliver cargo within the time reasonably necessary to make the voyage, and the delay is not due to stress of weather or any of the causes for which they do not assume liability, they are liable to the shipper for losses resulting to him from such delay, although no time for delivery was fixed by the bill of lading.[11] A steamship line is liable for damages suffered by the owner of goods through a fall in price while delivery was delayed, owing to a failure of the company to forward the goods on the vessel to which they were constructively delivered and which issued bills of lading.[12]

Excuses for Delay.—The carrier is not responsible for delay in the voyage on account of boisterous weather or adverse winds, low tides, or the like, un-

4. **Excuses for deviation.** — Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

5. **Ordinary or temporary obstruction.** —Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

6. **Delay as deviation.**—The Citta Di Messina, 169 Fed. 472.

Delay not constituting deviation.—Under bills of lading which recited that the vessel was bound for New York, "but with liberty to the steamer either before or after proceeding towards that port to proceed to and stay at any port or places whatsoever, although in a contrary direction to or out of or beyond the route to the said port of discharge once or oftener in any order, backwards or forwards for loading or discharging cargo or passengers or for any purpose whatsoever," the stopping of the vessel at the next port of call for 13 days awaiting cargo of which she obtained but a small part did not constitute a deviation. The Citta Di Messina, 169 Fed. 472.

7. **Delay in transportation or delivery.** —See ante, "Delay in Transportation or Delivery," Chapter 11.

8. **Time of sailing.**—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41. See Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606.

9. The Indrapura, 171 Fed. 929.

10. **Transportation to destination within reasonable time.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; The Gordon Campbell, 141 Fed. 435.

11. **Where no time agreed upon.**—The Prussia, 100 Fed. 484.

Proper estimate of delay.—On a libel for damages for unreasonable delay in transporting horses to Alaska during the Klondike rush of 1898, the evidence showed that a horse was worth $20 a day during the period of delay. It further showed that the horses were put on board the vessel on February 22d, that the vessel did not sail until February 24th, that it stopped two days on the way, that it arrived at its destination on March 6th, that the horses were not discharged until March 9th, and that, owing to a further delay in unloading their equipment, they were not available for service until March 14th. This delay was caused by using a lighter which was used, notwithstanding the payment of wharfage by the shipper in advance in order that there should be no such delay. Held, that an estimate of damages on the basis of 10 days' delay was reasonable, and an award of damages on such basis was not excessive. La Conner, etc., Transp. Co. *v.* Widmer, 136 Fed. 177, 69 C. C. A. 193.

12. **Failure to forward goods on vessel to which they were delivered.**—The Gutenfels, 166 Fed. 989, decree affirmed in 170 Fed. 937.

less it could be avoided by the use of proper precautionary measures.[13] The carrier is liable for failure to promptly deliver a cargo unless prevented by stress of weather, endangering the safety of the cargo, or preventing further progress. Exposure to inclement weather, or fear of encountering ice or cold, constitutes no excuse.[14] While it may be the duty of a common carrier receiving freight for transportation by rail and beyond the seas ordinarily to provide for the clearance of the vessel in which the goods are to be shipped, the shipper can not complain of failure to obtain such clearance when it is prevented by the nature of the shipment.[15]

Delay in discharging through default of the vessel does not entitle the charterer or consignee to damages, in the absence of a contract for delivery by a particular day, but simply extends the time within which the discharge may be made without liability of the charterer or consignee for demurrage.[16] Of course, if a vessel having agreed to load or discharge a cargo on a certain day, fails to do so, the usual consequences of a breach of contract may be recovered.[17]

Waiver of Right to Damages.—Where the owner of a cargo has means of information that the ship has become unfit for navigation, and of the opportunities for repairs, and of the probable delay, he may be estopped by his acts or acquiescence from claiming damages to the market value of the goods arising from such delay.[18] Where the carrier after agreeing to furnish a vessel to transport a cargo of lumber, but without any definite contract as to time, was delayed in procuring a vessel, but the owner, having failed to secure one elsewhere, accepted the carrier's when tendered, the carrier can not be held liable for expenses incurred in consequence of the delay.[19]

Failure to Show Contract of Carriage.—Where it is not shown that a vessel undertook the carriage of goods, an action in rem will not lie against her for delay in their transportation caused by being sent on another vessel.[20] A com-

13. **Excuses for delay.**—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

14. Holland *v.* 725 Tons of Coal, 36 Fed. 784; Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606.

A barge laden with coal started on a voyage from Philadelphia to Boston in tow of a powerful steamship at a time when there was floating ice in the Delaware river. Two or three miles down the river, heavier ice was encountered; and in the first, unsuccessful, attempt of the steamship to force her way through, the barge was injured, making it necessary for her to stop for repairs. The steamship then successfully passed through the ice, and proceeded alone. Held, under the evidence, that the condition of the river was not such as to render the barge negligent in starting, in view of the size and strength of the vessels; it being her duty to make every reasonable effort to deliver the cargo promptly. Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606.

15. **Nature of shipment.**—Farmers,' etc., Trust Co. *v.* Northern Pac. R. Co., 112 Fed. 829, reversed in 120 Fed. 873, 57 C. C. A. 533, which is affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269, on the ground that the carrier was negligent.

16. **Delay in discharging.**—Milburn *v.* Federal Sugar Refin. Co., 161 Fed. 717, reversing The Heathdene, 155 Fed. 368.

17. Milburn *v.* Federal Sugar Refin. Co., 161 Fed. 717, citing Petrie *v.* Heller, 35 Fed. 310.

18. **Waiver of right to damages.**—The Strathdon, 89 Fed. 374.

The ship was delayed necessarily for six months for repairs, during which time the cargo owners and underwriters, to whom abandonment was made, although fully apprised of the condition of the ship, made no demand for the transshipment and forwarding of the sound portion of the cargo, and the cargo owners apparently acquiesced in the delivery of the goods by the ship, while the underwriters simply stated that they should hold the ship responsible for the delay, but declined all propositions of the carrier for expediting the delivery. Held, that the cargo owners, or their successors in title, were not entitled to recover damages for decline in the market value of such cargo on account of the alleged unreasonable delay in delivery. The Strathdon, 89 Fed. 374.

19. Murray *v.* Jump Co., 148 Fed. 123.

20. **Failure to show contract of carriage.**—The agent at Barcelona of the owners of the B. contracted to carry goods from there to New York via Marseilles. The bill of lading provided for the carriage of the goods by the B., or, at the carrier's

plaint alleging that after a breach by defendant of a contract to transport plaintiff's property on defendant's vessel "it was then and there agreed" that defendant would transport the property on the same terms on a following vessel, not alleged to have been owned or controlled by defendant, and that such vessel would reach the port of destination "at substantially the same time" as defendant's; but that by reason of delays it did not arrive until several days later than defendant's vessel whereby plaintiff was damaged, does not state a cause of action, there being no contract nor consideration alleged which would render defendant responsible for the delay complained of.[21]

§§ 4232-4283. Failure or Refusal to Deliver—§ 4282. In General.—The duty of the carrier is not merely to safely carry the goods intrusted to it, but also to deliver them, or do what is equivalent thereto.[22] Where a vessel stranded on a voyage near her port of delivery, and on being released some days later started back with the intention of delivering the cargo back to the consignors, in violation of the contract of carriage, the consignees were entitled to sue the vessel in admiralty to recover the cargo and damages for its nondelivery.[23]

Excuse for Nondelivery in General.[24]—Though generally a bailee may not set up title in a third party in an action by the bailor, in an action against a master of a vessel for failing to deliver goods, he may show that the goods belong to a third party who has forbidden delivery.[25] And a shipper can not demand the delivery of his goods, if the landing of them would expose the vessel to seizure.[26] Where a suit against a common carrier by water for nondelivery of certain goods was not brought until two years after the defendant had received them, it was no defense that the river on which the goods were to be carried was for four months after they were received too low for the navigation of defendant's boat.[27]

Requiring Proof of Right to Goods.—See ante, "Requiring Proof of Right to Goods," § 839.

Detention for Debt or Charges.—See ante, "Detention for Debt or Charges," § 841. A carrier, refusing to deliver freight without payment of demurrage not due, is liable for a conversion.[28]

§ 4283. Short Delivery.—Where a certain number of cases of goods are laden on board of a vessel in good order, they are thereafter until delivery, at the ship's risk with respect to contents, and she is liable for a deficiency, in the absence of a valid exception in the bill of lading.[29] But the carrier is not liable for the shrinkage of the cargo owing to the inherent nature and quality of the goods.[30] The receipt of a specified number of packages by the master makes

option, by another ship. It recited the name of the captain of the B., but the signature thereto was illegible, and bore no satisfactory resemblance to his name. The B. was not at Barcelona at that time nor thereafter. The goods were carried by another vessel, which sailed from Marseilles 19 days after the B. sailed from that port. Held, that a libel in rem for damages from the delay would not lie against the B., even in favor of a bona fide purchaser of the bill of lading, as there was nothing on its face to indicate, to one exercising care, that it was signed by her captain. The Britannia, 87 Fed. 495.

21. Johanson *v.* Sondheim, 145 Fed. 620, 76 C. C. A. 310.

22. **Liability for failure or refusal to deliver.**—See ante, "Duty and Necessity of Delivery," § 835; "Liability for Failure or Refusal to Deliver," §§ 836-841.

23. The Eva D. Rose, 153 Fed. 912, modifying decree, 151 Fed. 704.

24. **Excuse for nondelivery in general.**—See ante, "Excuse for Nondelivery in General," § 837.

25. **That goods belonged to another.**—Hayden *v.* Davis, 9 Cal. 573.

26. **Vessel exposed to seizure.**—Montegudo *v.* Silva, 1 La. 279.

27. Wallace *v.* Vigus (Ind.), 4 Blackf. 260.

28. **Detention for demurrage not due.**—Barker-Bond Lumber Co. *v.* Pennsylvania R. Co., 131 N. Y. S. 624, 74 Misc. Rep. 63.

29. **Short delivery.**—The Seneca, 163 Fed. 591.

30. **Shrinkage due to inherent nature of goods.**—Janney *v.* Tudor Co., 3 Fed. 814. See Glasgow Steam Shipping Co. *v.* Tweedle Trading Co., 154 Fed. 84.

a prima facie case against the ship where a smaller number is delivered;[31] but the ship will be discharged if he is able to show that he delivered all that he actually received.[32] Under a bill of lading providing that it should, in the absence of fraud or obvious error, be conclusive evidence against the carrier of the quantity of cargo received, where the cargo was carefully tallied when received on board, but the ship delivered less than the stated quantity, there was no "obvious error" which will relieve her from liability for the shortage.[33] Where bills of lading for cargoes of phosphate specified the quantity, but contained the further statements, "Weight and quantity unknown," or "Weight unknown," the burden rests upon the shipowners to account for any discrepancy between the quantity delivered and that specified; but this is met by proof that the full quantity loaded was delivered, and this may be shown as against a consignee who has paid drafts drawn by the shippers for the full quantity specified, where the bills of lading were attached to the drafts.[34] The rule that a vessel is liable for cargo received, but not delivered, does not apply to a case where all the cargo received was carried to the port of delivery, but a portion of it had been so damaged on the voyage that it could not be identified.[35]

§ 4284. Notice of Arrival of Goods.—It is indispensable that a consignee should have notice of the arrival of the goods.[36] So the carrier is liable for the destruction of goods from nonexempted causes after delivery upon its wharf at destination, but before notice of arrival to the consignee.[37] It is held that if the

31. Effect of receipt.—Bolton Steam Shipping Co. *v.* Crossman, 206 Fed. 183; James *v.* Standard Oil Co., 189 Fed. 719, decree affirmed in 191 Fed. 827.

32. Liable only for goods actually received.—Dean *v.* King, 22 O. St. 118; Bolton Steam Shipping Co. *v.* Crossman, 206 Fed. 183. See Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; James *v.* Standard Oil Co., 189 Fed. 719, affirmed in 191 Fed. 827. See Glasgow Steam Shipping Co. *v.* Tweedle Trading Co., 154 Fed. 84.

The rule that the master of a vessel has no authority by virtue of his position, either actual or apparent, to sign a bill of lading for cargo not actually received on board, applies when there is only a deficiency in part through mistake, and the owner can not be held liable, either by the original consignee or an indorsee of the bill of lading, for such a shortage, where the quantity actually received is delivered. American Sugar Refin. Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42, affirming decree, 91 Fed. 166.

Evidence showing delivery of entire cargo.—A ship received 151,886 cases of petroleum to be transported to Japan. The consignee only acknowledged receipt of 151,661. The cargo was tallied out of the steamer by her second and third officers and three of her sailors, whose tally showed a shortage of 753 cases, which was manifestly incorrect. When the discrepancy was discovered, the master requested a recount from the consignee, which was declined, on the ground that it could not be conveniently had, and in the meantime part of the cargo was reshipped. It was shown that no part of the cargo was used on the steamer, and there was no opportunity for abstraction or loss during the voyage, and that all of the cargo received was delivered except six cases, purchased for the steamer's use. Held, in the absence of other evidence, such facts established a prima facie case of delivery of the entire cargo. McLaren *v.* Standard Oil Co., 124 Fed. 958.

33. The Sikh, 175 Fed. 869, decree affirmed in 184 Fed. 990, 107 C. C. A. 566.

34. Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

35. The Good Hope, 190 Fed. 597.

36. Notice of arrival of goods.—Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264. See ante, "Carrier by Water," § 844; "Express Companies and General Carriers by Water," § 1093; "Necessity for Notice of Arrival of Goods," § 1095.

A bill of lading provided that the goods were to be taken from the ship by the consignee immediately upon their coming to hand in discharging the ship, and that the carrier's responsibility should cease package by package immediately upon the goods leaving the ship's deck or tackle, and that, if not taken from alongside by the consignee, the goods would be landed at his risk of fire, loss, or injury on the dock or in the warehouse or in craft. The bill contained no provision as to notice to the consignee of the arrival of the goods. Held, that it was the duty of the carrier to give notice of the time and place of the arrival of the vessel and a reasonable time thereafter for the removal of the goods. Judgment, 92 N. Y. S. 86, 102 App. Div. 39, affirmed in Rosenstein *v.* Vogemann, 77 N. E. 625, 184 N. Y. 325.

37. Jennings *v.* Clyde Steamship Co., 133 N. Y. S. 298, 148 App. Div. 615; Sea Coast Lumber Co. *v.* Clyde Steamship Co., 133 N. Y. S. 303, 148 App. Div. 622.

consignee has actual notice of the arrival of the vessel containing the consignment, the master is not bound to give him further notice thereof;[38a] but there are cases holding the contrary.[38b]

Sufficiency of Notice.—See ante, "Duties in Making Delivery," § 845.

§ 4285. Mode and Sufficiency of Delivery.[39]—Must Be Attended with No Fact to Impair Title.—The delivery contemplated by the contract is a transfer of the property into the power and possession of the consignee. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property.[40]

Necessity for Personal Delivery.—See ante, "Necessity for Personal Delivery," § 848.

Time of Delivery.—A delivery by the carrier, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time.[41]

Place of Delivery.[42]—A carrier by water must deliver goods at the destination,[43] at the customary wharf for the discharge of a vessel in the absence of a contract or established usage to the contrary.[44] Any right of the carrier under the contract to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods onto the dock.[45] Where a vessel went aground not far from a port of delivery, consignees who received cargo where she lay, thereby waived a delivery in strict compliance with the contract.[46] Although provisions in a bill of lading permit the discharge of cargo at other ports than that to which it is consigned in case of circumstances of war, which, in the opinion of the master, render it unsafe to enter or discharge there, the master, as agent of all concerned, is bound to exercise prudence to protect the interests of the cargo as well as the vessel, and the discharge of cargo by him at another port, as being contraband of war, is not justified unless the facts show that there was reasonable necessity therefor.[47]

38a. Where consignee has actual notice of arrival of ship.—The Ravensdale, 75 Fed. 413.

38b. The Middlesex, Fed. Cas. No. 9,533; Unnevehr *v.* Hindoo, 1 Fed. 627.

39. Mode and sufficiency of delivery.—See ante, "In General," § 842; "What Constitutes Delivery," § 843.

40. Must be attended with no fact to impair title.—Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391; O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140.

"Delivering the cargo charged with a lien for an indebtedness of the shipowner is not different in principle or effect from the nondelivery of a portion or the whole in a damaged condition. It is also analogous in principle to a jettison of a portion of the cargo for the benefit of the ship and the remainder of the cargo, when a clear right to contribution would exist, enforceable in admiralty. Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584." O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140.

41. Time of delivery.—Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412. See ante, "Carrier by Water," § 844; "Time of Delivery," § 847.

42. Place of delivery.—See ante, "Carrier by Water," § 844; "Place of Delivery," §§ 849-853.

43. Adams & Co. *v.* Haught, 14 Tex. 243.

44. Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

Where a consignee of goods did not inform a transportation company of his intention not to be bound by the established custom at a certain port to make wharfage charges against consignees and not against the carrier, the carrier was entitled to unload the goods at the wharf, which was the usual place of deposit, instead of delivering them out of the ship or at its side. Riddick *v.* Dunn, 145 N. C. 31, 58 S. E. 439, 13 Am. & Eng. Ann. Cas. 382.

45. The Titania, 131 Fed. 229, 65 C. C. A. 215, affirming 124 Fed. 975.

46. Accepting cargo at intermediate point.—The Eva D. Rose, 151 Fed. 704, decree modified on rehearing, 153 Fed. 912.

47. The Styria, 93 Fed. 474.

The Austrian steamship Styria was loaded at an Italian port with a cargo of sulphur consigned to New York, and cleared on April 24, 1898. On the day before, a Spanish proclamation was issued, declaring the existence of a state of war between Spain and the United States, and in which sulphur was declared contraband. On April 27th, the master, who had not sailed, commenced the discharge of the cargo, which was completed May 7th. Almost immediately after the declaration of war the public prints contained statements of negotiations for the

Effect of Custom or Usage.—See ante, "Effect of Custom or Usage," § 846; "In General," § 849. A custom having been established to deliver cargoes of tea within a particular part of the water front in a certain port, a vessel having a cargo consisting principally of tea is bound to make delivery there if required by the consignees, and it is no defense to a suit for damages for the refusal to discharge there that in one or two instances other vessels have also refused, nor is it material that other piers afforded better facilities for discharging.[48] Evidence that, on the arrival of a vessel in port, the master, by direction of the consignees, who were to pay the wharfage, engaged a berth for the vessel at a particular wharf, is not sufficient to charge him with their knowledge of a rule of that wharf concerning the mode of discharging cargoes different from the usage at similar wharves in the same port.[49]

Opportunity to Inspect and Remove Goods.—See ante, "Carrier by Water," § 844; "Duties in Making Delivery," § 845.

Insufficient Delivery.—A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfill the obligation of his contract.[50] Where a carrier contracted to deliver wheat to the consignee, who had an office on the pier within the port of delivery but on the arrival of the vessel, the consignee directed the master to proceed with his vessel across the channel of the river to a railroad elevator within the port, and the cargo was destroyed by fire while waiting to be discharged, there was not sufficient delivery before the fire to discharge the carrier from liability.[51]

§ 4286. To Whom Delivery May Be Made—Misdelivery.—See ante, "To Whom Delivery May Be Made," §§ 854-857. It is not enough if the carrier by water carry the goods in safety, but he must, in due time, and without demand upon him, deliver them to the consignee or do that which in contemplation of law is tantamount thereto, before he is discharged from his responsibility as carrier.[52] A ship's delivery of a consignment of dutiable goods to the customs authorities, being required by the law and usage of the place—delivery to the proper party thereafter devolving on such authorities—is a good delivery as between the shipper and carrier.[53] By issuing bills of lading for merchandise, stipulating for a delivery to order, the ship becomes bound to deliver it to no one who has not the order of the shipper.[54]

Misdelivery.—A carrier is bound to deliver the goods entrusted to it for transportation to the person entitled to receive them and it is liable for delivery to the wrong person.[55]

purpose of having sulphur exempted from contraband goods, and repeatedly stated that such efforts would be successful, of which statements the master was aware, and also of the announcement of their success, and he was also notified of such result by one of the shippers before the discharge of the cargo was completed. At the next Italian port, to which he went for a new cargo, on May 10th, he heard read an official announcement to the same effect, though it had not been publicly proclaimed. Other vessels sailed at about the same time he cleared with cargoes of sulphur, and were not molested. Held that, under the circumstances, it was his duty to wait a reasonable time before discharging the cargo, and, as he had reasonable assurance of safety by May 10th, he was not justified in such discharge. The Styria, 93 Fed. 474.

48. **Custom as to place of delivery.**—Hewlett *v.* Burrell, 105 Fed. 80, 44 C. C. A. 362.

49. Croucher *v.* Wilder, 98 Mass. 322.

50. **Insufficient delivery.**—Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412.

51. Gibbs *v.* Van Buren, 48 N. Y. 661.

52. **To whom delivery may be made.**—Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

53. **Delivery to custom authorities.**—Herbst *v.* The Asiatic Prince, 97 Fed. 343, affirmed in The Asiatic Prince, 108 Fed. 287, 47 C. C. A. 325.

54. **Stipulation for delivery to order.**—The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804.

55. **Misdelivery.**—See ante, "Misdelivery," §§ 858-866.

Carrier not liable.—B. and C. took goods to a boat and accepted a receipt

§ 4287. Failure or Refusal of Consignee to Receive Goods.—See ante, "Failure or Refusal of Consignee to Receive Goods," § 868.

Sale of Goods.—Where goods arrive in a perishing condition from causes for which the carrier is not responsible, and the consignee refuses to receive them, the carrier is justified in selling the goods for their value in such condition.[56]

§ 4288. Transshipping and Forwarding.—When the vessel is wrecked or otherwise disabled in the course of the voyage, and can not be repaired without too great delay and expense, the master is at liberty to transship the goods and send them forward; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination.[57] The rule, however, is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle and for the same end, if he have no means to transship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command.[58]

Where Voyage but Part of Transit.—Where a bill of lading, signed by a master, shows that a voyage to a particular place named on it is but part of a longer transit which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward.[59] In such a case, if any obstacle should intervene, which by the regular course of the trade is liable to occur and for a short time retard the forwarding, the master can not, from a mere inability to find storage at the intrepot, turn about, and taking the cargo to some near port, store it there, and inform the consignee; but he should wait.[60] The general course of business in forwarding when the ship of the signer of a through bill of lading does not go all the way to the port of ultimate destination, of which fact the shipper has knowledge, or is given notice by the through bill of lading, and the manifest necessity of transshipment by the through undertaker under such contract as it can reasonably make, justifies the presumption of its authority to make such contract, and to bind the shipper thereby, although the terms of the new contract may not be in all respects the same as its own; but, in any event, the undertaking and liability of the second carrier are measured by its own contract, provided its terms are reasonable, and

from the second clerk in the name of A., to whom C. was indebted. B. held himself out as owner to the captain, accompanied the goods on the trip, and when the boat reached its destination received the goods and paid the freight. Held, that A. could not recover the value of the goods from the owner of the boat, since the receipt was taken merely as a security, and B. was by the consent of A. and C. made apparent owner, and put in a position to impose on the officers of the boat. De Baun *v.* Atchison, 14 Mo. 543.

56. **Sale of goods.**—The Bobolink, Fed. Cas. No. 1,588, 6 Sawy. 146. See Astsrup *v.* Lewy, 19 Fed. 536.

57. **Transshipment and forwarding when vessel wrecked or disabled.**—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Strathdon, 89 Fed. 374; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017; Harrison *v.* Fortlage, 161 U. S. 57, 40 L. Ed. 616, 16 S. Ct. 488.

58. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41. See The Strathdon, 89 Fed. 374.

59. **Where voyage but part of transit.**—The Convoy's Wheat (U. S.), 3 Wall. 225, 18 L. Ed. 194.

60. **Inability to find storage at entrepot.**—The Convoy's Wheat (U. S.), 3 Wall. 225, 18 L. Ed. 194.

If there is easy telegraphic communication with the consignees, the master should notify them of his difficulty, that they may send him, if they please, instructions. The Convoy's Wheat (U. S.), 3 Wall. 225, 18 L. Ed. 194.

not in contravention of the maritime law.[61] The foreign agents of an owner of merchandise, authorized to ship the goods, also have implied authority, generally speaking, to agree upon the terms of the contract of carriage; and where they know that transshipment is necessary they may lawfully empower the first carrier to deliver the goods to a connecting carrier upon terms that are not the same as those of the first bill of lading.[62]

Transshipment without Legal Excuse.—As agent of the owner the master of a vessel is bound to carry the goods shipped on her to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, the act of the shipper, or by some one of the perils excepted in the contract of shipment.[63] A transshipment of the freight without a legal excuse, however competent and safe the vessel into which the transfer is made, is a violation of the contract, an infringement of the rights of the freighter, and subjects the carrier to liability if the freight be lost.[64]

§§ 4289-4311. Loss or Injury—§§ 4289-4296. Liability as Insurer —§ 4289. In General.—A carrier of merchandise by water for hire is to be regarded as a common carrier, and like common carriers by land, in the absence of any legislative provision prescribing a different rule, is in general to be held responsible as an insurer,[65] and as such is liable for the safe custody, due transportation, and right delivery of the goods or merchandise which it receives and undertakes to transport;[66] and consequently is liable in all events and for every loss or damage to the merchandise, unless it happen by the act of God, or the public enemy, the fault of the shipper or owner of the goods, the inherent nature of the goods,[67] the law of the country,[68] or some other cause or accident, without any fault or negligence on its part, as is expressly excepted in the bill of lading or contract of shipment.[69] The carrier must show that the loss or injury was from some cause for which he is not responsible.[70] So a vessel is

61. **Transshipment by through carrier —Liability of second carrier.**—The St. Hubert, 107 Fed. 727, 46 C. C. A. 603.

62. **Authority of shipper's agent to make contract.**—The St. Hubert, 102 Fed. 362, holding that where in such case, the goods are shipped on through bills of lading which authorize the initial carrier to transship and forward by steamer, "subject to the terms and conditions of local bills of lading issued by the agents of such steamer," or contain other equivalent provisions, the owner of the goods are bound by the provisions of bills of lading issued by the connecting carrier to the first carrier therefor on their transshipment, so far as such provisions are lawful and enforceable.

63. **Transshipment without legal excuse.**—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

64. Cox *v.* Foscue, 37 Ala. 505, 79 Am. Dec. 69; Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

65. **Liability as insurer.**—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499. See, also, Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748. See ante, "General Rule," § 989.

66. Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Propeller Commerce (U. S.), 1 Black 574, 17 L. Ed. 107.

67. See post, "Exceptions and Excuses," §§ 4290-4296.

68. **Law of country.**—Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391. See post, "Seizure, under Legal Process," § 4293.

69. **Excepted causes.**—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499. See post, "Limitation of Liability," Chapter 40.

70. See post, "Cause of Loss or Injury to Goods," § 4317.

liable for damage to a cargo of cement which was received in good condition, but was lumpy and set when delivered, due to its having been wet, in the absence of explanation of the manner in which it became wet.[71] The rule as to the carrier's liability applies whether he is employed in internal, in coasting or in foreign commerce.[72] The liability of the carrier for the loss of a package of money intrusted to him to be transported is to be determined by an inquiry into the nature and extent of the employment and business in which he holds himself out to the public as engaged.[73]

Liability as Forwarder.—Where a vessel has only contracted to carry the goods from one point to another, from which latter place they were to be reshipped, the vessel is only liable as a forwarder of merchandise, and is only bound to exercise ordinary care in procuring a proper conveyance for the goods.[74]

§§ 4290-4296. Exceptions and Excuses—§ 4290. Act of God or Public Enemy.—Act of God.—The carrier is not an insurer against loss or injury to goods caused by an act of God.[75] Unless the carrier assumes the risk of all contingencies, he is not liable because he fails to perform what is rendered impossible by the perils of the sea. Such events as are known as the accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition in every such engagement.[76] If proper care could have avoided a loss it was not a peril incident to the navigation; if such care could not, it was.[77] So damage to goods from sea water, which came through a broken port hole, is not the result of inevitable accident or act of God if the accident was one which could have been prevented by human effort, sagacity and care.[78] If a damage to cargo is due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case.[79] And where a carrier is negligent in stowing goods it can not claim that the damage was caused by an act of God or peril of the sea.[80] An injury caused by an explosion

71. The D. Harvey, 139 Fed. 755.

72. **Carriers to which rule applicable.**—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748; Elliott *v.* Rossell (N. Y.), 10 Johns. 1, 6 Am. Dec. 306. See ante, "Carriers to Which Rule Applicable," §§ 1005-1009.

73. **Carriage of money.**—Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345. See ante, "Carriers of Money," § 1007.

74. **Liability as forwarder.**—Devillers *v.* Schooner John Bell, 6 La. Ann. 544. See ante, "Forwarders," § 1009.

75. **Act of God.**—The Propeller Commerce (U. S.), 1 Black 574, 17 L. Ed. 107; Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391; The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748; The Gualala, 178 Fed. 402, 102 C. C. A. 548; Elliott *v.* Rossell (N. Y.), 10 Johns. 1, 6 Am. Dec. 306. See ante, "Act of God," §§ 990-994, post, "Jettison," § 4291.

76. Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220.

Instance of perils of sea.—A quantity of arsenic was stowed in the same hold with olive oil, but where the slant of the deck was downward from the arsenic toward the oil, and with a dunnage of about four inches. It was shown that the method of stowing the arsenic was usual, and that there was apparently no danger to it under ordinary circumstances. It was also shown that the voyage across the Atlantic was very rough, and that the vessel rolled and pitched to an unusual extent, and when she arrived at New York some of the arsenic was found to have been injured from leakage of the oil. Held, that under such evidence the damage must be attributed to perils of the sea, for which the vessel was not liable. The Langfond, 143 Fed. 150.

77. Graham & Co. *v.* Davis & Co., 4 O. St. 362.

78. The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

79. Corsar *v.* Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378. See post, "Navigation of Vessel," § 4305.

80. **Negligent stowage.**—See post, "In General," § 4299; "Stowage on Deck," § 4300.

of a steamboat boiler [81] or by the incompetency, unskillfulness, or negligence of the master or pilot in charge of the deck,[82] is not chargeable to the act of God. And where by the use of such precautions as actually are used on many boats, an accident which resulted in the injury of goods in transportation could have been avoided, such injury is not caused by the danger of navigation.[83]

Act of Public Enemy.—A carrier is not an insurer against loss or injury to goods caused by acts of the public enemy.[84]

§ 4291. Jettison.—The carrier without fault is not liable for goods necessarily jettisoned.[85] If the master is competent; if an emergency actually exists calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful.[86] The single fact that the boat is in such a situation at the time of a jettison as that in all reasonable probability a total loss of both vessel and cargo must ensue if immediate relief be not afforded, will not justify the carrier or his agents in resorting to the extreme measure of casting overboard a portion of the cargo, so as to throw the loss upon all who may be benefited by the sacrifice (though it be at the moment necessary and prove successful), unless the crisis come without fault, that is,

81. Explosion of boiler.—Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376.

82. Incompetency, etc., of master or pilot.—The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; The Morning Light (U. S.), 2 Wall. 550, 17 L. Ed. 862; Union Steamship Co. *v.* New York, etc., Steamship Co. (U. S.), 24 How. 307, 16 L. Ed. 699.

83. Failure to use usual precautions.—Haughton *v.* The Memphis, 8 West. L. J. 562, 1 O. Dec. 403.

84. Act of public enemy.—The Propeller Commerce (U. S.), 1 Black 574, 17 L. Ed. 107; Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748. See ante, "Act of Public Enemy," §§ 995, 997.

85. Jettison.—Bentley *v.* Bustard (Ky.), 16 B. Mon. 643, 63 Am. Dec. 561; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58.

"The case of a jettison at sea, to save the vessel from foundering, and to preserve the lives of the crew, is a loss by the act of God, although it is accomplished by the immediate agency of man." Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645, quoting Story on Bailments, § 525.

"The right and law of jettison had its origin and growth as a law of the sea, in the navigation of which the loss of the vessel involved not only, in most instances, the loss of the cargo, but generally the loss, and always the hazard, more or less imminent, of life. And we sometimes find the rule exempting the carrier from liability on the ground of this right laid down as if depending upon or growing out of a necessity of throwing goods overboard for the preservation of the vessel and crew in a tempest: 2 Kent's Com. 603; or in extremity produced by other causes coming within the common-law exceptions to the undertaking of the carrier." Bentley *v.* Bustard (Ky.), 16 B. Mon. 643, 63 Am. Dec. 561.

Illustrations.—A vessel put into Bombay with part of her cargo of sugar damaged. By recommendation of surveyors a part of the cargo was there sold. While in the Red Sea she grounded on a coral reef near Mocha, and jettisoned some more, and, on arriving at Mocha, sold some more that had been taken off when aground by lighter. Held, as the sales had been recommended chiefly by surveyors, and as at the time of the jettison the ship and cargo appeared in imminent danger, and would have been totally lost had any rough weather come on, and the chance of relief from Mocha did not appear to justify delay, and the jettison seemed a necessity, there was no improper conduct on the part of the master. Bursley *v.* The Marlborough, 47 Fed. 667.

A vessel being aground, the captain ordered the deck load, consisting of casks of brandy, to be thrown overboard; it was found impossible, however, to throw the casks over whole, and their heads were knocked out to allow the liquor to escape through the scuppers. Held, that such a state of facts would not sustain a charge of want of skill or of misconduct against the captain; and that the brandy was lost by "peril of the sea." Van Syckel *v.* The Thomas Ewing, Fed. Cas. No. 16,877, Crabbe 405, 3 Clark 301.

86. Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58, followed in Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

without the want of due care in avoiding and due skill and diligence and exertion in overcoming the evil.[87] If the jettison is rendered necessary by or due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case.[88] If a jettison is made only to prevent harm to the boat or to expedite her on the voyage, the carrier is liable.[89] A jettison is not justified where a part, if not the whole, of the cargo could have been saved by lighters.[90] Under an ordinary bill of lading the carrier is liable for goods stowed on deck and necessarily jettisoned.[91] But if a vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owner, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden.[92] The justifiable consumption of cargo has the same effect upon the ships liability as jettison in an emergency.[93]

§ 4292. Humidity and Dampness of Ship.—In the case of damage on account of humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade and navigation, especially upon the high seas, if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, the carrier may be held liable.[94]

§ 4293. Seizure under Legal Process.—A carrier is excused from liability when without any act or fault on his part the cargo is seized by virtue of a valid legal process and taken out of his possession;[95] but he must give proper notice of the seizure to the owner of the goods.[96] A seizure under invalid

87. Bentley *v.* Bustard (Ky.), 16 B. Mon. 643, 63 Am. Dec. 561.

88. Corsar *v.* Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378.

89. **Jettison to prevent harm to boat or expedite voyage.**—Bentley *v.* Bustard (Ky.), 16 B. Mon. 643, 63 Am. Dec. 561.

90. The Portsmouth, Fed. Cas. No. 11,295, 2 Biss. 56.

91. **Goods carried on deck.**—The Wellington, Fed. Cas. No. 17,384, 1 Biss. 279. See The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187; The Gran Canaria, 16 Fed. 868.

92. Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58.

93. **Justifiable consumption of cargo.**—A steamship, sufficiently coaled, going from Colombo to Aden, met a hurricane in her front, and, after failing to make way against it, and being much damaged, ran back to Bombay, the nearest available port. Her coal supply became exhausted, and much of the woodwork and part of the sugar forming her cargo was burned. Held, as persistence in her endeavor to push on would have imperiled ship and cargo, and as sufficient coal to take her to Bombay could not be expected to be carried, the consumption of the cargo was justifiable. Bursley *v.* The Marlborough, 47 Fed. 667.

94. **Humidity and dampness of ship.**—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

95. **Goods seized under legal process.**—See ante, "Goods Seized under Legal Process," §§ 870, 874; "Act or Mandate of Public Authority," § 1004.

A canal boat brought a cargo of hay from Quebec to New York, where it arrived in good condition. It was loaded by the consignor, and was to be unloaded by libelants, who had become owners of the bills of lading. On arriving in New York the boat and cargo were seized by libelants under process from the state court in a suit against the consignor, and held on demurrage for some 30 days, when the suit was dismissed, and the cargo was unloaded. During such time the weather was damp, and the hay in the hold became musty. The vessel was seaworthy, having no more leakage than was usual in such class of boats. Held, that the damage was due to the long detention during the damp weather, and to the lack of ventilation, due to the manner of loading, which, combined, caused the hay to sweat, and neither of which was the fault of the vessel. The M. C. Currie, 133 Fed. 125.

96. **Necessity for notice of seizure.**—See ante, "Duties of Carrier," § 871; "Seizure under Police Regulations," § 872.

orders of the secretary of war will not relieve the carrier.[97]

§ 4294. Fault of Shipper or Owner.—A carrier who has used due care is not responsible for loss of or injury to goods resulting from the neglect or act of the shipper or owner.[98] Thus, the carrier can not be held liable for damage to a deck cargo of hay arising from defective covers, which were furnished by the shipper.[99] A shipper who puts books containing valuable memoranda with some clothing in a package described in the bill of lading as worn clothing is guilty of fraud destroying his claim to indemnity.[1]

§ 4295. Inherent Infirmities of Property.—If the damages has preceded from an intrinsic principle of decay naturally inherent in the goods themselves, whether active in every situation, or only in the confinement and closeness of the ship, the shipper or owner must bear the loss, as the carrier is in no fault, nor does its contract contain any insurance or warranty against such an event.[2] So the carrier is not liable for damage to sugar arising from sweat, largely due to the inherent nature of the commodity.[3]

Loss from Disease.—A carrier is not liable for the death of a mare due to an attack of meningitis, of which it was not forewarned, when it did all in its power to care for the animal after the attack.[4]

§ 4296. Commencement and Termination of Liability.—The carrier's liability as an insurer of freight does not attach until the freight has been actually or constructively delivered to and accepted by it for transportation.[5] When the liability has begun, it continues until there has been a proper delivery,[6] or the carrier has in some way been discharged of his peculiar relation to the property.[7]

97. **Invalid orders of secretary of war.**—Where live fowls were put on board of a vessel, at New York, for exportation to Havana, and three bills of lading were signed for them, one of which was retained by the master of the vessel, and two of which were delivered to the consignor, and forwarded to the consignee, who made an advance thereon, and afterwards the fowls were seized by the collector of customs, under invalid orders of the secretary of war, and removed from the vessel, and the bill of lading in the hands of the master was cancelled by the consignor; held, in action by the consignee against the vessel, on the two bills of lading, to recover the amount of such advance, because of the nondelivery of the fowls at Havana, that the vessel was liable. The Matilda A. Lewis, Fed. Cas. No. 9281, 5 Blatchf. 520.

98. **Fault of shipper or owner.**—The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391; The M. C. Currie, 132 Fed. 125. See ante, "Fault of Shipper or Owner," §§ 998, 1002.

99. The M. C. Currie, 132 Fed. 125.

1. The St. Cuthbert, 97 Fed. 340.

2. **Inherent infirmities of goods.**—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985. See ante, "Inherent Infirmities of Goods," § 1003.

Flour.—Mephams *v.* Biessel (U. S.), 9 Wall. 370, 19 L. Ed. 677.

Potatoes.—Ship Howard *v.* Wissman (U. S.), 18 How. 231, 15 L. Ed. 363.

Soap.—McKinlay *v.* Morrish (U. S.), 21 How. 343, 16 L. Ed. 100.

Spools of cotton thread.—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

3. The Niceto, 134 Fed. 655.

4. **Loss from disease.**—Klair *v.* Wilmington Steamboat Co. (Del.), 4 Pen. 51, 54 Atl. 694.

5. **When liability commences.**—See ante, "When Liability Commences," Chapter 5; post, "Lien of Shipper against Vessel," § 4337.

6. **Termination of liability.**—Bowman *v.* Hilton, 11 O. 303. See ante, "Carrier by Water," § 844; "Necessity for Personal Delivery," § 848; "To Whom Delivery May Be Made," §§ 854-857.

7. Bowman *v.* Hilton, 11 O. 303; McGregor & Co. *v.* Kilgore, 6 O. 359. See ante, "Failure or Refusal of Consignee to Receive Goods," § 868; "Goods Seized under Legal Process," §§ 870, 874; "Stoppage in Transitu," Chapter 17.

Carriers, who have agreed with the consignee of goods to store them for him for a certain time, have a right, if he does not come for them within that time, to deliver them to a responsible warehouseman and thus discharge their own liability; and, in an action by the consignee against them for the warehouseman's negligence, the jury may be justified in finding that the warehouseman was his agent and not theirs, although they gave him an order on the warehouseman for the goods, and al-

§ 4297. Losses during Deviation or Delay.—Deviation.—An unnecessary deviation from a voyage renders a carrier responsible for all losses,[8] resulting directly or indirectly,[9] even from unavoidable casualty,[10] such as destruction of the goods by fire.[11] Where no route is specified the carrier is not liable for injuries resulting from taking the usual and only route for its vessel, though the injury would have been avoided by taking another more direct route.[12] Where a vessel sailed with an intention to deviate, and was compelled by mere necessity to put into the port to which she had intended to deviate, and afterwards a loss of cargo occurred, it was held that the owners of the vessel were not answerable to the shippers for the loss.[13]

Delay.[14]—A vessel sailing under bills of lading giving her liberty to stop at other ports and exempting her from liability for decay or damage to perishable goods through delay in obtaining other goods to complete her cargo is not liable for the loss of perishable goods in the absence of proof that her stay in loading ports was a departure from general usage, and so unreasonable as to constitute negligence.[15] In a bill of lading for old metal, a provision, that if the goods be prevented, "by any cause," from going by the steamer specified, the carrier may forward them by the succeeding steamer of his line, warrants him in leaving them for the next vessel, which sails four days later, when the space reserved for the goods is needed for more perishable articles, and his failure to notify the shipper that they are so left does not make either him or the vessel liable for their loss in transit by a peril of the sea, though the shipper procures insurance on the goods only by the vessel specified, whereby he is unable to recover on the policy.[16]

Unavoidable Delay.—A ship can not be held liable for damage to the cargo resulting from delay due to the condition of the weather, and not to any negligence in her navigation.[17] And a vessel with a perishable cargo, driven by stress of weather out of her course and into a strange port for repairs, is not liable for such injuries to the cargo as are caused merely by the delay of the voyage.[18] It is not negligence in a carrier to receive goods to be forwarded at a time when by reason of a low stage of water his boat is so delayed that the goods spoil before arrival.[19] Where a boat was expected to be at hand to start

though the warehouseman paid the freight to them, and, on being repaid the freight and paid for storage by the consignee, gave him as a receipt, a bill of freight signed by them. Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151.

Termination of liability as carrier and beginning of liability as warehouseman.—See ante, "Carrier as Warehouseman," Chapter 13.

8. Losses during deviation.—Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970; The Citta Di Messina, 169 Fed. 472; Globe Nav. Co. *v.* Russ Lumber, etc., Co., 167 Fed. 228; Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58. See Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

9. The Indrapura, 171 Fed. 929.

Any deviation from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding will cast loss of, or injury to, either ship or cargo on the shipowner, without reference to whether it had any bearing on the particular loss complained of. The Citta Di Messina, 169 Fed. 472.

10. Lawrence *v.* McGregor (O.), Wright 193; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Cassilay *v.* Young & Co. (Ky.), 4 B. Mon. 265, 39 Am. Dec. 505; Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970.

11. Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970. See The Indrapura, 171 Fed. 929.

12. Emerson Co. *v.* Reunis, 118 Pac. 631, 65 Wash. 513.

13. Hobart *v.* Norton (Mass.), 8 Pick. 159.

14. Delay.—See ante, "Delay in Transportation or Delivery," Chapter 11; "Negligence Concurring with Act of God," § 992.

15. The Citta Di Messina, 169 Fed. 472.

16. The Kansas, 87 Fed. 766.

17. Unavoidable delay.—The Hiram, 101 Fed. 138.

18. The Brig Collenberg (U. S.), 1 Black 170, 17 L. Ed. 89.

19. Starbuck *v.* Chesapeake, etc., R. Co., 1 Wkly. L. Bull. 110, 7 O. Dec. Reprint 97.

on a certain day, but by detention by fog and low water did not arrive until several days later, the delay was not from insufficiency of equipment for transportation, but from want of a boating stage of water, and the carrier is not liable for loss sustained by a shipper on account of the delay.[20]

§ 4298. Losses during Loading of Goods.[21]—Where a cargo is loaded by the vessel, she is liable for damages due to the negligent manner in which it is handled.[22] The duties of the master extend to all that relates to loading the cargo, and the vessel is liable for his faithful performance.[23] It is not the duty of a mate in loading casks of wine from a lighter, either to work at the fall, or bear off with his own hands the casks from the side as it is about to come aboard, though both duties are sometimes performed by mates from commendable motives, and hence a vessel will not be liable for injury or loss of goods in loading caused by his failure to perform these duties.[24]

Where a shipper undertakes to load his goods upon a vessel, he must himself bear any loss occasioned by the negligence of himself or servants in so doing.[25]

§§ 4299-4301. Stowage of Goods.—§ 4299. In General.—The carrier contracts for the use of due care and skill in stowing the cargo, and is liable for losses occasioned by the failure to use such care.[26] In the matter of proper stowage, as in all others, due care and its opposite, negligence, are relative terms, having respect to the nature of the duty to be performed, the knowledge communicated to the party to be charged, and the prevailing usages of the trade.[27] The cargo must be so stowed that the different goods will not injure each other.[28]

20. Delay in starting.—Starbuck *v.* Chesapeake, etc., R. Co., 1 Wkly. L. Bull. 110, 7 O. Dec. Reprint 97.

21. Losses during loading of goods.—See ante, "Means for Loading and Unloading," § 1021.

22. Negligence in loading.—The D. Harvey, 139 Fed. 755 (cement in bags).

23. Duties of master.—The R. G. Winslow, Fed. Cas. No. 11,736, 4 Biss. 13.

In loading wheat from a warehouse through a pipe, it is the master's business to arrange the pipe and trim the vessel, and for any loss by the careening of the vessel and consequent parting of the pipe, the vessel is liable. The R. G. Winslow, Fed. Cas. No. 11,736, 4 Biss. 13.

24. Duty of mate.—The Belvidere, Fed. Cas. No. 17,790, 1 Pet. Adm. 258.

25. Where shipper loads goods. — Stockton Milling Co. *v.* California Nav., etc., Co., 165 Fed. 356.

26. Stowage of goods.—Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; Dowgate Steamship Co. *v.* Arbuckle, 158 Fed. 179. See post, "Improper Stowage or Overloading," § 4303.

Firecrackers.—A shipowner held liable for damage to a shipment of firecrackers on the ground of negligent stowage, where although the ship encountered no unusual perils on the voyage, and the packages were marked "frail" on the bill of lading, they were found broken open, and the contents injured, when they were delivered. Doherr *v.* Houston, 123 Fed. 334, affirmed in 128 Fed. 594, 64 C. C. A. 102.

Flour.—Mephams *v.* Biessel (U. S.), 9 Wall. 370, 19 L. Ed. 677.

Mirrors—Statuary.—The Star of Hope (U. S.), 17 Wall. 651, 21 L. Ed. 719.

Nuts.—The Star of Hope (U. S.), 17 Wall. 651, 21 L. Ed. 719.

Salt.—The master is not to blame for bringing sacks of salt between decks, if it be well stored and packed, and secured with proper dunnage. The usage of trade is to carry salt in that way. Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017. See Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

Sugar.—The Earnwood, 83 Fed. 315.

27. The Star of Hope (U. S.), 17 Wall. 651, 21 L. Ed. 719.

28. Stowage so that goods may not injure each other.—The Pharos, 9 Fed. 912; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

Illustrations.—A carrier is responsible for stowing merchandise in unsafe proximity to chemicals liable to injure it. The St. Patrick, 7 Fed. 125.

A vessel which carries paper stock and petroleum in the same cargo is bound to use special care in stowing them with reference to each other. The Sabioncello, Fed. Cas. No. 12,198, 7 Ben. 357.

Charterers of a vessel held liable, on the ground of negligent stowage, for damage done to a cargo of goatskins caused by a leakage of brine from casks of citron, which, as shown by the evidence, usually leaked, and in close prox-

or be injured by the motion or leakage of the vessel,[29] unless by agreement the stowage of the goods is to be performed by the shipper.[30] The ship is not liable for a loss caused by bad stowage, where the goods were stowed by stevedimity to which the skins were stowed. Lazarus *v.* Barber, 124 Fed. 1007, affirmed in 136 Fed. 534, 69 C. C. A. 310.

Stowing heavy cargo on casks.—Stowage of cargo is bad where heavy casks of oil were placed on small casks of plumbago. Crooks *v.* The Fanny Skolfield, 65 Fed. 814.

A steamship held liable for damage to a cargo of olives shipped in casks, on the ground of negligent stowage, on evidence showing that cargo of such weight was stowed on top of the casks as to flatten the staves of some, causing the brine to leak out, and consequent damage to the olives. The Soyo Maru, 178 Fed. 921, 102 C. C. A. 428.

Wool injured by oil.—A vessel is liable for damage to wool cargo by whale oil which leaked in large quantities from barrels in an adjoining compartment when the wool was raised but little if any above the deck in stowing, and the facts that whale oil barrels always leaked, and that there was an excessive leakage during the voyage, were known to the navigators, and no steps were taken to discharge the oil from the bilges where it had accumulated to a depth of more than two feet, and from which it was liable to and did escape into the compartment where the wool was stowed. The Persiana, 156 Fed. 1019.

Where barrels of cod oil were stowed in a compartment of the hold of a vessel partly filled with wool, another compartment being available, and the barrels were laid on their bilges in a single tier upon a wooden bedding, separated from each other by hanging pieces of wood, no attempt being made to secure them, and during the voyage some of the barrels were broken open and the wool saturated, the steamship was answerable for such damage on the ground of negligent stowage. The Orcadian, 116 Fed. 930.

Glycerin injuring furs and skins.—A steamship, on a voyage from London to New York, stowed a quantity of glycerin in iron drums in the orlop deck of a hold, while on the lower deck was a quantity of furs and skins. The drums were not so fastened as to prevent fore and aft motion, or to prevent their moving vertically in heavy weather; nor was the hatch of the orlop deck battened and calked, as were the hatches above. The ship encountered rough weather, and at the end of the voyage it was found that some of the drums had been chafed through and were empty, and that a quantity of the glycerin had washed over the coamings of the hatch, and damaged the goods below. Held, that in view of the dangerous character of glycerin as a cargo, owing to the frailty of the packages and the consequent liability of leakage, it was incumbent on the ship, if it stowed it above other cargo, to take proper precautions, both by securing it from shifting in heavy weather, and by rendering the hatch leading below absolutely tight, and its failure to do so was negligence, which rendered it liable for the resulting damage to the cargo below. The Mississippi, 120 Fed. 1020, 56 C. C. A. 525, affirming 113 Fed. 985.

29. **Motion or leakage of vessel.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

A contract for the carriage of a cargo of creosote oil in iron drums from Liverpool to Eagle Harbor, Wash., as evidenced by the charter party and bill of lading, warranted the seaworthiness of the ship, specified that she should load in a customary manner, that all liability of the charterer should cease on completion of loading, and payment of advance if required, admitted the receipt of the cargo in good order, and obligated the carrier to deliver it in like good order, subject to the usual exceptions of loss by perils of the sea, etc. In the vicinity of Cape Horn, the vessel encountered bad weather, and in a heavy gale was thrown on her beam ends and a part of the cargo in the between decks was dislodged, drums there stowed and in the upper tier in the hold were injured by chafing, straining, and bruising, and the contents spilled and lost. The ship made the voyage safely, and no damage to the cargo was caused by any exposure to the direct action of the elements. It was shown that such drums could be stowed so as to remain secure in the rough weather, which was to be expected in rounding the Horn. Held, that the damage was due to improper stowage, and that the ship was liable therefor. Knohr *v.* Pacific Creosoting Co., 181 Fed. 856.

Upon proof of extraordinary sea perils and of damage to the ship, which was accompanied by considerable damage to cargo in the hold on the side of the vessel, held, on proof of usual good dunnage, that the ship was not liable for such damage, but that the ship was liable for certain damage occasioned to bags stowed about the masts and pump-well, where the evidence showed that there was not the usual and customary amount of dunnage to prevent damage from leaks in heavy weather. The Aspasia, 79 Fed. 91, decree affirmed in 80 Fed. 1003, 26 C. C. A. 372.

30. **When shipper stows goods.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

dores employed, directed, and paid by the shipper.[31] But a ship is responsible for proper stowage of her cargo, although the charter party gave a representative of the charterer the right to select the stevedores for loading, which fact did not deprive the master of his authority to control the manner of stowage.[32] And the rule that a ship and its owners are exempt from liability for damages by bad stowage performed by stevedores selected by the owner of the cargo does not apply, where the loss was not caused by bad stowage or mischievous acts in handling the cargo, but by carrier's negligent failure to safeguard the same after it had been placed aboard and stowed.[33]

Degree of Care Required.—A ship is bound to the exercise of reasonable care and skill only in the stowage of cargo, and to render her liable for damage to cargo by reason of improper stowage it must be shown that the manner of stowage was such as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage to be made and the weather and sea conditions which the vessel might reasonably be expected to encounter.[34] It is incumbent upon a carrier who accepts goods knowing them to be of a character requiring special care in stowing to exercise such care, and he is liable for damage resulting from a failure to stow them in such place and in such manner that they will not be injured by the ordinary contingencies of the voyage.[35]

Perils of the Sea.—Where weather encountered on a voyage was not more severe than was to be expected at that season of the year and in the locality traversed, peril of the sea is no defense to an action for injuries to goods from improper stowage.[36] If, "sweating" be produced in consequence of negligent stowage, the carrier is precluded from setting up the defense that "sweating" is one of the dangers of the sea.[37] And where a steamship company is negligent in stowing bags near coal, and sea water coming into the vessel washes coal dust into the bags, it can not claim that the damage was caused by an act of God.[38]

§ 4300. Stowage on Deck.—Upon an ordinary contract of affreightment a vessel is bound to carry goods under deck, and is responsible for any loss of goods carried on deck without the owner's consent.[39] But express contracts may be made in writing which will define the obligations and duties of the parties as to stowage on deck.[40] Where the contract between the shipper and the

31. The Diadem, Fed. Cas. No. 3,875, 4 Ben. 247.

32. Knohr *v.* Pacific Creosoting Co., 181 Fed. 856.

33. California Nav., etc., Co. *v.* Stockton Mill. Co., 184 Fed. 369, 107 C. C. A. 46, affirming judgment, 165 Fed. 356.

34. Degree of care required.—The Musselcrag, 125 Fed. 786.

In an action to recover for damage to range boilers because of negligent stowage, where the evidence shows that the boilers were stowed in the customary way, and according to the best judgment of experienced stevedores, the fact that if they had been put in crates, or several of them lashed together, the injury sustained might have been avoided, does not make the carrier liable, as he was not required to take such extraordinary precautions. Montague *v.* The Isaac Reed, 82 Fed. 566.

35. Goods requiring special care.—Doherr *v.* Houston, 123 Fed. 334, affirmed 128 Fed. 594, 64 C. C. A. 102.

36. Perils of the sea.—The Orcadian, 116 Fed. 930.

37. "Sweating" of cargo.—The Star of Hope (U. S.), 17 Wall. 651, 21 L. Ed. 719.

38. Delta Bag Co. *v.* Frederick Leyland & Co., 173 Ill. App. 38.

39. Stowage on deck.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; The Gran Canaria, 16 Fed. 868; The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187; The Peytona, Fed. Cas. No. 11,059, 1 Ware 541, affirmed in Fed. Cas. No. 11,058, 2 Curt. 21; Waring *v.* Morse, 7 Ala. 343; Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149; Dorsey *v.* Smith, 4 La. 211; Shackleford *v.* Wilcox, 9 La. 33.

A "clean" bill of lading—that is, a bill of lading which is silent as to the place of stowage—imports a contract that the goods are to be stowed under deck. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

40. The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58.

master refers to the "capacity of the vessel," a doubtful inference may be drawn that the cargo was to be carried on deck; but this inference is repelled by the fact that the shipper refused to let such an agreement have a place in the bill of lading, and bound himself to pay under-deck freight.[41] Cargo stowed on deck in violation of a contract is at the vessel's risk, unless clearly shown that it would have been destroyed if it had been loaded below deck.[42]

Custom or Usage.—A commercial usage to stow gin on deck having existed for a sufficient length of time to have become generally known rebuts a presumption of negligence arising from the loss of gin so stowed.[43] In the case of a parol shipment, the master is allowed to show a local custom to carry the goods on deck in a particular trade. It must, however, be a custom so generally known and recognized, that a fair presumption arises that the parties in entering into the contract agreed that their rights and duties should be regulated by it.[44]

Perils of the Sea.—A shipowner is not exonerated from liability for a failure to deliver cargo on the ground that it was lost through perils of the sea, where it was stowed on the deck without the consent of the shipper, and there is no proof that the place or manner of stowage was sanctioned by general usage, or that they did not contribute to the loss.[45]

§ 4301. Dunnage.—It is the duty of the carrier to dunnage the cargo in a manner reasonably sufficient to protect it from what is to be naturally expected, and in accordance with the usages of the port of shipment.[46] For fail-

41. Construction of contract with reference to capacity of vessel.—The Water Witch (U. S.), 1 Black 494, 17 L. Ed. 155.

42. The Governor Carey, Fed. Cas. No. 5,645, 2 Hask. 487.

43. Custom or usage.—Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

44. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

45. Perils of the sea.—The Gualala, 178 Fed. 402, 102 C. C. A. 548; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58. See The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187, cited in New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 343, 12 L. Ed. 465.

46. Dunnage.—The Aspasia, 79 Fed. 91. "Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is 'fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady.'" Insurance Co. *v.* Thwing (U. S.), 13 Wall. 672, 20 L. Ed. 607.

A ship which neglects to provide dunnage for sugar cargo, in consequence of which the bags in the lower tier are allowed to rest on the floor, in the moisture caused by drainage from above, is liable for the damage, including both natural drainage and such as arises from soaking by sea water. The Earnwood, 83 Fed. 315.

Instance of improper dunnage.—A carrier, having received in good condition a large block of deeply veined marble, which, after notice to the officer of the ship in charge of the stowage "that it was a weak-looking block; that it wouldn't take much to break it,"—was stowed so that it supported overlying cargo, with no support for itself, except pieces of dunnage near each end, with one end resting unevenly on the dunnage, is liable for the break at the end, extending partly through a vein. The Victoria, 114 Fed. 962.

Two drums of glycerine in a consignment of 102 on board the steamship Britannia were cut by chafing together during the voyage, whereby the glycerine leaked out. It appeared that the dunnage wood which was placed between all the drums of the consignment, had fallen out during the voyage from between these two drums only. The voyage had been a rough one. The damage was within the exceptions of the bill of lading. Held, that the only fair inference was that the wood between these drums was not secured in the usual and proper manner, and that the loss was therefore the result of negligence in stowage, for which the steamship was liable, notwithstanding the exceptions of the bill of lading. Marx *v.* The Britannia, 34 Fed. 906.

Where the cargo is stowed around the mast, particularly a cargo of salt, it should be dunnaged away from the mast, so the water flowing down the same would not affect it. The Nith, 36 Fed. 383, 13 Sawy. 481, cited in The Aspasia, 79 Fed. 91.

The use of green cocoanuts for dunnage has been held negligence. Crooks *v.* The Fanny Skolfield, 65 Fed. 814.

ure to use such reasonable and customary dunnage as will protect the cargo from heavy weather, the carrier remains liable. But upon proof of extraordinary sea perils and of damage to the ship, which was accompanied by considerable damage to cargo in the hold on the side of the vessel, on proof of usual good dunnage, the ship is not liable for such damage.[47]

§§ 4302-4304. Unseaworthiness or Unfitness of Vessel—§ 4302. In General.—In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is or shall be in fact seaworthy at that time and does not depend upon his knowledge or ignorance, his care or negligence.[48] The vessel must be seaworthy for the particular voyage,[49] and the cargo she undertakes to carry.[50] All the cases must

47. The Aspasia, 79 Fed. 91.

48. **Unseaworthiness or unfitness of vessel.**—The Nellie Floyd, 116 Fed. 80; The Irrawaddy, 171 U. S. 187, 190, 43 L. Ed. 130, 18 S. Ct. 831; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Rappahannock, 173 Fed. 829; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; In re Churchill, 198 Fed. 711, affirming, The Indrapura, 178 Fed. 591; Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen, 78 Fed. 155; Clark *v.* Richards, 1 Conn. 54. See The Medea, 179 Fed. 781, 103 C. C. A. 273, reversing decree, 173 Fed. 498; The Lockport, 197 Fed. 213; Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

The term "seaworthy," as now construed, has relation to the article carried and the different compartments of the ship and their particular use, as well as to the navigability of the vessel. The Indrapura, 178 Fed. 591.

"Seaworthy," means that the boat must be tight, staunch and strong, well furnished, manned, victulated, and in all respects equipped in the usual manner for the trade in which she is engaged. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

There is no such thing as absolute seaworthiness in the law. The term "sea worthy" is a relative one, and is always construed in reference to a voyage in which a vessel is to be engaged. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

"Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage quite another." McLanahan *v.* Universal Ins. Co. (U. S.), 1 Pet. 170, 184, 7 L. Ed. 98.

Latent defects.—The undertaking is not discharged because the want of fitness is the result of latent defects. Richelieu, etc., Nav. Co. *v.* Boston Marine Ins. Co., 136 U. S. 408, 34 L. Ed. 398, 10 S. Ct. 934; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Irrawaddy, 171 U. S. 187, 190, 43 L. Ed. 130, 18 S. Ct. 831; The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746; Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen, 78 Fed. 155; The Lockport, 197 Fed. 213.

Barges.—The owner is liable for damages for the sinking of an old barge, whose timber was decayed, by an ordinary rub over a sandbar. The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746.

49. **Must be seaworthy for particular voyage.**—The Nellie Floyd, 116 Fed. 80, affirmed in Neilson *v.* Coal, etc., Supply Co., 122 Fed. 617, 60 C. C. A. 175; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Indrapura, 190 Fed. 711, affirming 178 Fed. 591; Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398; Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

The shipowner's undertaking is not

50. **Must be seaworthy for particular cargo.**—The Nellie Floyd, 116 Fed. 80, affirmed in Neilson *v.* Coal, etc., Supply Co., 122 Fed. 617, 60 C. C. A. 175; The Rappahannock, 173 Fed. 829; Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; Wright *v.* Grace Co., 203 Fed. 360; Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

be decided upon their particular facts and circumstances.[51] To be seaworthy as respects cargo, the hull of a vessel must be so tight, stanch, and strong, as to resist the ordinary action of the sea during the voyage, without damage or loss of cargo.[52] The vessel should be well furnished with suitable tackle, sails, or motive power, and furniture necessary for the voyage.[53] Instances of what does[54]

merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage. The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537.

"The same vessel may be seaworthy for one voyage and entirely unseaworthy for another." Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

"When we come to consider what shall constitute fitness or unfitness for the voyage we must take into account the nature of the service which she is to perform, and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river from what it is in open seas or lakes or their bays and inlets." The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746.

51. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7; The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746; Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398.

Review of findings.—The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337, 1 S. Ct. 582; United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; The Britannia, 153 U. S. 130, 38 L. Ed. 660, 14 S. Ct. 795.

52. Must be tight, stanch and strong.—Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584; The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

53. Must be well furnished.—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398. See Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

Spare sails.—Ships to be seaworthy ought in general to have spare sails where the voyage is a long one. The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

54. Instances of unseaworthiness.—Atlas Portland Cement Co. *v.* Dougherty Co., 205 Fed. 508, 123 C. C. A. 576; Wright *v.* Grace & Co., 203 Fed. 360; The Listie, 197 Fed. 1022; Braker *v.* Jarvis Co., 166 Fed. 987; The Willie, 134 Fed. 759; Bush Co. *v.* Central R. Co., 130 Fed. 222, affirmed in 149 Fed. 734, 79 C. C. A. 440.

A vessel cannot be said to be seaworthy for a voyage where, at its inception, she has little, if any, metacentric height, and a list of 8 or 9 degrees, and her cargo weight is so distributed that her instability must increase as she proceeds from the consumption of coal and water. The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing 108 Fed. 886.

A lighter, so constructed that the presence of any water in the hold rendered it unstable when loaded, which overturned shortly after being loaded, when the weather was clear, the wind light, and the water smooth except from a slight swell caused by a passing steamer, by reason of water entering her hold through seams which were insufficiently calked, must be held unseaworthy when loaded. Nord-Deutscher Lloyd *v.* Insurance Co., 110 Fed. 420, 49 C. C. A. 1, affirming 106 Fed. 973.

A steamship of a very tender model (being unusually narrow in proportion to her depth, with a "tumble-home," materially increasing her disadvantage), bound from San Francisco to Panama, had 47 tons of lumber on deck, and was otherwise so loaded as to have an excessive roll, from which she recovered slowly. In a storm of no extraordinary severity, it was found that she was neither able to keep out of the trough of the sea, nor to ride safely in it; and she was finally thrown on her beams and sunk by three successive heavy seas. Held, that such loading, combined with her tender model, constituted unseaworthiness. The Colima, 82 Fed. 665.

The chain locker of a steamship, which extended from the bottom to the main deck, was not watertight, and during a voyage across the North Atlantic in winter sea water entered through the chain pipes, and damaged sugar which was stowed next the locker, without dunnage properly laid to protect it against leakage. The ends of the pipes on the forecastle deck had been stopped or covered at the beginning of the voyage, but not sufficiently to withstand the action of the seas which broke over such deck, although the weather was no worse than should reasonably have been anticipated at that season of the year. Held, that the ship was liable for the injury to the cargo. The Palmas, 108 Fed. 87, 47 C. C. A. 220.

Failure to repair hatch coamings, covers and tarpaulins.—The C. W. Elphicke, 117 Fed. 279, decree affirmed in 122 Fed. 439, 58 C. C. A. 421.

Failure to calk seams in deck.—The Nellie Floyd, 116 Fed. 80, affirmed in

or does not[55] constitute unseaworthiness are set out in the notes. The shipper is under no obligation to see that the vessel is seaworthy or fit to perform the voyage.[56] Where a contract provided that respondent company should furnish good, sound, insurable boats, where unseaworthy boats were supplied, the respondent was not entitled to resort to the agreement that the shipper should be liable for loss of goods in case of marine disaster.[57]

Inspection.—It is the duty of the carrier to have his vessel often examined

Neilson *v.* Coal, etc., Supply Co., 122 Fed. 617, 60 C. C. A. 175.

Defective compass.—Going to sea with a compass known to be defective constitutes unseaworthiness. Richelieu, etc., Nav. Co. *v.* Boston Marine Ins. Co., 136 U. S. 408, 34 L. Ed. 398, 10 S. Ct. 934.

Defect in plate covering bilge pump hole.—The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823.

Failure to properly close and secure port holes may constitute unseaworthiness, but not necessarily so; that depends upon the circumstances. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7; see The Manitoba, 104 Fed. 145, where failure to close port rendered ship unseaworthy.

55. What does not constitute unseaworthiness.—A vessel was not unseaworthy at the beginning of her voyage because ports between decks, eight inches in diameter, and a few feet above the water line, were closed only with the glass covers, and the hatches were battened down, where the hatches could be taken off in two minutes, the cargo was so stowed as to afford free access to the ports, and they were provided with additional covers of iron, which could be closed if deemed necessary. The Silvia, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment, 68 Fed. 230, 15 C. C. A. 362.

A vessel is not unseaworthy in respect of her cargo by reason of the stowage of coffee in a compartment adjoining that in which water ballast is carried, though the water pipe connecting with the tank passes through the compartment containing the coffee. Steinwender *v.* The Mexican Prince, 82 Fed. 484, decree affirmed in The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168.

The placing of the filling pipe extending from the engine room of a steamer to a trimming tank in the forepeak upon the floor of the intermediate hold, boxed in, and extending through the collision bulkhead, held not a faulty construction, which rendered the vessel unseaworthy as to cargo carried in such hold, where the evidence showed that many contemporary vessels were so constructed and rated A 1 by Lloyds. But the omission to fit such pipe with a valve or stopcock within the forepeak, or where it passed from the hold to prevent the flooding of the hold in case of a break in the pipe rendered her unseaworthy as to such cargo and liable for its injury from the flooding of the hold in consequence of the breaking of the pipe through some fault of construction. The Indrapura, 178 Fed. 591.

Absence of deck sounding pipes.—The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168, affirming Steinwender *v.* The Mexican Prince, 82 Fed. 484.

An obstruction in a water pipe passing through a cargo compartment, by a piece of wood, at the outset of a voyage, so that water gets into the compartment, does not amount to unseaworthiness, because incidental and temporary in character. Decree, Steinwender *v.* The Mexican Prince, 82 Fed. 484, affirmed in The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168.

A leakage sluiceway between two compartments of a vessel does not constitute unseaworthiness. The British King, 92 Fed. 1018, 35 C. C. A. 159, affirming 89 Fed. 872.

The existence of two worm-holes in the bow of a new vessel, about three-eighths of an inch in diameter, there being no doubt that these holes were in the plank when put on the vessel, does not amount to unseaworthiness. Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

Defective tubes in a tubular boiler.—The fact that 26 of the tubes of a tubular boiler which had 144 tubes, were pluged up because they leaked, does not render the vessel unseaworthy. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

Defective construction and working of the refrigerating room and apparatus connecting therewith, either from inherent defects in said apparatus, or from not using a sufficient quantity of ice, does not render a vessel unseaworthy when a warranty says that the vessel was seaworthy for navigation. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

56. Obligation of shipper.—See The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; Bush Co. *v.* Central R. Co., 130 Fed. 222, affirmed in 149 Fed. 734, 79 C. C. A. 440.

57. Sanbern *v.* Wright, etc., Lighterage Co., 171 Fed. 449, affirmed in 179 Fed. 1021, 102 C. C. A. 666.

and thoroughly inspected so as to be sure of its condition.[58]

Proximate Cause of Injury.—Where a steamer was run upon the beach solely because a leak had been discovered which could not be controlled, and water immediately came in over her deck, so that merchandise was injured, the proximate cause of the injury was the leak, and not the stranding of the vessel.[59]

§ 4303. Improper Stowage or Overloading.—The requirement of seaworthiness at the beginning of a voyage includes, not only seaworthiness in hull and equipment, but also in the stowage of the cargo.[60] A ship is not seaworthy when from her improper loading she is rendered unfit to encounter the ordinary perils of navigation which could reasonably have been anticipated on the projected voyage.[61] A carrier is liable where a loss is due to the overloading of its vessel.[62] The acceptance of cargo by the master of a lighter without objection to the quantity is an implied representation that the vessel is seaworthy for the carriage of such quantity.[63] No custom allowing the loading of lumber on deck can validate navigation by an unstable ship, or excuse the neglect to load sufficiently heavy weights below, especially where the ship is naturally of a tender model.[64]

§ 4304. Incompetency or Insufficiency of Crew.—The want of an experienced master or to have an incompetent crew will render a vessel unsea-

58. **Duty of inspection.**—The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823. See The Northern Belle (U. S.), 9 Wall. 526, 19 L. Ed. 746.

A steamship originally constructed for passengers, but later used for the carriage of goods, had ports in the lower between-decks, which were submerged when she was fully loaded. These were equipped with glass bull's-eyes, and shutters for properly closing the same. On commencing to load cargo at Batoum the ports in a compartment were examined and found properly closed, and the compartment was then partially filled with wool. The vessel stopped at a number of other ports on the Black Sea and the Mediterranean, and took on more cargo; the hatchway leading to such compartment being used, and finally closed when she started on the voyage for New York. Shortly afterward water was discovered in the hold under such compartment, and on examination it was found that one of the glass bull's-eyes had been stolen, and that the water had entered through such port and damaged the cargo. The brass pins holding the bull's-eyes in a number of the other ports had also been removed. No inspection of the ports had been made after the loading commenced at Batoum. Held, that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that such inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable. The Tenedos, 137 Fed. 443, affirmed in 151 Fed. 1022, 82 C. C. A. 671.

59. Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming 78 Fed. 155.

60. **Improper stowage or overloading.**—Corsar *v.* Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378; Knohr *v.* Pacific Creosoting Co., 181 Fed. 856; The Medea, 179 Fed. 781, 103 C. C. A. 273.

61. Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733.

The turret steamship Royal Sceptre, chartered to carry a full cargo of quebracho wood from the River Plate to New York, loaded at points up the river and had proceeded down to Rosario when, turning on a hard astarboard helm to reach her anchorage, under the influence of the current and possibly of grazing on the bottom, she careened to starboard until she had a list of 170 degrees, and dumped the most of her deck load, which was lost. When she left her last loading port, she had a deck load of over 700 tons of wood, piled to a height of 11 feet, besides 100 tons of coal, her ballast tanks were nearly empty to lessen her draft in the river, and her range of stability was about one-fourth that calculated for her at sea. There was nothing in the condition of the river or current unusual or which should not have been expected. Held, that the loss of cargo was due to the unseaworthiness of the ship when she finished loading and commenced her voyage by reason of her instability because of improper loading, and that she was liable therefor. The Royal Sceptre, 187 Fed. 224.

62. **Overloading vessel.**—Aststrup *v.* Lewy, 19 Fed. 536; Barker *v.* The Swallow, 44 Fed. 771; The Dana, 190 Fed. 650; The G. B. Boren, 132 Fed. 887.

63. The Dana, 190 Fed. 650.

64. The Colima, 82 Fed. 665.

worthy.[65] The vessel must be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence.[66]

§ 4305. Navigation of Vessel.—The carrier by water contracts for the use of due care and skill in the navigation of the vessel and in carrying the goods.[67] The carrier impliedly undertakes that he has a competent knowledge of the navigation, and he will be liable for a loss occasioned by a want of such knowledge.[68] A peril of the sea does not excuse the carrier from a loss or injury to the goods committed to his care if his own negligence or want of skill has contributed to the result.[69] The officers of steamers plying the western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them.[70] A vessel proceeding in the night and in a fog into port

65. Incompetency or insufficiency of crew.—Marine Fire Ins. Co. *v.* Burnett, 29 Tex. 433. See Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

66. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499. See Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398.

To be seaworthy the vessel must be well manned. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

"It is the duty of the owners of a steam vessel carrying goods and merchandise, not only to provide a seaworthy vessel, but they must provide a full complement of licensed officers and a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route. The officers and crew must not only be competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as the striking of a ship on a reef of rocks." Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

67. Negligence in navigation.—Compania, etc., La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12. See Stockton Milling Co. *v.* California Nav., etc., Co., 165 Fed. 356; The Gladys, 159 Fed. 698, 86 C. C. A. 566; Bradley *v.* Lehigh Valley R. Co., 145 Fed. 569, affirmed in 153 Fed. 350, 82 C. C. A. 426. See ante, "Incompetency or Insufficiency of Crew," § 4304.

Instances of negligent navigation. — The steamship A., while on a voyage from Inagua, Bahama Islands, to New York, was stranded on the coast of Maryland. In actions brought on her bills of lading to recover for the loss and damage to cargo resulting, it appeared that on January 19 the master supposed himself to be in latitude 36 deg. 40 min., longitude 74 deg. 10 min., and the next day, at 1:25 a. m., was on a bar four miles north of Green Run inlet, the weather being thick, and no explanation was given of the vessel's course meantime. Held, that if her course was directly between those two points, it was clearly negligence; and that if the master supposed himself on January 19 to be in that latitude and longitude, it was his duty to verify his supposition by sounding; and that the failure of the ship to deliver her cargo was caused by this negligence. The Alpin, 23 Fed. 815.

A steamship, running past Old Providence Island, in mild weather, had the land in sight for 40 minutes. A slight haze rendered distance deceptive, and the master supposed himself some seven miles off shore. No soundings were taken and no calculations made to verify the supposed distance. In fact, the vessel was within a mile and a half of the shore, and afterwards struck upon a coral reef located on the charts with which the vessel was provided. Held, that her navigation was negligent. The City of Para, 44 Fed. 689.

68. Morel *v.* Roe (Ga.), R. M. Charlt. 19.

69. The Nith, 36 Fed. 383, 13 Sawy. 481.

While a snag in one of our western rivers is a peril of navigation, if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs, the carrier is not absolved. Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122, 127.

70. Rivers spanned by bridges.—The Mollie Mohler (U. S.), 21 Wall. 230, 22 L. Ed. 485.

The Longfellow, a large river steamer, was starting on a trip from Cincinnati to New Orleans, carrying passengers and a valuable cargo. She had pilots on

is bound to proceed at a low rate of speed.[71] The rule which imputes carelessness to the captain whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of rivers. In such navigation, each case must be governed by its own circumstances, and be tested by the course usually pursued by skillful pilots in such cases.[72] Negligence is not a conclusion of law from the fact that a boat passes, in the night, a point in the river known to be difficult for boats to pass.[73] Negligence must be presumed where a steamboat proceeding quietly up the Ohio River was run into the bank by the pilot so hard as to knock a hole into the bottom of the boat big enough to sink it, and there was light enough to see, and no reason shown for the accident.[74]

§ 4306. Negligence in Discharging or in Caring for Goods after Discharge.—Loss or Injury during Discharge.[75]—A carrier by water is liable for loss of or injury to goods caused by its negligence in discharging the cargo.[76]

board, and was assisted by a tug. While the smokestacks were lowered to permit her passage under the suspension bridge at Cincinnati, as was frequently the case, the pilot house became so filled with smoke that the pilot could not see to navigate the vessel past the railroad bridge below, but she continued at full speed; and, her side striking one of the piers, she was broken in two by the current and sunk, some of her passengers being drowned, and her cargo lost. The river was high and the current strong. No effort to stop the vessel was made until too late to avoid the collision. No arrangement appeared to have been made with the tug to secure efficient aid in the management and handling of the vessel. Held, under the facts shown, that the disaster was due to negligence of the officers and pilots, in failing to make such arrangements, and in not stopping and backing at once when the smoke so obscured their vision as to make the attempt to pass the lower bridge at that time unsafe. Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246.

71. Vessel proceeding in night and in fog.—The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754.

72. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

73. Passing difficult point in night.—Ready *v.* Steamboat Highland Mary, 17 Mo. 461.

74. Running into river bank.—Louisville, etc., Packet Co. *v.* Smith, 60 S. W. 524, 22 Ky. L. Rep. 1323.

75. Loss or injury during discharge.—See ante, "Means for Loading and Unloading," § 1021.

76. A lighter was loaded with 100 barrels of cement in the hold and a large number of rolls of bagging, weighing 253 tons, piled upon the deck. It was the duty of respondent to transfer the load to a steamer; and when a portion of the bagging had been unloaded, all of which was taken from the side next the steamer, the lighter listed to the other side, and a portion of the bagging was thrown overboard, and lost or damaged. The load was unusual in weight and height, but not to an extent to endanger it if properly handled. It was properly loaded, and the lighter had been brought with it a considerable distance in safety. Held, that the fact of its unusual height required that in unloading the removal should be distributed as evenly as possible over the whole load, which was also shown to be the usual way, and that the negligent manner of unloading was the cause of the vessel's listing, and rendered respondent liable for the damage. McAllister *v.* Southern Pac. Co., 111 Fed. 938.

Cargo was shipped at Baltimore on respondent's steamship Bulgaria to be carried to Hamburg. When the ship reached a point in the river Elbe some 14 miles below Hamburg, owing to the low water in the river she anchored and proceeded to discharge her cargo into lighters owned by respondent, as was customary and provided for in the bill of lading. The Patricia, another ship owned by respondent, was also anchored above the Bulgaria a sufficient distance away, so that the two vessels swung clear of each other with the changes of the tide. Early on the morning of the second day at the commencement of the flood tide when the Bulgaria swung up stream it was seen that she was likely to collide with the Patricia, and her engines were started ahead, and a lighter into which a part of the cargo had been discharged was cast off and drifting against the Patricia was injured and sunk. Held, under the evidence that the drifting together of the two ships was caused by the fact that at some time during the night the Patricia dragged her anchor and moved with the tide into dangerous proximity to the Bulgaria, and that the negligence of the officers of the

An agreement by the owner of a vessel to lighter goods which she had contracted to deliver at her anchorage for an agreed compensation, in the absence of a stipulation otherwise therein, imposed on him the obligations of a common carrier, and as such he became responsible for all goods lost or damaged between the vessel and shore, unless such loss was occasioned by act of God or the public enemy.[77] Where a bill of lading consigned a canal boat alongside of a steamer for the purpose of transferring a cargo of iron from the canal boat to the steamer, and the iron was properly put in slings in the hold of the canal boat, and two of the loads fell, from contact with the side of the ship, because there was no guy to control the slings in rising, the canal boat was not liable for the resulting loss.[78]

Loss or Injury after Discharge.—After the liability of a vessel as a carrier ceases it can be held liable only for negligence in caring for the goods until their removal by the consignee;[79] but it is liable where it leaves the goods in an exposed position without proper covering, and they are injured by rain.[80] The carrier is not liable for damage to goods by rain before their removal from the wharf by the consignee when there has been an actual delivery and acceptance,[81]

ships in failing to discover such fact, and in not taking measures to avert the danger, rendered respondent liable for the cargo lost in the lighter. Higgins *v.* Hamburg-American Packet Co., 145 Fed. 24, 76 C. C. A. 24.

Discharging upon unsafe pier.—See Rosenstein *v.* Vogemann, 184 N. Y. 325, 77 N. E. 625, affirming 92 N. Y. S. 86, 102 App. Div. 39.

77. Ames Mercantile Co. *v.* Kimball Steamship Co., 125 Fed. 332.

78. Vincent *v.* Hogan, 108 Fed. 428.

79. Loss or injury after discharge.—The Italia, 187 Fed. 113, 109 C. C. A. 33, modifying decree, 184 Fed. 366.

Instances where carrier not negligent.—A vessel discharged a shipment of macaroni on a covered pier in New York, where two days after she had left that pier it was injured by water by the bursting of a leader from the roof of the shed during an extraordinary rainfall. The pipe was sound, and had not leaked before. Held, that no negligence was attributable to the ship in leaving the goods near such pipe, and that she could not be held liable for the loss. The Italia, 187 Fed. 113, 109 C. C. A. 33.

A consignment of oleo stearine, the trade name of which in France is "pressed tallow," was shipped from Paris, and transshipped at London, for New York, as "tallow." The consignment was discharged at the steamer's covered pier, but was placed, uncovered, in an adjacent portion of the street, by the stevedore, who supposed it was tallow. The goods were here damaged by rain, but it appeared that tallow would not have been damaged under similar conditions. Held, that the ship was not liable. The Mississippi, 76 Fed. 375.

The fact that a bulletin from the weather bureau had been posted and published in a port in the morning, predicting light showers or a moderate thunder storm at such port during the day, can not alone be held sufficient to charge the master of a vessel with negligence in discharging a consignment of perishable goods on an open wharf during the morning, when the weather was at the time clear, such as would render the vessel liable for their subsequent injury by rain, and especially where the master was unacquainted with the English language, and it does not appear that he had actual knowledge of the forecast, and no objection to the time or place of delivery was made by the consignee. The St. Georg, 104 Fed. 898, 44 C. C. A. 246.

Where the owners of a consignment of 6,400 bales of jute, required by the bill of lading to take it from the ship's tackles, were duly notified of the arrival of the ship and time of discharging, and on the first day removed over 1,200 bales, but did not remove any more until four days later, because it was more convenient to load it on lighters after the ship had left her berth, the ship was not liable for an injury by rain to a portion of the jute which she was compelled to unload on an uncovered part of the wharf because the shed under which the most of it was placed had been filled, and where she covered it, and took all reasonable care to protect it from injury. Smith *v.* Britain Steamship Co., 123 Fed. 176.

80. Leaving goods exposed.—Vitelli *v.* Cunard Steamship Co., 203 Fed. 697, 122 C. C. A. 81.

81. Where goods have been delivered.—The St. Georg, 104 Fed. 898, 44 C. C. A. 246, holding that where the contract made by a bill of lading for a consignment of goods shipped by steamer provided that the goods should be discharged as soon as the steamer was ready to unload, and should be received by the consignee at the ship's dock as fast as she could deliver them, and be thereafter at his sole risk and expense, and the consignee was notified, and was present while the goods were being discharged

as where the consignee, after being notified of the arrival of the goods and paying the freight, permitted a portion of the goods to remain on the carrier's unenclosed platform or shed, according to custom.[82] A provision of a bill of lading requiring the consignee to be ready to receive the cargo as soon as the vessel was ready to unload, in default of which she was authorized to land, warehouse, or lighter the same at the consignee's risk, does not relieve her from liability for damages arising from her failure to reasonably protect perishable goods landed on a dock upon a claim of delivery, where she refused to permit the consignee's agents to remove them, although having no claim thereon for freight.[83] A general custom of a port, that "after a vessel arrives at the port and goes to a wharf designated by the consignee, and due notice has been given to the consignee, and the cargo is taken off and distributed upon the wharf according to the marks and numbers, the care of the goods devolves upon the consignee," is valid.[84]

§ 4307. Acts of Employees or Third Persons.—For the acts of commission or omission, of its employees, occasioning damage, the carrier is equally liable as for acts of his own.[85] A carrier undertaking to take lumber from a schooner and place it on its barge and convey it to a designated point, can not relieve itself from liability by showing that a loss occurred because of the act of the schooner in an honest though mistaken effort to save the barge which had been left by the carrier for the night without a watchman.[86] Carriers by water are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principle as carriers by land.[87] So if a loss of goods occurred from the carelessness or wantonness of the navigators of another vessel, brought into collision with the vessel, that does not excuse the carrier.[88]

§ 4308. Duties after Injury or Disaster.—Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the wrecking or stranding of the vessel, he is still bound by the original obligation to take all possible care of the

upon an uncovered wharf, and made no objection to the time, manner, or place of delivery, there was an actual delivery and acceptance when they were so placed on the wharf.

82. Stone *v.* Clyde Steamship Co., 139 N. C. 193, 51 S. E. 894.

83. Refusal to permit removal of goods.—The Alnwick, 135 Fed. 884.

84. Valid custom.—Pickering *v.* Weld, 159 Mass. 522, 34 N. E. 1081.

85. Liability for acts of employees.—Bowman *v.* Hilton, 11 O. 303; Clark *v.* Richards, 1 Conn. 54. See Stockton Milling Co. *v.* California Nav., etc., Co., 165 Fed. 356; The Dana, 190 Fed. 650. See, generally, ante, "Negligence of Agents or Servants," § 1014.

The carrier is liable for a breach of a contract of the master within the scope of his authority resulting in an injury to the cargo. Bell *v.* Wood (Ky.), 1 Dana 146.

Respondent contracted to transport flour for libelant in open barges and to load the same, but at libelant's request employed a warehouse company to do the loading. After a barge had been partly loaded, and while it was lying unattended, one end grounded at night at low tide, causing seams to open and the barge to leak. This was promptly discovered, and an unsuccessful attempt made to pump out the barge; but no effort was made for 16 hours to save or safeguard the flour that had been loaded, after which the barge sank, causing loss and injury to the flour. Held, that respondent, having no other representative in control of the barge, was liable for the negligence of the servants of the warehouse company in failing to exercise ordinary care to preserve the flour while in its custody for transportation. California Nav., etc., Co. *v.* Stockton Mill. Co., 184 Fed. 369, 107 C. C. A. 46, affirming judgment, 165 Fed. 356.

86. Stockton Lumber Co. *v.* California Nav., etc., Co., 101 Pac. 541, 10 Cal. App. 197.

87. Acts or negligence of third persons.—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Mershon *v.* Hobensack, 22 N. J. L. 372.

88. Lawrence *v.* McGregor (O.), Wright 193.

goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill, and prudence.[89] Where it appears that a part of the cargo of a wrecked vessel was so stored that it might have easily been saved, and that several opportunities to reship what was saved were neglected, the carrier is responsible to the shipper for his loss, though the shipment was at the owner's risk, and "dangers of the river" were excepted.[90] Where the master of a wrecked vessel abandons her to the underwriters without exercising due diligence to save the cargo, the fact that the underwriters take possession, and sell a part of the cargo which is not insured, does not exempt the carrier from liability to the shipper.[91] Owners, who supervise the repair of a vessel after a collision, are personally negligent in failing to make an examination of a part of the cargo for damage caused by the shock, when such damage had been discovered in another part of the cargo, similarly placed, and they are liable for damage arising from causes which an examination would have revealed, notwithstanding a clause in the bill of lading exempting the owner from liability for damage from collision.[92]

Duty to Repair Injury to Goods.—See ante, "Duties after Injury," § 1022.

§ 4309. Effect of Insurance.[93]—It is not a defense to an action by a shipper against a vessel owner for goods lost through the latter's negligence that the goods were insured and the insurance has been paid, though it does not appear from the pleadings or evidence that the suit is brought by the direction or for the benefit of the insurer.[94] Where a carrier already held policies insuring it against loss through liability to cargo owners, a provision in a bill of lading, in consideration of a higher freight rate, that the cargo therein specified "is covered by marine insurance while on board, * * * under and in accordance with and subject to the conditions and limitations of policies of marine insurance held by" the carrier, must be construed as an obligation on the part of the carrier to pay the shipper's loss under the same contingencies as permitted it, through its reinsurance, to throw the loss on its own insurers.[95]

§ 4310. Estoppel to Deny Liability to Deliver in Good Order.—A ship, which received a cargo, carried it to the consignees at the port of destination, and then libelled the cargo for freight, is estopped to deny her liability to deliver in like good order as received, with the usual exceptions, and the fact that the master of the ship refused to sign the bill of lading, upon the ground that the cargo was not in good order, is immaterial.[96]

§ 4311. Persons and Vessels Liable.—Owners of Vessel.—The owner of a vessel is never liable as a carrier merely by virtue of his ownership. The vessel must also have been in his employment, so as to make him a party to the

89. Wrecking or stranding of vessel.—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754.

90. Bixby *v.* Deemar, 4 C. C. A. 559, 54 Fed. 718.

A steamboat, going through an inland passage, grounded from the reflux of the tide, and fell over, so that bilge water rose into the cabin and injured a box of books. Held, that the owners of the boat were responsible for this injury, though the bill of lading excepted "dangers of the navigation," and though the grounding of the boat was unavoidable, as the carriers were bound to remove the books from the cabin before the water reached them. Charleston, etc., Steamboat Co. *v.* Bason (S. C.), Harp. 262.

91. Bixby *v.* Deemar, 4 C. C. A. 559, 54 Fed. 718.

92. The Guildhall, 12 C. C. A. 445, 64 Fed. 867; Peterson *v.* Schultze-Berge, 12 C. C. A. 445, 64 Fed. 867, affirming decree, 58 Fed. 796.

93. Effect of insurance.—See ante, "Effect of Insurance," §§ 1023-1029.

94. Stockton Milling Co. *v.* California Nav., etc., Co., 165 Fed. 356. See Baker & Co. *v.* New York, etc., R. Co., 162 Fed. 496, affirmed in 168 Fed. 248.

95. Southern Cotton Oil Co. *v.* Merchants', etc., Transp. Co., 179 Fed. 133.

96. The Water Witch (U. S.), 1 Black 494, 17 L. Ed. 155.

contract for carriage. The party having the control of the vessel, and in whose business it is engaged, is regarded as the owner pro hac vice, and as such is answerable to the freighter.[97] The owner of a chartered vessel, retaining control of her navigation, is liable for injuries to a part of the cargo occasioned by unaccustomed and dangerous goods subsequently taken aboard.[98] Where a shipmaster agreed to take the defendant's schooner, for the purpose of getting employ in the freighting business, and engaged "to victual and man her, and pay half of all port charges, pilotage, etc.; and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the schooner in sufficient order for the business; and all money so stocked in the schooner, whether for freight or passage, or whatever, was to be equally divided between the master and defendant, each party accounting for the above," it was held that the contract did not make him and the defendant partners, and that the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading.[99] It is not necessary that the owners of a boat shall always receive or be entitled to a reward for the carriage of goods, in order to render them liable for a loss; if there was an agreement between the master and the owners, or between the owners themselves, by which the master in the one case, or some of the owners in the other, were to receive to their use exclusively, the freight earned in whole or in part by the boat, such an agreement would not exempt all the owners from liability; unless it was known to the shipper at the time his shipment was made.[1] But a shipper of cotton can not recover for its loss of all the owners of a boat carrying goods for hire where he makes a special contract with some of the joint owners, without the knowledge of the others, by which the freight is to go in extinguishment of a demand of the shipper against the owners with whom the contract was made.[2] The part owners of a steamboat are liable for the torts of the master, who is also a part owner, done in the execution of the business on which the boat is engaged.[3]

Vessel.—Whenever the owners of a ship are liable for injury to her cargo, the ship is also liable.[4] The liability of a vessel in rem for want of due diligence in the care and custody of goods received on board for transportation is the same whether the owners of the ship remain in possession as carriers, or whether the terms of the charter party are such as to constitute a demise of the vessel for the voyage, so as to render the charterers the owners pro hac vice, and alone personally responsible for the transportation.[5] Where the owners of certain steamboats formed an association, and appointed a common agent, with authority to sign bills of lading, under an arrangement by which the bills were frequently signed on delivery of the goods at the landing, and the goods were to be taken by the first boat which passed, the name of which was usually entered in the bill when the goods were received on board, it was held that, where goods were destroyed at the landing after the bills of lading were signed, the fact that no particular boat was mentioned therein would not prevent the maintenance of a libel against the next boat which passed the landing, and upon which the goods would have been shipped.[6]

Consignee Furnishing Towage.—The consignee of a cargo, having assumed by his contract the duty of furnishing towage, can not relieve himself from liability for the manner in which it is performed by the employment of a towing

97. **Owners of vessel.**—Tuckerman *v.* Brown (N. Y.), 17 Barb. 191.

98. **Owner retaining control of navigation.**—The T. A. Goddard, 12 Fed. 174.

99. Cutler *v.* Winsor (Mass.), 6 Pick. 335, 17 Am. Dec. 385. See Denny *v.* Cabot (Mass.), 6 Metc. 90.

1. Jones *v.* Sims, 9 Port. 236, 33 Am. Dec. 313.

2. Jones *v.* Sims, 9 Port. 236, 33 Am. Dec. 313.

3. Taylor *v.* Brigham, Fed. Cas. No. 13,781, 3 Woods 377.

4. **Vessel.**—The Huron *v.* Simmons, 11 O. 458.

5. The T. A. Goddard, 12 Fed. 174.

6. The Guiding Star, 53 Fed. 936, judgment affirmed in 62 Fed. 407, 10 C. C. A. 454.

company, and is responsible to the vessel for any damage or injury caused by the negligent manner in which the service is performed by such company.[7]

Failure to Furnish Covers for Lighter.—Where the agent of a steamship company, to facilitate unloading employed a lighter without covers, and agreed on behalf of the steamship company to furnish the covers, which he failed to do, resulting in injury to the cargo from rain, the lighter was not liable in rem, but the agent was primarily, and the steamship company secondarily, liable.[8]

Loss Through Negligence of Lighter.—Where an ocean carrier undertook to transship goods, and employed a lighterage company for the service, they are jointly liable for a loss of the goods through the negligence of the lighterage company.[9]

§§ 4312-4327. Actions—§ 4312. By Carrier.—Right of Carrier to Maintain Action.—A carrier by water of merchandise may maintain an action in his own name for its loss or injury, and may sue in admiralty as well as at common law.[10] The carrier's right of action is not defeated by the fact that the loss has been paid by an insurer or that he is doing business under a fictitious or trade name, and that contracts of affreightment are made in such name.[11]

§§ 4313-4327. Against Carrier—§ 4313. In General.—Jurisdiction of Admiralty.—Where the cargo, or a portion thereof is not delivered, or delivered in a damaged condition by the fault of the master, the right to proceed in admiralty to recover the damage sustained is clear.[12]

Prerequisites to Bringing Action.—See ante, "Conditions Precedent," § 875; "Prerequisites to Bringing Action," § 960; "Conditions Precedent," § 1034.

Nature and Form of Action.[13]—Consignees or shippers may proceed in the admiralty in rem against the vessel to enforce their maritime lien, or they may waive that lien and still proceed in the admiralty in personam against the owners of the vessel to recover damages for the nonfulfillment of the contract, or they may elect to bring a common action against the owners to recover damages, as in other cases for the breach of a contract to be executed on land.[14] Assumpsit lies against the owner of a steamboat in favor of the owner of the goods for breach of a contract of the master within the scope of his authority resulting in injury to the cargo shipped.[15]

Who May Maintain Action.—To sustain an action against a carrier for loss

7. **Consignee furnishing towage.**—Thompson *v.* Winslow, 128 Fed. 73.

8. **Failure to furnish covers for lighter.**—The Seven Bros. No. 1, 203 Fed. 21, 121 C. C. A. 385.

9. **Loss through negligence of lighter.**—Smith *v.* Booth, 122 Fed. 626, 58 C. C. A. 479, affirming 110 Fed. 680.

10. **Right of carrier to maintain action.**—The Nonpariel, 149 Fed. 521. See ante, "Right of Carrier to Maintain Action," § 808.

Libelant, a lake carrier, which contracted for the carriage of merchandise from New York to Chicago, and afterwards chartered the respondent canal boat to carry the cargo from New York to Buffalo, to be there transshipped, made such contract in the capacity of shipper, and as such may maintain a suit in rem against the canal boat to recover for damages to the cargo during the shipment. The Presque Isle, 140 Fed. 202.

Right of action assignable.—See ante, "Right of Carrier to Maintain Action," § 808.

11. **Loss paid by insurer—Doing business under fictitious name.**—The Nonpariel, 149 Fed. 521.

12. **Jurisdiction of admiralty.**—O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140; Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The Belfast (U. S.), 7 Wall. 624, 19 L. Ed. 266; The Habil, 100 Fed. 120; New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 343, 12 L. Ed. 465.

13. **Nature and form of action.**—See ante, "Form of Action," § 876; "Nature of Action," § 955; "Nature and Form," § 1032; "Nature and Form of Action," §§ 2095-2058.

14. The Belfast (U. S.), 7 Wall. 624, 19 L. Ed. 266. See The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; The Atlas, 93 U. S. 302, 23 L. Ed. 863.

15. **Assumpsit.**—Bell *v.* Wood (Ky.), 1 Dana 146.

of or injury to goods or for delay in delivery the plaintiff must be the owner or have some special interest in them.[16] A consignee of goods may sue in a court of admiralty, either in his own name, as agent, or in the name of his principal, as he thinks best.[17] One who contracts to furnish a certain lot of cattle to be carried by a ship, agreeing to pay for any detention of the ship while waiting for them, may, without proof that the cattle are his, there being no stipulation that they should be, recover on the stipulation in the contract for payment by carrier of expense of feed, in case of delay in sailing.[18] A claim by the carrier that the plaintiff was not entitled to recover because he was not the owner of the goods is not sustained, where the evidence showed that he had possession of the goods with the right to sell and collect the proceeds.[19] A charterer of a vessel to carry a cargo of which he is not the owner, but merely the agent for its sale on commission, has no legal interest therein which will support an action against the vessel for its loss or damage; nor can he maintain such action as trustee for the owner, who was not a party to the charter.[20]

Applying Part of Claim for Damages to Extinguish Claim for Freight.—Parties claiming damages for loss of goods resulting from the fault of the master and crew can not split up the claim for damages by applying a part to extinguish the claim for freight, and taking a decree for the remainder.[21]

§ 4314. Pleading.—In Common-Law Action.—The same rules govern pleadings in a common-law action against a carrier by water as govern in actions against other common carriers.[22] A petition alleging that defendant agreed to transport plaintiff's corn by river as a common carrier, and that the sinking of the barge and the loss of the corn were caused by the negligence of defend-

16. **Who may maintain action.**—See ante, "Right to Maintain Action against Carrier," §§ 809-811. See, also, ante, "Rights of Action," §§ 2059-2062; "Parties Plaintiff," §§ 2064-2066.

Illustration.—Where plaintiff, having a grub-staking contract with certain miners, providing for the delivery of outfits to them at an Alaskan port in consideration of one-half of the profits of the mining venture, and pursuant thereto purchased and shipped the outfits by defendant's steamer, which was lost, so that the outfits were never delivered at destination, plaintiff was still the owner, and was therefore entitled to sue for the damages sustained. Plaintiff was still entitled to sue as the trustee of an express trust, even if the title to the outfits passed to the firm, consisting of himself and the persons to whom the outfits were to be delivered, and should be regarded as the owner of the goods from the time they were delivered to the steamship for transportation. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

17. **Consignee.**—Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; McKinlay *v.* Morrish (U. S.), 21 How. 343, 16 L. Ed. 100.

The consignee of a cargo may maintain an action in admiralty against the vessel for an injury to his interest therein, and, when he is vested with the legal ownership by an assignment of the bill of lading, he may recover for any breach of the contract made by such bill of lading; but where there was no bill of lading, and he has no interest in the cargo, if he is, in any event, authorized to recover against the vessel on behalf of the consignor, it can only be such damages as result from a breach of the contract between shipper and carrier, and arising after the cargo has been received on board. The Habil, 100 Fed. 120.

A party who has made advances on the cargo of a ship, and been treated as consignee by the owners, has such a title as enables him to libel the ship for damages to the cargo. The Water Witch (U. S.) 1 Black 494, 17 L. Ed. 155.

18. **Person making contract of shipment.**—Morris *v.* Wilson Sons & Co., 114 Fed. 74, 52 C. C. A. 22.

19. Sanbern *v.* Wright, etc., Lighterage Co., 171 Fed. 449.

20. **Agent selling on commission.**—The Ask, 156 Fed. 678.

21. **Applying part of claim for damages to extinguish claim for freight.**—The Water Witch (U. S.), 1 Black 494, 17 L. Ed. 155.

22. **Pleading in common-law actions—Actions for nondelivery or misdelivery.**—See ante, "Pleading," §§ 880-882.

Actions for delay.—See ante, "Pleading," §§ 961, 964.

Actions for loss or injury.—See ante, "Pleading," §§ 1038-1051.

Actions against carriers of live stock.—See ante, "Pleading," §§ 2067-2075.

Actions against connecting carriers.—See ante, "Pleading," §§ 3792-3797.

ant, its officers and employees, was not objectionable for indefiniteness of the allegation of negligence.[23]

In Admiralty.—The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam.[24] Where a bill of lading provides that notice of any claim for loss or damage to the property must be given to the carrier within a stated time after delivery, the failure to give such notice is a matter of defense in a suit to recover for such loss or damage, and performance of the requirement need not be alleged in the libel.[25] It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel.[26] The admiralty courts are generally very liberal in the matter of amendments. But amendments in matters of substance should not be allowed on the hearing unless the justice of the case requires it, and then to conform to the proof, and in no case should an amendment be allowed on the hearing which would change the entire cause of action.[27]

§ 4315. Issues, Proof and Variance.—In Common-Law Actions.—The general rules as to issues, proof and variance apply in common-law actions against carriers by water for less of or injury to property[28] or for delay in transportation or delivery.[29]

In the admiralty there are no technical rules of variance or departure. The court decrees upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him.[30] An allegation of negligence of the master will not let the libelant in to prove unseaworthiness of the vessel.[31]

23. Sufficiency of allegation of negligence.—Marsden Co. *v.* Bullitt & Co., 72 S. W. 32, 24 Ky. L. Rep. 1697.

24. Pleading in admiralty.—Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

The same technical minuteness is not necessary in a libel as in a declaration at common law. Only the essential facts need be alleged, without regard to particular forms, either in contract or tort. New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 343, 12 L. Ed. 465.

The admiralty court is not precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because the entire case is not distinctly stated in the libel. Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

25. The Tampico, 151 Fed. 689.

26. Answer.—Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

27. Amendment.—The Habil, 100 Fed. 120.

28. Issues, proof and variance. — See ante, "Issues, Proof and Variance," § 883; "Issues, Proof and Variance," §§ 1052-1055.

Actions against carriers of live stock.—See ante, "Issues Raised by Pleading," § 2076; "Variance," § 2078.

29. Actions for delay.—See ante, "Issues, Proof and Variance," § 965.

30. In admiralty.—Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584.

On a libel by the consignee of goods against a vessel for nondelivery of the same—the defense being that the goods were subject to the lien of the vessel for freight and that the libelants improperly refused to pay it—any supposed misconduct of a bailee of the goods, not before the court, with whom the goods had been stored on the refusal of the consignee to pay freight and take them away, is a question not involved in the pleadings. And if on such a state of pleadings the defendants prove their defense, they are entitled to a decree in their favor irrespective of any such supposed misconduct of the bailee. The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

31. Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; McKinlay *v.* Morrish (U. S.), 21 How. 343, 16 L. Ed. 100, explaining why the rule of pleading was not endorsed in Lawrence *v.* Minturn, supra.

§§ 4316-4326. Evidence—§§ 4316-4319. Presumptions and Burden of Proof—§ 4316. In General.[32]—In an action against a carrier by water for injury to goods the plaintiff must, in the first instance, show that the goods were delivered to the carrier in an undamaged condition and were in a damaged condition when delivered to the consignee. And in an action for loss of property the plaintiff has the burden of proving that the carrier failed to deliver the goods to the consignee, but slight evidence will be sufficient to throw upon the carrier the burden of showing delivery to the consignee.[33] The plaintiff makes a prima facie case by proving that the goods were received by the carrier for transportation and that it failed to deliver them according to contract.[34] When it is shown that goods, when delivered by a vessel which was the last carrier to the consignee, were deficient in quantity, the presumption is that the missing goods were delivered to such vessel, and the burden rests upon her to prove that she delivered all that she received.[35] Where through bills of lading for boxes of goods recited that the weight and quantity were unknown, the burden rests upon the shipper to show their weight, when received, in order to hold the last carrier liable for a claimed short weight in the quantity delivered.[36] But where bills of lading for cargoes of phosphate specified the quantity, but contained the further statements, "weight and quantity unknown," or "weight unknown," the burden rests upon the shipowners to account for any discrepancy between the quantity delivered and that specified.[37]

Necessity of Proving Negligence, Value of Lost Freight or That Defendant a Common Carrier.—See ante, "Plaintiff's Burden of Proof in General," § 1056.

Condition of Goods When Received by Carrier.—See ante, "Condition of Goods When Received by Carrier," § 1058.

Notice of Claim for Damages.—Where a bill of lading exempts the ship from liability "for any claim, notice of which is not given before the removal of the goods" and the failure to give such notice is set up by respondent as a defense, the burden rests upon libelant to prove the notice, as a condition to the right of recovery, it being an affirmative fact peculiarly within his knowledge.[38]

Benefit of Insurance.—Under a provision of a bill of lading giving the carrier, in case of loss or damage to the property for which it is liable, the benefit of "any insurance that may have been effected upon or on account of such property," the burden rests upon the carrier, when sued for a loss to prove that there was insurance, to the benefit of which it was entitled.[39]

§ 4317. Cause of Loss or Injury to Goods.—After the shipper has shown that the goods were delivered to the carrier in good condition and that it failed to deliver them or delivered them in a damaged condition the presumption is that the carrier was negligent and it has the burden of proving that the loss or damage resulted from some cause for which it was not responsible.[40] Thus the

32. **Presumptions and burden of proof.**—See ante, "Presumptions and Burden of Proof," § 884; "Presumptions and Burden of Proof," §§ 1056-1060.

Actions for delay.—See ante, "Burden of Proof and Presumptions," § 967.

Actions against carriers of live stock.—See ante, "Presumptions and Burden of Proof," §§ 2079-2086.

33. See ante, "Plaintiff's Burden of Proof in General," § 1056.

34. **Prima facie case.**—The E. M. Norton, 15 Fed. 686; Mallory Steamship Co. *v.* Bahn Diamond, etc., Co. (Tex. Civ. App.), 154 S. W. 282.

35. The Ghazee, 172 Fed. 368, 97 C. C. A. 66.

36. The Seneca, 172 Fed. 370, 97 C. C. A. 68, reversing 163 Fed. 591.

37. Planters' Fertilizer Mfg. Co. *v.* Elder, 42 C. C. A. 130, 101 Fed. 1001.

38. **Notice of claim for damages.**—The Westminster, 127 Fed. 680, 62 C. C. A. 406.

39. **Benefit of insurance.**—Baker & Co. *v.* New York, etc., R. Co., 168 Fed. 248, affirming 162 Fed. 496.

40. **Carrier must prove itself not responsible.**—The La Kroma, 138 Fed. 936; Mallory Steamship Co. *v.* Bahn Diamond, etc., Co. (Tex. Civ. App.), 154 S. W. 282. See Holland *v.* Gammett, 5 La. Ann. 705, holding that after the damage is proved, the ship must show it did not happen on

carrier has the burden of proving that the damage was due to a risk excepted in the bill of lading,[41] such as perils of the sea.[42] Where damage was caused by sea water, the burden rests on the vessel to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea.[43] Where it satisfactorily appears that sea perils have been encountered adequate to cause damage to a seaworthy ship, and there is general proof of seaworthiness, the damage is presumptively due to such perils.[44] Extraordinarily rough weather warrants a finding of damage to cargo or baggage by sea perils, provided proof of ordinary good stowage is first given by the ship; but this preliminary burden is on the ship, and can not rest in mere presumption.[45]

Under a bill of lading acknowledging receipt of goods in good order and excepting dangers of the sea, the vessel has the burden of proof to show that damage to the cargo was occasioned by an expected peril,[46] or that it was not in good order when received.[47]

board. See ante, "Defendant's Burden of Proof in General," § 1057.

Act of God.—The burden is on the carrier to show that the injury was by the act of God, for which the company was not liable. Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Transportation Co. *v.* Downer (U. S.), 11 Wall. 129, 20 L. Ed. 160; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

Peculiar nature of property.—Where the goods shipped are alleged to have been impaired by the dampness of the vessel during passage to her port of delivery, the burden of proof is upon the carrier to show that the loss arose from the peculiar nature of the property. Nelson *v.* Woodruff (U. S.), 1 Black 156, 17 L. Ed. 97; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017.

The breaking of a greatly unusual number of bags in which a cargo of sugar was shipped in discharging raises a presumption of negligence on the part of the ship in handling, and, if unexplained, renders the carrier liable to the shipper for the loss and expense resulting. The Asiatic Prince, 103 Fed. 676.

41. Excepted risk.—The Patria, 132 Fed. 971, 68 C. C. A. 397, affirming 125 Fed. 425; The Henry B. Hyde, 32 C. C. A. 534, 90 Fed. 114; Graham & Co. *v.* Davis & Co., 4 O. St. 362, holding that the carrier must show that proper care and skill were exercised to prevent the loss.

With respect to the liability of a common carrier for loss or damage to goods, while in his possession, the question as to the burden of proof is not one of pleading but of primary liability, and where goods were received by a vessel in good condition, but delivered in a damaged condition, the ship has the burden of proof to show that the injury was due to some cause within the exceptions of the bill of lading to avoid liability although the libel may allege a specific ground of negligence. The Medea, 179 Fed. 781, 103 C. C. A. 273, reversing decree, 173 Fed. 498.

42. Perils of sea.—The Rappahannock, 173 Fed. 829, reversed on another point in 184 Fed. 291, 107 C. C. A. 74; The Italia, 184 Fed. 366, modified in 187 Fed. 113, 109 C. C. A. 33; The Frey, 106 Fed. 319, 45 C. C. A. 309; Insurance Co. *v.* Easton, etc., Transp. Co., 97 Fed. 653; The Westminster, 127 Fed. 680, 62 C. C. A. 406, affirming 116 Fed. 123; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen, 78 Fed. 155, and reversed on another point in The Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

43. The Folmina, 153 Fed. 364, 82 C. C. A. 440, affirming 143 Fed. 636.

Where goods are returned to the port of shipment greatly damaged by sea water, a presumption arises of negligence on the part of the carrier. The Queen, 78 Fed. 155, decree affirmed in Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, which is reversed on another point in The Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

44. The Sandfield, 79 Fed. 371, affirmed in 92 Fed. 663, 34 C. C. A. 612.

45. The Kensington, 88 Fed. 331, decree affirmed in 94 Fed. 885, 36 C. C. A. 533, which is reversed on other grounds in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

46. Acknowledging receipt of goods in good order.—The Lockport, 197 Fed. 213; Argo Steamship Co. *v.* Seago, 101 Fed. 999, 42 C. C. A. 128; The Presque Isle, 140 Fed. 202.

Where cotton was receipted for by a ship as in good condition, but was in bad condition when delivered at destination, the vessel is prima facie liable for the injury, and has the burden of proof to establish its exercise of proper care. Insurance Co. *v.* Leyland & Co., 191 Fed. 161, 111 C. C. A. 641, reversing judgment, 171 Fed. 524.

47. Argo Steamship Co. *v.* Seago, 101 Fed. 999, 42 C. C. A. 128.

Where damage to cargo was prima facie within the exceptions in the bills of lading, the burden is on the shipper to show that the loss occurred through the carrier's negligence.[48] Thus, to entitle a shipper to recover for damage to cargo from heat when liability for such damage is excepted in the bill of lading, he has the burden of showing that such heat was caused by the ship's negligence.[49] Where a cargo shipped under bills of lading containing exceptions of damage by collision was damaged as the result of a collision, wherein the other vessel was clearly shown to be guilty of inexcusable fault, it was held that in order to hold the vessel which carried the cargo liable, the burden was on the plaintiff to defeat the operation of the exception in the bills of lading by proof of such negligence on her part as would justify a decree against her if sued alone.[50]

Insufficient Protection.—Where a bill of lading for packages of firecrackers contained the usual printed clause exempting the carrier from liability for breakage, or for loss or damage arising from the nature of the goods or insufficiency of the packages, and also contained a stipulation signed by the shipper to the effect that the steamer was not accountable for chafage or breakage to insufficiently protected property, and that the packages were frail, on proof of breakage of the packages the carrier, relying on such indorsement for exemption, had the burden of proof to establish that the damage was due to insufficient protection.[51]

§ 4318. Stowage of Goods.—Where the bill of lading under which merchandise is shipped exempts the carrier from liability for damage to the goods "if properly stowed," if the goods are damaged the burden of proving proper stowage is on the carrier.[52] Where a bill of lading contains exceptions in behalf of the vessel of breakage and leakage and of dangers of the sea, and the cargo owner maintains that the true cause of injury to the cargo was improper stowage, the burden of maintaining this proposition rests on the cargo owner.[53] And

48. **Where damage within exceptions in bill.**—The Citta Di Messina, 169 Fed. 472; The Lennox, 90 Fed. 308; The Henry B. Hyde, 32 C. C. A. 534, 90 Fed. 114.

If a loss is manifestly due to a risk excepted in the bill of lading as from breakage or decay, which are excepted generally, the ship need not show the cause of the breakage or decay, but the cargo owner can only recover by proof of negligence. The Patria, 132 Fed. 971, 68 C. C. A. 397, affirming 125 Fed. 425.

Breakage or leakage.—Under a libel alleging injury to goods in shipment from breakage, where the bill of lading exempted the carrier from liability from breakage, the burden is on the libelant to show that the breakage occurred through negligence. The Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534, affirming 82 Fed. 681; Wright *v.* Grace & Co., 203 Fed. 360.

Where a shipment of olive oil in barrels was made under a bill of lading containing a clause that "the owner is not responsible for * * * leakage, breakage, land damage or any other injury resulting from the natural condition of the goods shipped or their deficiency of packing not externally recognizable," but also had a clause, "not accountable for leakage or breakage" stamped across it in large letters in different colored ink, the latter clause prevails over the one in the printed form, and to recover from the vessel for a loss resulting from leakage and breakage the shipper has the burden of proof to show negligence, which can not be inferred from the fact alone that the loss was greatly in excess of the normal, especially where second-hand barrels were used, some of which had been patched. The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578, reversing decree 173 Fed. 811.

In the absence of some fault such as negligent stowage, the burden is on the libelant to show that the damage might have been prevented by reasonable skill and diligence on the part of the servants of the vessel. Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310, affirming 124 Fed. 1007.

49. **Damage from heat.**—The Good Hope, 197 Fed. 149, 116 C. C. A. 573, affirming 190 Fed. 597; The Baralong, 172 Fed. 220, 97 C. C. A. 24.

50. **Damage by collision.**—The Victory, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519, reversing 68 Fed. 395, 15 C. C. A. 490.

51. **Insufficient protection.**—Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102, affirming 123 Fed. 334.

52. **Burden of proving proper stowage.**—Montague *v.* The Isaac Reed, 82 Fed. 566.

53. Crowell *v.* Union Oil Co., 107 Fed. 302, 46 C. C. A. 296.

A vessel which was new, properly con-

where a ship during the voyage encountered storms of such violence as to reasonably account for the opening of her deck seams and the consequent damage to her cargo from water, the burden of proof rests upon the cargo owner to establish a claim made by him that improper stowage of the cargo caused or contributed to the strain on the vessel's deck and the resulting injury thereto.[54]

Stowage on Deck.—Where, in an action on a bill of lading for the loss of goods shipped by a vessel of the defendant, the defendant relies on the defense that the goods were inflammable and therefore within an exception which permitted such goods to be stowed on deck at the owner's risk, the burden of proof is on the defendant to establish this defense.[55]

Where a vessel is not a common carrier, proof of loss of cargo alone does not cast upon her the burden of proof to show proper stowage; but the cargo owner must prove the negligence affirmatively.[56]

§ 4319. Seaworthiness or Fitness of Vessel.—Where the proof shows damage to the cargo, the burden is cast upon the ship to establish the fact of seaworthiness, or to show due diligence in ascertaining whether or not she was in fact seaworthy, and in making her so at the beginning of the voyage.[57] And where the cargo is lost by the sinking of the ship the burden of proving seaworthiness at the beginning of the voyage rests upon the shipowner.[58] Where disaster overtakes a vessel soon after the beginning of her voyage, without stress of weather or other adequate cause appearing, the presumption is that she was unseaworthy when the voyage commenced,[59] and the burden rests on the owner

structed and in all respects seaworthy can not be held liable for leakage under bills of lading exempting her from loss on that account and from weather, heat, and perils of the sea, unless it is affirmatively shown that there was negligence in the stowage which it should reasonably have been anticipated would cause such damage, and the libelant must make out a case showing the cause of injury with sufficient clearness before the burden is cast upon the vessel to show that the exemption is broad enough to cover the damage. The Oceana, 171 Fed. 172.

54. Where vessel encounters storms.—The Musselcrag, 125 Fed. 786.

55. Stowage on deck.—Tower Co. *v.* Southern Pac. Co., 184 Mass. 472, 69 N. E. 348.

56. Where vessel not common carrier.—The Rokeby, 202 Fed. 322.

57. Seaworthiness of vessel.—The Ninfa, 156 Fed. 512. See The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. Ed. 65; Mallory Steamship Co. *v.* Bahn Diamond, etc., Co. (Tex. Civ. App.), 154 S. W. 282.

Defective fitting of port.—Where a cargo is injured by a leak caused by the defective fitting of a port, the burden is on the ship to show that the port was tight at the time of sailing. The Phœnicia, 99 Fed. 1005, 40 C. C. A. 221, affirming 90 Fed. 116.

The breaking of a section of cast-iron pipe extending from engine room of a steamship to a tank in the forepeak along the floor of the hold, allowing water to escape into the hold and injure the cargo therein, in the absence of evidence to the contrary, authorizes an inference that the ship was unseaworthy as to the cargo placed in the hold at the beginning of the voyage, by reason either of defects in the pipe or the boxing, and the burden rests upon the vessel to overcome such inference. The Indrapura, 190 Fed. 711.

58. The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing 108 Fed. 886.

59. Disaster soon after beginning voyage.—The Listie, 197 Fed. 1022; Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733; The Arctic Bird, 109 Fed. 167; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen, 78 Fed. 155, and reversed on another point in The Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419. See Sanbern *v.* Wright, etc., Lighterage Co., 171 Fed. 449, affirmed in 179 Fed. 1021, 102 C. C. A. 666.

Proof that a vessel within a few hours after leaving port, and before encountering any peril of the sea, sprung a-leak from defective butts in her bottom, and that, in addition, her steam pump was not in good working order, and broke down when put in use, raises a presumption that she was unseaworthy at the beginning of the voyage, which is not rebutted by evidence merely of previous diligence. Carolina Portland Cement Co. *v.* Anderson, 186 Fed. 145, 108 C. C. A. 257.

If a defect without any apparent cause develops, it is to be presumed it existed when the service began. Work *v.* Leathers, 97 U. S. 379, 24 L. Ed. 1012; The

to avoid liability for cargo lost or injured to overcome such presumption by showing affirmatively that the ship was seaworthy.[60] Where a barge careened and dumped its cargo while lying in a sheltered basin without known external cause[61] or a lighter capsized when the water was still, there being no other explanation than that there was an ordinary swell from a passing steamer,[62] there is a presumption of unseaworthiness. A provision of a bill of lading exempting the carrier from liability for loss or damage occasioned by unseaworthiness, provided the owners had exercised due diligence to make the vessel seaworthy, leaves upon the owners the burden of proving such due diligence, which includes thorough and careful inspection.[63] Where it appears that a boat, sinking without apparent cause, was actually seaworthy, the presumption of unseaworthiness from the sinking is overcome.[64] Storms encountered during a voyage, although they may have been an adequate cause for an injury to the vessel resulting in leakage and damage to the cargo, are not sufficient to relieve the carrier from the burden of proving seaworthiness, where they were not of such an unusual character but that they should have been anticipated, and it is not shown that the injury could not have been provided against by proper inspection and care with respect to the part injured before sailing, and such inspection was not made, nor care exercised.[65] The fact that the beams of the main hatch of a vessel had been cracked some time previous to a voyage, and on the discharge of her cargo, at the end of the voyage, were found to be in worse condition and her deck to have sunk in consequence, where the vessel encountered a hurricane during the voyage, which would account for her condition at its end, did not overcome the presumption of her seaworthiness when she sailed, arising from the fact that the beams had been repaired and strengthened, and that her classification had been kept up thereafter on repeated surveys, and had not expired.[66] The fact that a single rivet, among many thousands used in the construction of a vessel's hull, was not as strong as the average, and parted under the stress of extraordinary stormy weather, does not raise a presumption of unseaworthiness, rendering the owner liable for a resulting damage to the cargo.[67]

When Burden on Shipper.—The warranty that a ship is fit at the beginning of a voyage to safely carry the cargo received by her, which is implied where the bill of lading is silent, can not be implied if the parties have contracted otherwise; and in such case the burden of proof is not upon the carrier, but upon the shipper, who must show the carrier's negligence to entitle him to recover for loss or damage to cargo.[68]

§ 4320. Necessity of Producing Bill of Lading.—See ante, "Necessity

Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

Vessel sinking at dock.—A vessel some 50 years old, which had been used as a steam propeller until she had become unfit for such service, and afterwards converted into a freight barge, sank at a dock with her cargo during the night, after she had been loaded. The evidence showed that the immediate cause of her sinking was a leak due to the springing of a plank in her hull, the spikes which held it having become loosened. The only peril to which she was subjected was that from the swells caused by passing vessels, and that was one which was usual and ordinary, and was withstood by other vessels at the dock without injury. Held, that the presumption arising from such facts was that the barge was unseaworthy, and that her sinking was due to that cause, in the absence of evidence establishing some other adequate cause. Forbes *v.* Merchants' Exp., etc., Co., 11 Fed. 796.

60. Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733.

61. Careening of barge.—United States Metals Refin. Co. *v.* Jacobus, 205 Fed. 896, 124 C. C. A. 209.

62. Capsizing of lighter.—Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

63. The Friesland, 104 Fed. 99.

64. When presumption overcome.—The America, 174 Fed. 724.

65. The Aggi, 93 Fed. 484.

66. The Guadeloupe, 92 Fed. 670.

67. The Sandfield, 92 Fed. 663, 34 C. C. A. 612, affirming 79 Fed. 371.

68. When burden on shipper.—The Tjomo, 115 Fed. 919.

of Producing Bill of Lading," § 885; "Necessity of Producing Bill of Lading," § 1061.

§ 4321. Admissibility of Evidence.—The rules governing the admissibility of evidence in actions against common carriers generally apply in similar actions against carriers by water.[69] In an action to recover for damage to cargo from leakage of the vessel, evidence that directions as to the manner of loading were given the agents of the vessel by libelant, which directions were not followed, was competent.[70] An allegation that the vessel was wrecked and the merchandise lost on account of defendant's negligence, and without fault on plaintiff's part, raises the issue of defendant's negligence, and authorizes the admission of evidence that the vessel was being operated without a full complement of officers, required by statute.[71] In an action by a shipper against a carrier for loss of oil clothing (shipped under a bill of lading providing that inflammable goods shall be transported if the carrier choses, on deck or elsewhere, and shall be at the shipper's risk), which goods were carried on the deck of defendant's steamer, became loose during a storm, and were thrown overboard to save other goods from damage and to prevent their interfering with the navigation of the vessel, defendant, by introduction, without objection, of the deposition of the steamer's captain that the oil clothing was stowed on deck because of their inflammable nature, laid a foundation for introduction of evidence to show a general usage that because of its character it was customary among steamship companies to stow oil clothing on deck, and to class it as inflammable goods.[72] And where in such action a custom treating oil clothing as inflammable was shown, evidence that the shipper's oil clothing was difficult to ignite, and on ignition did not burst into flame, but only charred, was properly excluded.[73]

Parol Evidence.—Evidence of an oral agreement made at the time the contract of transportation was made to vary and contradict it, is incompetent.[74] And

69. **Admissibility of evidence—Actions for nondelivery or misdelivery.**—See ante, "Admissibility of Evidence," § 886.

Action for loss or injury.—See ante, "Admissibility of Evidence," §§ 1062-1066.

Actions for delay in transportation.—See ante, "Admissibility of Evidence," § 968.

Actions against carriers of live stock.—See ante, "Admissibility of Evidence," §§ 2087-2094.

Actions against connecting carriers.—See ante, "Admissibility of Evidence," §§ 3802-3804.

Evidence as to authority of agent.—On an issue as to the apparent authority of a carrier's agent, B., to receive money for transportation from Boston to Finland, evidence that on a previous occasion another had gone to the same office where such business was transacted, and was directed by defendant's superior agent to B., to transact her business with, and that she gave B. $20 and had purchased certain tickets from Finland to America, which she directed B. to send to Finland to her brother, and that the brother received the money and tickets, and that B.'s letters forwarding the tickets and money were copied in the letter books in the office, and an advertisement in which B. was described as the manager of defendant's Finnish department, was admissible as bearing on B.'s authority and defendant's knowledge of what he had done. Rintamaki *v.* Cunard Steamship Co., 91 N. E. 220, 205 Mass. 115.

70. **That directions not followed.**—Donaldson *v.* Perry Co., 138 Fed. 643, 71 C. C. A. 93.

71. **That vessel without full complement of officers.**—Rev. St. § 4463 (U. S. Comp. St. 1901, p. 3045); Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

72. **General usage.**—Tower Co. *v.* Southern Pac. Co., 69 N. E. 348, 184 Mass. 472.

73. Tower Co. *v.* Southern Pac. Co., 195 Mass. 157, 80 N. E. 809.

74. **Parol evidence.**—Where a contract recited that second parties were desirous to ship by vessel certain lots of hard lumber, and the first party agreed to carry on his vessels any and all of the lumber, as may be desired by the parties of the second part, evidence that at the time the contract was executed it was understood that the second parties had about a certain quantity of lumber, which it was expected by both parties would be shipped under the contract, or that they orally promised to ship the same on the vessels of the first party, is inadmissible to show that they were bound by the contract, since by its express terms they were given the option to ship "any or all" of it thereunder. Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520.

where the only exception specified in the bill of lading is "dangers of the river," parol evidence can not be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew.[75] Though parol evidence of an agreement that goods shipped under a clean bill of lading should be carried on deck is inadmissible,[76] yet such evidence may be received to show a supplemental agreement for a particular mode of stowage under deck.[77]

Documentary Evidence.—On an issue as to the authority of an agent to receive money for transportation by a carrier, the receipt for the money, the agent's card showing that he was acting as agent for defendant, and not on his own account, and untranslated letters in Finnish, copied in defendant's letter book, relating to its business, were admissible as bearing on the extent of his apparent authority and defendant's knowledge or means of knowledge of his acts.[78]

Illegal Custom.—In an action against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, he can not give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise.[79]

Evidence as to Damage.—Where a shipment of coffee was damaged on the voyage through the fault or negligence of the carrier, who had knowledge of the damage after its arrival, the consignee was not bound to sell it at public sale or on public notice, but in a suit against the ship to recover the damage may show that its market value in its damaged condition was no greater than the price for which it was sold at private sale.[80]

§§ 4322-4326. Weight and Sufficiency of Evidence—§ 4322. In General.—The general rules as to weight and sufficiency of evidence in actions against common carriers generally apply in similar actions against carriers by water.[81] A ship may sustain the burden of proof resting on her to show that

75. The Belfast, 40 Ala. 184, 88 Am. Dec. 761, overruling Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516.

76. The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Star of Hope, Fed. Cas. No. 13,313, 2 Sawy. 15, affirmed in 17 Wall. 651, 21 L. Ed. 719.

77. The Star of Hope, Fed. Cas. No. 13,313, 2 Sawy. 15, affirmed in 17 Wall. 651, 21 L. Ed. 719.

78. **Documentary evidence.**—Rintamaki *v.* Cunard Steamship Co., 205 Mass. 115, 91 N. E. 220.

79. **Illegal custom.**—Miller *v.* Pendleton (Mass.), 8 Gray 547. See Lewis *v.* Smith, 107 Mass. 334.

80. **Evidence as to damage.**—United Steamship Co. *v.* Haskins, 181 Fed. 962.

81. **Weight and sufficiency of evidence.**—See, generally, ante, "Weight and Sufficiency of Evidence," § 887; "Weight and Sufficiency of Evidence," § 969; "Weight and Sufficiency," § 1084.

Actions against carriers of live stock.—See ante, "Weight and Sufficiency," §§ 2095-2103.

Evidence insufficient to establish negligence.—The San Paulo, 207 Fed. 51, 124 C. C. A. 611.

Evidence insufficient to show that valves closed when steamer sailed.—The Manitou, 127 Fed. 554, 63 C. C. A. 109, affirming 116 Fed. 60.

Evidence held to show apparent authority of agent.—Rintamaki *v.* Cunard Steamship Co., 91 N. E. 220, 205 Mass. 115.

Evidence insufficient to show damage the result of defective coverings on goods.—Doherr *v.* Houston, 123 Fed. 594, 64 C. C. A. 102.

Evidence showing that sufficient notice of arrival and reasonable time to take charge of freight not given to consignee.—Rosenstein *v.* Vogemann, 184 N. Y. 325, 77 N. E. 625, affirming 92 N. Y. S. 86, 102 App. Div. 39.

Evidence insufficient to rebut presumption of negligence.—A cargo of sugar was damaged on a voyage from Java to Boston by sea water which entered around loosened bolts securing in place a wooden scroll work under the ship's figure-head, and extending some feet from the prow on either side of the vessel. These bolts extended through the ship's plates, being fastened by nuts on the inside, and were in such position that water entering through the holes would readily flow into the fore peak, where the sugar damaged was stowed. The action of the seas upon the scroll work, especially in rough weather and when the ship was heavily

cargo damage was due to a cause for which she is not liable by circumstantial evidence as to the manner in which the water causing the damage entered the hold, and in the absence of direct evidence the court is justified in adopting her theory in that respect, where the facts and circumstances shown are consistent with such theory and not consistent with any other.[82] Where, in an action for damages to merchandise alleged to have been produced by sea water caused by a leakage of the vessel, the preponderance of the evidence did not show that the

laden, would naturally tend to gradually loosen the nuts on such bolts. The bolts had not been inspected for two years, and there was no evidence showing whether or not the nuts were loose at the beginning of the voyage, except the testimony of the officers that there was no leakage on the previous voyage. On the voyage the ship was heavily laden and encountered some heavy weather, but not more than should have reasonably been anticipated. Held that, the evidence was not sufficient to overcome the presumption of fault which arises against the carrier when goods are damaged during their transportation. The Aggi, 107 Fed. 300, 46 C. C. A. 276.

When damage occurred.—Evidence held to require a finding that wool was injured by being stored with wet wool on the lighter or steamer that carried it to destination, and not by being negligently stored while waiting terminal transportation. Sanbern *v.* Panama R. Co., 205 Fed. 348, 123 C. C. A. 423.

The new steamer P., on her first voyage from Hamburg to New York, when in midocean, on January 25th, was discovered to have a leaking port, by which cargo in compartment No. 4 was damaged. The port could not be screwed tight, so as to stop the leak, until the outside iron blind was removed. When that was removed, the port was screwed water-tight. Upon arrival in New York the brass ring of the glass door was found to be bent inward at the top and bottom 1/16 of an inch, on a vertical axis. The port in question was near the bridge, about 2½ feet above the water line, and 175 feet aft of the stem. A few bolts were found a little loosened about this port, and in its vicinity, and there were some scratches there; but no bolts were loosened, nor was damage done, for 75 feet or upward forward of the port, nor until about abreast of the foremast, where there was again some damage on the same starboard side of the ship, which arose from contact with fender on entering Havre or departing. The expert evidence showed that violent contact with the side of the ship where the port was might cause the glass door to be sprung, or the blind to catch, as it was found when the leak was discovered. There was no proof of such inspection at Hamburg before the ship sailed as would show the port to have been then water-tight. Held, that the evidence failed to show that the leak was caused after sailing, by contact at Havre, and hence the ship was liable. Decree 90 Fed. 116, affirmed in The Phœnicia, 99 Fed. 1005, 40 C. C. A. 221.

Evidence not showing that fire caused by overheating flue.—The donkey boiler of a steamship was directly under the deck where a portion of the cargo was stored. The top of the boiler was 10 or 12 feet above the fire, and a flue in its furnace extended from its top to the main boiler funnel, its nearest point to the roof being 19 inches therefrom. The entire shell of the boiler contained water, and there were four transverse water tubes in the interior. Expert witnesses testified that it would be almost impossible for the heat in the boiler to make the flue red-hot; and that such a fire would cause the steam to explode the boiler, if the safety valve did not lift, and warn the men. The use of the boiler did not require a heat sufficient to overheat the flues, and to maintain such a heat was contrary to instruction, and the testimony of witnesses who saw the flue before and after the fire indicated that it had not been red-hot. A former employee of the steamship, who had been discharged for bad conduct, and who was shown to have sworn falsely as to other matters tending to discredit the owners, testified that the flue was red-hot. The cargo was on planks on an iron deck over the boiler room. Between the flue and the deck were three baffle plates, leaving three 3-inch air spaces and one 10½-inch air space between the flue and the roof. Experts testified that the deck could not have become hot enough to set fire to the cargo. Held not sufficient to warrant a finding that the cargo caught fire as a result of the flue becoming overheated. Decree 94 Fed. 206, affirmed in The Strathdon, 101 Fed. 600, 41 C. C. A. 515.

Evidence held to show that damage due to water pumped on lighter by steamer.—Johnstone *v.* Furness, etc., Co., 172 Fed. 1016, affirmed in 179 Fed. 1019, 102 C. C. A. 664.

Evidence showing that injury caused by brine leaking from citron barrels negligently stowed.—Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310, affirming 124 Fed. 1007.

82. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, affirmed in McCahan Sugar Refin. Co. *v.* Steamship Wildcroft, 26 S. Ct. 467, 201 U. S. 378, 50 L. Ed. 794.

damage occurred while the merchandise was in the charge of the ship or under its control, and the majority of the witnesses heard were present at the examination of the goods, and unable to determine whether the damage was the result of sea water, the ship was not liable.[83]

That Port Opened by Thief.—In an action for damages to a cargo of cigarettes by leakage resulting from negligently leaving a port open, evidence that cigarettes were found missing from the cargoes of other steamers of this line, and that the situation of the port was such as to make theft possible, and that on arrival at the ship's destination some of the boxes were found misplaced, was not sufficient to excuse defendant by showing that the port had been opened feloniously in an attempt at theft.[84]

§ 4323. Delivery to Carrier.—Upon the issue whether goods claimed to have been shipped in a foreign port, but which were not delivered by the carrier, were in fact received on board, the acts of the ship's officers, whose customary duty it is to check off merchandise received aboard, is received as evidence of great importance.[85] Bills of lading, signed for the master, and acknowledging the receipt of goods on the ship, even though shown to have been executed by a duly authorized agent of defendant, are insufficient to prove delivery of the goods to defendant for carriage, where plaintiff's evidence further shows that when they were executed the goods had not been received on board ship, nor consigned to the care of a master, but were in a public warehouse, registered in the name of a third party, and that there was no vessel in port.[86]

§ 4324. Condition of Vessel.—Where all the direct evidence was to the effect that a steamer was seaworthy when she entered on her voyage, it can not be inferred from the fact that a short time before she had met with two accidents, in one of which she was slightly injured, that her seaworthiness was thereby impaired, in the absence of affirmative evidence that she was in fact injured thereby in her hull or machinery.[87] Evidence that damage to chemicals and rags in a cargo from sea water resulted from leaks in the steamer's ballast tank, which was found after heavy weather to be sprung, and the rivets started and broken, is not sufficient to establish unseaworthiness where first-class construction, careful inspection, and good stowage are shown.[88] In the appended note are cited decisions where the evidence was held sufficient or insufficient to show unseaworthiness.[89]

83. Clastrier *v.* Sun Mut. Ins. Co., 18 La. Ann. 621.

84. **That port opened by thief.**—The Manitoba, 104 Fed. 145.

85. **Delivery to carrier.**—Kelley *v.* Cunard Steamship Co., 120 Fed. 536.

86. Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

87. **Condition of vessel.**—The Longfellow, 104 Fed. 360, 45 C. C. A. 379.

88. The British King, 92 Fed. 1018, 35 C. C. A. 159, affirming 89 Fed. 872.

89. **Evidence held to show unseaworthiness of the vessel.**—The Good Hope, 197 Fed. 149, 116 C. C. A. 573; The Abbazia, 127 Fed. 495; The William Power, 131 Fed. 136; Neilson *v.* Coal, etc., Supply Co., 122 Fed. 617, 60 C. C. A. 175, affirming The Nellie Floyd, 116 Fed. 80; The Gordon Campbell, 141 Fed. 435.

Evidence held to sustain a finding that damage to a cargo of flaxseed from water on a voyage from Duluth to Buffalo resulted from the defective condition of the hatch coverings, which rendered the vessel unseaworthy at the commencement of the voyage, having in view the nature of the cargo, the time of the year, and the weather to be fairly anticipated. The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421, affirming 117 Fed. 279.

Same—By reason of improper stowage.—Corsar *v.* Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378; The Medea, 179 Fed. 781, 103 C. C. A. 273.

Evidence not showing proper inspection.—A cargo was injured by sea water which entered the vessel through a hole which had been worn and eaten by corrosion through the iron bottom of a valve chest three-eighths of an inch thick. The peculiar liability to corrosion of iron in such place was well known, and, while there was evidence of inspection, it was not specific as to manner in which such inspection was made, and it did not appear that the valve chest had ever been removed for examination since it was placed in the ship nine years before, or even that the valve itself had been taken

Certificate of Seaworthiness.—It has been held a certificate of the seaworthiness of a vessel issued by the authorities is not conclusive evidence thereof in a shipper's action for injuries to a shipment due to a leak in the vessel.[90]

Construction of Vessel.—While, in determining whether or not the construction of a vessel rendered her unseaworthy, it is proper to consider evidence of the usual custom of shipowners and the usual method of construction of ships and their appliances, such evidence is not necessarily conclusive, and should be considered in the light of what would appear to be the prudent method of construction, and may be rejected entirely where the construction is obviously defective.[91]

§ 4325. Evidence as to Sea Perils.—The burden of showing how a leak arose, so as to bring the damage to cargo resulting therefrom within an exception in the bills of lading, was not discharged by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely left in doubt the question as to how the leak arose.[92] The fact alone that damage to cargo was caused by sea water, without any evidence as to how the water entered the ship, is not sufficient to relieve the vessel from liability on the ground that the damage resulted from sea perils within an exception in the bill of lading, nor is it sufficient to show, in addition, that the ship encountered stormy weather on the voyage, which was no worse than should have been anticipated;[93] and testimony that on the voyage the vessel encountered gales which caused her to roll, and that rivets in her side were found loose on her arrival in port, is not alone sufficient, without showing that reasonable precautions had been taken to prevent the wetting of the cargo, and that the rivets were in place at the beginning of the voyage.[94] The fact that one vessel passed through a storm without injury to her cargo is not evidence of much weight on the question whether another, sailing two days after her, was subjected by such storm to unusual sea perils.[95] A libel to recover for damage to cargo is properly dismissed where the evidence leaves it uncertain whether the damage was caused by sea water or by sweat and heat, and the bill of lading exempted the vessel from liability for injury caused by perils of the sea or from sweat or decay.[96] In the appended note are set out decisions where the evidence

out. Held, that such evidence did not show reasonably careful inspection, such as was incumbent upon the owners under a provision of the bill of lading requiring them to exercise due diligence to make the vessel seaworthy, in order to exempt them from liability. The Friesland, 104 Fed. 99.

Evidence not showing unseaworthiness.—The Marechal Suchet, 112 Fed. 440; The Tjomo, 115 Fed. 919; The Ontario, 106 Fed. 324, affirmed in Grubnan *v.* The Ontario, 115 Fed. 769, 53 C. C. A. 199.

Evidence considered, in an action against the owner of a lighter to recover for loss of her cargo through her sinking at a pier during the night, and held not to show that her sinking was due to unseaworthiness, but that it was caused by a blow received from some unknown vessel in collision with her, or from swells causing her to collide with a vessel or wharf alongside. National Board *v.* Bowring & Co., 148 Fed. 1010.

Evidence held to show that the sinking of a barge, 14 hours after being loaded as a lighter, and while still lying alongside the ship with another large steamship close on the other side, was caused by her being crushed between the two during a storm, and was not due to her unseaworthy condition, so as to render her owner liable for the loss of the cargo. The Samuel F. Houseman, 108 Fed. 875, 48 C. C. A. 120.

90. Certificate of seaworthiness.—Mallory Steamship Co. *v.* Bahn Diamond, etc., Co. (Tex. Civ. App.), 154 S. W. 282; The Abbazia, 127 Fed. 495.

91. Construction of vessel.—The Indrapura, 190 Fed. 711, affirming decree 178 Fed. 591.

92. Sea perils.—Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen, 78 Fed. 155, and reversed on other grounds in The Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

93. The Medea, 179 Fed. 781, 103 C. C. A. 273.

94. The Italia, 184 Fed. 366, decree modified in 187 Fed. 113, 109 C. C. A. 33.

95. The Hyades, 118 Fed. 85, affirmed in 124 Fed. 58, 59 C. C. A. 424.

96. The Folmina, 153 Fed. 364, 82 C. C. A. 440, affirming 143 Fed. 636.

was held sufficient or insufficient to show that the damage was caused by sea perils.[97]

§ 4326. Short Delivery.—Where the testimony of the officers and crew of a steamer concurred that all the lumber loaded by a charterer was delivered at the end of a voyage, a shortage can not be established by testimony on behalf of the charterer as to the quantity loaded, based entirely on an estimate of the total quantity on the dock, from which the witnesses deducted the quantity carried by two other vessels.[98] Where a ship is liable for loss in a cargo of coffee by reason of rats having eaten holes in the mats in which it was packed during the voyage, the weight of the coffee when placed in the mats at interior plantations is sufficient, prima facie, to establish the amount of the shortage.[99] In determining a question of shortage of weight of sugar cargo, the custom house weight is entitled to superior credit as against a subsequent unofficial weight, taken after the sugar had been stored for fifteen months, including two summers.[1]

§ 4327. Trial.—Province of Court and Jury.—In actions against carriers by water the same rules govern as to the province of court and jury as govern

97. **Evidence held to show that damage resulted from sea perils.**—The Patria, 118 Fed. 109; The Wildenfels, 161 Fed. 864; The Hyades, 118 Fed. 85, affirmed in 124 Fed. 58, 59 C. C. A. 424; The Frey, 106 Fed. 319, 45 C. C. A. 309; The Marechal Suchet, 112 Fed. 440.

The steamer Ontario encountered heavy weather in crossing the Atlantic, during which the seams of the ballast tank, which was constructed of iron plated riveted together, were sprung, and two rivets were lost, permitting leakage into the hold above, by which a portion of the cargo stowed therein was injured. The ship had been surveyed, and her tanks tested, but two months prior to the voyage, and had been given a certificate of classification in the highest class. Proper inspection had been made before entering on the voyage, and the tanks tested by pressure, and found tight. In the opinion of all the officers, who were called as witnesses by libelant, the leak was caused by the straining of the ship in the heavy weather during the voyage, and there was no evidence tending to contradict such opinion, or to show that the rivets lost were in any way defective in material or workmanship. Held, that the leakage was properly attributable to excepted perils of the sea. The Ontario, 106 Fed. 324, affirmed in Grubnan *v.* The Ontario, 115 Fed. 769, 53 C. C. A. 199.

At the close of a stormy voyage on which a steel steamer was damaged about her decks, had her wheel chains parted, and her propeller shaft fractured by heavy seas, a leak was discovered around a rivet in the after port bilge. Three-sixteenth of an inch of the outer end of the rivet was gone; the end of the remaining part showed evidence of fracture. This bilge had been sounded daily before the heavy weather began, and had been opened and cleaned by the crew before the loading of the cargo. No water was entering it at such times. Held, upon evidence of similar loss of rivet heads in previous cases, probably from excessive vibration through the racing of the propeller in rough weather, that the rivet was fractured by that cause, which was a peril of the sea. The Sandfield, 79 Fed. 371, decree affirmed in 92 Fed. 663, 34 C. C. A. 612.

Evidence insufficient to show that damage caused by danger of navigation.—The cargo of grain carried by a steamer from a Lake Superior port to Buffalo was found on arrival to have been damaged by water escaping from a crack in the main feed pipe running through the cargo space between the boiler and engine. Such construction was not unusual, and the vessel had an A1 rating, but had been built for 11 years, during which time the pipe had not been renewed, and had not been thoroughly inspected for more than a year, being covered with asbestos and inclosed in a box, which had not been removed in that time. Rough weather was encountered on the voyage, but not worse than was to be expected at the season. Held, that the evidence was not sufficient to sustain the burden of proof resting on the vessel to show that the damage resulted from a danger of navigation within the exception of the bill of lading, rather than from a defect in the pipe which rendered her unseaworthy at the beginning of the voyage. The Rappahannock, 184 Fed. 291, 107 C. C. A. 74.

Evidence held to show that loss did not arise from inevitable accident.—Elliott *v.* Rossell (N. Y.), 10 Johns. 1, 6 Am. Dec. 306.

98. **Short delivery.**—The Minnie E. Kelton, 109 Fed. 164, 48 C. C. A. 271.

99. The Rose Innes, 122 Fed. 750.

1. **Custom house weight.**—Linklater *v.* Howell, 88 Fed. 526.

in similar actions against other carriers.[2] Where a cattle shipper sued for breach of a contract to lease him cattle space on defendant's line of ocean steamers, and

2. **Province of court and jury—Actions for nondelivery or misdelivery.**—See ante, "Questions for Jury," § 901.

Actions for loss or injury.—See ante, "Province of Court and Jury," §§ 1086-1087.

Actions for delay.—See ante, "Province of Court and Jury," § 970.

Actions against carriers of live stock.—See ante, "Questions for Jury," §§ 2105-2113.

Particular questions for jury.—Appellee sued appellant to recover the value of a buggy, sample trunks, and contents, which he placed on board one of appellant's steamers to ship from Paducah to Smithland. The defense was that the property was lost by "act of God," in that it was blown off the boat by a violent and unusual wind. The evidence is conflicting as to whether the wind was more violent than may be expected in the ordinary course of nature, and is not conclusive that the means adopted for the security of the buggy and contents were such as to protect it against the ordinary perils of the voyage. Held, that in this state of case these questions were properly submitted to the jury. Evansville, etc., Packet Co. *v.* Rehkoph, 9 Ky. L. Rep. 650.

Whether defendant a common carrier.—Where, in an action against defendant for loss of a cargo of brick it was towing for plaintiff under private contract, there was evidence that defendant's boats carried passengers, produce, and merchandise, and that they received all freight offered for transportation on the river at M., most of which was brought in empty barges as they returned from towing coal, while defendant's proof was that the boats had no terminal nor times of arrival nor departure, and did all towing by private contract for others when there was no work to do for a certain drain company, and then only did such work as they saw fit to take, whether defendant held itself out as a common carrier for the time being was for the jury. Bassett *v.* Aberdeen Coal, etc., Co., 88 S. W. 318, 120 Ky. 728, 27 Ky. L. Rep. 1122.

What constitutes peril of the sea.—Where the excessive violence of the sea is the efficient cause of the shifting of cargo, causing damage thereto, whether it constitutes a peril of the sea, within the exception in the bills of lading, is a question of fact, to be determined upon the circumstances of each case, depending upon whether a seaworthy vessel, properly trimmed and with the cargo properly stowed, would ordinarily go through such seas without material injury to its cargo. The Frey, 106 Fed. 319, 45 C. C. A. 309.

Whether stay in port negligence.—Where a steamer's call at an intermediate port during seven voyages made the previous year had averaged 5 5/7 days, a stay on a subsequent voyage extending to 11 days, including 2 Sundays, a holiday, and 1½ days of rain, was not negligence per se. Decree 168 Fed. 386, affirmed in The Toronto, 174 Fed. 632, 98 C. C. A. 386.

Whether carrier guilty of conversion.—Freight packed in a brandy case could not be found after an inspection of "those parts of the ship where such things were likely to be." The carrier promised to look further, and, finally, after repeated inquiries by the owner, announced that the box could not be found. Pending an action for conversion, however, it was found in a locker in the forepeak of the ship. There was nothing to show how it got there, except testimony of the chief officer, who said that on some voyage, but whether on the one in suit he could not be certain, he had had some whisky cases containing signals moved to the locker. Why the locker had not been searched for the freight was not shown. Held, that the question whether the carrier was guilty of conversion was for the jury. Wamsley *v.* Atlas Steamship Co., 56 N. Y. S. 284, 37 App. Div. 553.

A box of negatives and prints disappeared from the storeroom of a ship, and were thereafter found on the ship. There was no evidence as to the manner of its removal from the storeroom, though the circumstances raised the presumption that it had not been removed from the ship. Held that, though the carrier might possibly have been liable for negligence, he was not responsible, as a matter of law, in an action for conversion, and the court's refusal to charge that "he could only be made liable on proof of actual conversion of the box of negatives" was reversible error. Wamsley *v.* Atlas Steamship Co., 61 N. E. 896, 168 N. Y. 533, 85 Am. St. Rep. 699, reversing 63 N. Y. S. 761, 50 App. Div. 199.

Authority of agent—Whether goods delivered to defendant.—Goods were purchased by an agent, to be exported to the purchasers; the sellers contracting to deliver the same on board ship at their expense, which was required to be done by means of lighters. The sellers deposited the goods in the name of their own agent in a public warehouse, from which they could be removed only on the order of the agent. While so stored bills of lading for the goods were executed by an agent of a steamship company to the purchaser's agent; no vessel of the company being then in port. On arrival of the ship on behalf of which the bills were executed, goods purporting to be those sold and covered by the bills of lading were delivered on board by the sellers, and accepted. In a subsequent action by the

the evidence that plaintiff informed defendant that he had a contract for commissions on the purchase and sale of stock intended to be shipped, and was not shipping as owner, was conflicting, the question was for the jury.[3] Where in an action against a carrier for conversion of lumber shipped by plaintiffs as part of defendant's cargo, plaintiffs testified that defendant's agent at destination refused to recognize them, or deliver the lumber to the person to whom it was billed, unless he would pay the freight on the entire cargo, and also the purchase price of the lumber, and defendant testified that neither plaintiffs nor other parties having lumber in the shipment would receive the same, because unsuitable, and that later defendant's agent sold a portion of the shipment to plaintiffs, it was held error to withdraw from the jury all questions of fact save the value of the lumber at destination.[4] Though in an action by a shipper against a carrier, a steamship company, for loss in a storm of oil clothing carried on the steamer's deck, there is ample uncontradicted evidence of a custom of steamship companies to classify oil clothing as inflammable goods, and as such to carry them on deck, raising a presumption that both parties to the contract of shipment knew it, and that it was thus part of their contract, the presumption is one of fact for the jury.[5]

Direction of Verdict.—Where the evidence showed that plaintiff's jack was in good condition when delivered to defendant carrier; that the animal refused to go upon the plank leading to the boat; that when dragged towards it he fell over, and was carried upon the boat; and that when he reached his destination he was badly bruised, and died in a few days, it was error to direct a verdict for defendant.[6]

Instructions.—The same rules governing instructions in actions against carriers generally govern in actions against carriers by water.[7] Where the evidence in a shipper's action showed that the defendant did not exercise due diligence to make the vessel seaworthy, the court properly refused to instruct that defendant was not required to make it seaworthy, but was required only to use due diligence in such respect.[8]

Verdict and Judgment or Decree.[9]—Although one of several owners, who sailed a ship on shares under an agreement whereby he became the charterer, is sued jointly with the other general owners, in a libel which does not describe him as owner pro hac vice, a decree may be made against him alone.[10]

§§ 4328-4336. Damages—§ 4328. Failure to Receive and Carry According to Contract.—The measure of damages for the refusal of a vessel

purchaser against the steamship company for nondelivery of the goods, the authority of defendant's agent to issue the bills of lading, under the circumstances shown, was in dispute. Defendant also introduced evidence tending to show that a fraudulent substitution had been made in the warehouse, and that the goods received on board were not in fact those covered by the bills of lading. Held, that the questions of the agent's authority to issue the bills, and whether there was an actual delivery of the goods to defendant, were under the evidence both questions for the jury, upon which plaintiff had the burden of proof. Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

3. Brauer *v.* Oceanic Steam Nav. Co., 73 N. Y. S. 291, 66 App. Div. 605, modifying 69 N. Y. S. 465, 34 Misc. Rep. 127.

4. Beedy *v.* Pacey, 22 Wash. 94, 60 Pac. 56.

5. Tower Co. *v.* Southern Pac. Co., 69 N. E. 348, 184 Mass. 472.

6. **Direction of verdict.**—Jones *v.* Memphis, etc., Packet Co. (Miss.), 21 So. 303.

7. **Instructions—Actions for nondelivery or misdelivery.**—See ante, "Instructions," § 902.

Actions for loss or injury.—See ante, "Instructions," § 1088.

Actions for delay.—See ante, "Instructions," §§ 970-972.

Actions against carriers of live stock.—See ante, "Instructions to the Jury," § 2114.

8. Mallory Steamship Co. *v.* Bahn Diamond, etc., Co. (Tex. Civ. App.), 154 S. W. 282.

9. **Verdict and judgment or decree.**—See ante, "Verdict and Judgment," § 903; "Verdict," § 973; "Judgment," § 974; "Verdict," § 1089; "Verdict and Findings," § 2115.

10. Thorp *v.* Hammond (U. S.), 12 Wall. 408, 20 L. Ed. 419.

to fulfill its contract of affreightment is the difference necessarily paid by the shipper to procure an equal service in advance of the contract price, and such other damage as unavoidably flows from the breach of the carrier's contract.[11] A shipper who contracted for the transportation to a foreign market of a certain quantity of hay each week can not recover damages for the failure of the carrier on some occasions to take the required quantity, where it is not shown that there was any request that the deficiency should be made good in subsequent shipments, or any tender of the quantity necessary therefor, or that libelant suffered any actual loss by reason of the breach of the contract.[12]

Duty to Minimize Damages.—Where a steamship company breaches a contract to carry a shipment of lumber and machinery on a given date, it is its duty to minimize the damages resulting therefrom.[13]

§ 4329. Failure to Deliver or Misdelivery.—See ante, "Damages," §§ 888-900; "Damages for Wrongful Delivery," § 1781.

§ 4330. Delay in Transportation or Delivery.—See ante, "Damages," §§ 926-954; "Damages for Delay in Transportation and Delivery," §§ 1796-1826.

§§ 4331-4336. Loss or Injury—§ 4331. In General.—The shipper may recover the actual damages sustained as the direct and necessary consequence of the loss of or injury to his goods. Remote and speculative damages are not recoverable.[14] Where goods damaged in shipment, for which damage the ship is liable, the invoice value being made the basis of settlement by the bill of lading, are sold on their arrival, the freight paid thereon or due should be deducted from the proceeds, and the remainder only credited to the carrier against the invoice value, to determine the amount of his liability.[15]

Special Damages.—See ante, "Special Damages," § 1079.

Exemplary Damages.—See ante, "Exemplary Damages," § 1080.

Right to Abandon Goods.—See ante, "Right to Abandon Goods," § 1071.

Loss of or Injury to Live Stock.—See ante, "Elements of Damages," §§ 1853-1858.

§ 4332. Measure and Elements of Damage.—Loss of Goods.[16]—The measure of damages for goods lost in shipment, on which the freight had been prepaid, is their market value at the place of destination at the time when they should have been delivered, with interest from that date,[17] and, in the absence of proof of such value, it will be presumed to have been their value at the place of shipment, with the freight added.[18] Where the loss of goods occurs

11. **Refusal to fulfill contract.**—Miners' Co-op. Ass'n *v.* The Monarch, 2 Alaska 383.

12. **Failure to carry weekly shipment according to contract.**—Bloomingdale *v.* Wilsons, etc., Line, 105 Fed. 384.

13. **Duty to minimize damages.**—Revett *v.* Globe Nav. Co., 56 Wash. 550, 106 Pac. 176.

14. **Actual damage sustained.**—See ante, "In General," § 1068.

15. The Styria, 95 Fed. 698.

16. **Loss of goods.**—See ante, "Loss of Goods, § 1069.

17. **Market value at destination.**—The Nith, 36 Fed. 86, 13 Sawy. 368; The Arctic Bird, 109 Fed. 167, cited in Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230. See The Vaughan (U. S.), 14 Wall. 258, 20 L. Ed. 807; Ringgold *v.* Haven, 1 Cal. 108; Dyer *v.* National Steamship Co., Fed. Cas. No. 4,226, 7 Ben. 395. See ante, "Loss of Goods," § 1069.

Rate of interest.—An admiralty rule fixing the rate of interest to be allowed on judgments entered on a bond or stipulation for the release of property libeled has no application to a judgment for breach of a contract of carriage, in which case the legal rate of interest of the state may properly be allowed. Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733.

That a decree against a shipowner for loss of cargo includes interest to the date of its entry does not make it error to award interest on the entire decree from that time forward. Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733.

18. The Arctic Bird, 109 Fed. 167.

Where there is no market at the place of destination the measure of damages is the market value of the goods lost at the place of destination at the time when they

at the place of loading before the voyage begins, the carrier is liable for their value at such port.[19] Where the contract of shipment provides in detail for the carrier's compensation and the deduction therefrom for goods lost in transit caused by the sinking of the boats used in the transportation thereof, the price of the goods lost by the sinking of the boats as fixed by the contract must fix the allowance to the shipper on that account.[20]

Injury to Goods.—The measure of damages recoverable from a vessel for damage to a cargo through its fault is the difference between the market value of the cargo at the port of delivery in its damaged condition and its value if it had been delivered in good condition, with interest from the time of delivery,[21] and other items of expenditure made necessary by reason of the damage.[22]

Expenses of Owner.[23]—Where goods have been lost it is held that the owner may recover his expenses in going to the point of destination to receive them.[24]

Profits.[25]—Where the owner of goods did not ship them with the view of realizing a profit on their sale, but for the purpose of using them in mining operations, the court should direct the jury to allow interest, instead of profits.[26] The shipper or owner can not recover for loss of a profit he would have made by delivery of the cargo on a prior contract of sale, which delivery was refused by the purchaser on account of its damaged condition; the vessel having no relation to such contract.[27]

Goods Having No Market Value.—See ante, "Goods Having No Market Value," § 1077.

Goods Shipped under Contract of Sale.—See ante, "Goods Shipped under Contract of Sale," § 1076.

When Damaged Goods Sold.—See ante, "When Damaged Goods Sold," § 1072.

§ 4333. Determination of Damages.—The value of goods damaged through the neglect of the ship is best determined by a public sale within a reasonable time after arrival, and intermediate market fluctuations are not to be regarded.[28] It has been held that where the cargo of a vessel has been sold by order of the court in a port to which it was brought by salvors, in proceedings regularly instituted by the owners to recover possession, the proceeds of the sale may properly be taken as its value for the purpose of making adjustment between the several parties in interest, although the proceeding by the cargo owners was unwarranted, and the cargo was sold for less than its actual value.[29]

§ 4334. Apportionment of Damages.—Where it appears that the greater part of the damage to a cargo resulted from sea perils for which the ship is not liable, but further damage occurred through the negligence of the master in fail-

should have been delivered, which the jury is authorized to ascertain by taking the price at the place of shipment and adding thereto the cost of carriage. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230; The Olympia, 156 Fed. 252; The Protection, 102 Fed. 516, 42 C. C. A. 489.

19. **Goods lost before voyage begins.**—Lakeman *v.* Grinnel, 18 N. Y. Super. Ct. 625; Krohn *v.* Oechs (N. Y.), 48 Barb. 127; Dusar *v.* Murgatroyd, Fed. Cas. No. 4,199, 1 Wash. C. C. 13.

20. **Price fixed by contract.**—White *v.* Toncray, 46 Va. (5 Gratt.) 179.

21. **Injury to goods.**—The Berengere, 155 Fed. 439; United Steamship Co. *v.* Haskins, 181 Fed. 962; United Steamship Co. *v.* Schilling & Co., 181 Fed. 965.

22. The Berengere, 155 Fed. 439.

23. **Expenses of owner.**—See ante, "Expenses of Owner," § 1075.

24. The Protection, 102 Fed. 516, 42 C. C. A. 489.

25. **Profits.**—See ante, "Profits," § 1078.

26. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

27. The Berengere, 155 Fed. 439.

28. **Determination of damages.**—The Earnwood, 83 Fed. 315. See ante, "In General," § 1070.

29. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195, modified on another point, 132 Fed. 242, 65 C. C. A. 538, and reversed on another point, 26 S. Ct. 8, 199 U. S. 119, 50 L. Ed. 115, 4 Am. & Eng. Ann. Cas. 406.

ing to put into port to make repairs, it would be inequitable to hold the ship liable for the entire damage, although it can not be separated, and the loss should be divided.[30] Where a cargo has been damaged by independent causes, for only a part of which the ship is liable, the loss will not be equally divided nor cast wholly upon the ship except as a last resort, and when all means fail of making an approximate apportionment of the loss to the several causes of damages.[31] It has been held that where both the carrier and the shipper are in fault for damage to the cargo, the damage will be equally divided between them.[32] Where a shipment of wool was wetted and injured by contact with other wet wool on the lighter or the terminal steamship, and it was impossible to determine how much of the damage each contributed, they would be required to share the loss between them.[33]

§ 4335. Deductions.—Deduction of Freight Charges.—See ante, "Freight, Allowance and Deduction," § 1073. Under a bill of lading for cotton, which provided that loss or damage to the cotton should be computed on the basis of its value at the time and place of shipment, where it was delivered at destination in a damaged condition, the shipowner is not entitled to have the amount of the freight deducted from its value as ascertained pursuant to such provision.[34]

Deduction of Salvage Expenses.—It is the duty of a carrier of cargo which meets with disaster through the fault of the vessel to do what he can to minimize the damage, by which he profits as well as the cargo owner, and he is not entitled to a deduction of expenses so incurred from the damages recoverable by the cargo owner by reason of his loss.[35]

Deduction of Value of Damaged Goods—Determination of Value.—Where a ship carried a cargo of cotton from Charleston to New York, from which place it was to be forwarded to Liverpool, but under a separate and independent contract of affreightment, and the bill of lading provided that in case of loss or damage the value of the cotton in Charleston at the time of shipment should be taken as the basis for computing the damage to the cotton, which was injured before its delivery in New York through the unseaworthiness of the ship, it was held, that the contract of carriage terminated in New York, and the ship was entitled to credit for the value of the cotton in its damaged condition in that market, and not in the Liverpool market, and that it was error to give credit for the proceeds of its sale in Liverpool, less the freight from New York, the amount being materially less than would have been realized by its sale in New York.[36]

30. Apportionment of damages.—The Musselcrag, 125 Fed. 786.

31. The Shand, 16 Fed. 570, distinguishing Speyer *v.* The Mary Belle Roberts, 2 Sawy. 1, Fed. Cas. No. 13,240, and Snow *v.* Carruth, Fed. Cas. No. 13,144, 1 Spr. 324.

32. Tin was shipped from New York to Buffalo in an open boat, contrary to custom, and, by reason of heavy rains and some leaking of the boat, was delivered damaged. The evidence indicated that there had been a complete misunderstanding between libelant and claimant as to the hatches of the boat, the libelant supposing they were to be used, the claimant supposing the libelant waived the use of them. Held, that both were in fault for the damage, and that libelant should recover half his damage. Stillwell *v.* The J. D. Hall, 34 Fed. 904.

33. Sanbern *v.* Panama R. Co., 205 Fed. 348, 123 C. C. A. 423.

34. Deduction of freight charges.—The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing in 108 Fed. 886.

35. Deduction of salvage expenses.—Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

36. Deduction of value of damaged goods — Determination of value.—The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing 108 Fed. 886.

Error of surveyors.—The cotton was shipped to Liverpool for sale in compliance with the recommendation of the surveyors who adjusted the loss, and with the knowledge of the shipowners, who made no objection. Held, that they were not bound by the erroneous decision of the surveyors, nor estopped to claim credit for the New York value of the cot-

§ 4336. Evidence as to Value or Damage.—See ante, "Evidence as to Value or Damage," §§ 1082-1084; "Admissibility of Evidence," § 4321.

§ 4337. Lien of Shipper against Vessel.—Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfillment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment,[37] unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter party or bill of lading.[38] But the law creates no lien on a vessel as security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or someone authorized to receive it.[39] So

ton, where they at no time gave a positive assent to the substitution of the Liverpool value. The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing 108 Fed. 886.

37. Liens of shipper against vessels.—Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; The Keokuk (U. S.), 9 Wall. 517, 19 L. Ed. 744; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Belfast (U. S.), 7 Wall. 624, 19 L. Ed. 266; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; Miners' Co-Op. Ass'n *v.* The Monarch, 2 Alaska 383.

Usually the charter party contains a clause binding the ship to the merchandise and the merchandise to the ship, but the law merchant imposes that mutual obligation even if it be omitted. The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662.

38. Waiver of lien.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

39. Commencement of lien.—The Keokuk (U. S.), 9 Wall. 517, 19 L. Ed. 744; Vandewater *v.* Mills (U. S.), 19 How. 82, 15 L. Ed. 554; Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; The Hiram, 101 Fed. 138.

"Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent." The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

The goods need not have been actually placed on the deck of the vessel. Pollard *v.* Vinton, 105 U. S. 7, 9, 26 L. Ed. 998; Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599.

Delivery within reach of ship's tackle.—Texas, etc., R. Co. *v.* Callender, 183 U. S. 632, 46 L. Ed. 362, 22 S. Ct. 257.

Delivery to lighter.—Where goods were delivered at a steamboat company's dock for shipment, and it was thereafter found necessary to transport the goods to the steamer on a lighter, and they were damaged by the partial sinking of the lighter before reaching the steamer, the steamer was liable for the loss. The Pokanoket, 161 Fed. 383, affirmed in Petersburg, etc., Steamboat Line *v.* Norfolk-Virginia Peanut Co., 172 Fed. 321, 96 C. C. A. 383, 24 L. R. A., N. S., 569. See Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

In ports where it is necessary for a vessel drawing much water to lie outside of the bar and have her cargo brought to her by lighters, and the usage is for the lighterman to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel, delivery of goods to the lighterman is a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master engages to carry. Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged, the vessel was held responsible for the loss upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed. Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599.

Insufficient delivery.—A contract of affreightment can not be implied against a

the owner of a cargo has no lien upon a vessel for injury to such cargo resulting from delay in preparing the vessel for loading which occurred before the cargo was received by the owners or their agents.[40] The lien to the shipper arises alike whether the contract of affreightment be by charter party, by bill of lading, or by parol.[41] The fact that a steamer was being operated under a charter, even if known to shippers, does not relieve her from a lien arising from default in her obligation to the cargo.[42] Bills of lading given by mistake,[43] or fraudulently obtained,[44] create no lien on the vessel.

Priorities.—The vessel is, by the maritime law, hypothecated to the shipper for his damages, from the time that the misfortune happens, and his claim against it is preferred to the right of the general creditors of the owners.[45] The shipper's right of preference may be lost by unreasonable delay;[46] but his lien is not defeated by a bona fide sale, before he has had an opportunity for enforcing it, and still less when the purchaser has knowledge of the claim.[47] The owners of a cargo of brick with which a barge sunk and which were not recovered for several months, did not, by delaying the making of a formal claim for damages against the vessel until after she had been raised and the cargo recovered, so that the extent of the loss could be definitely known, lose the right to assert a lien therefor as against the insurer of the barge, which in the meantime had bought and raised her, such purchaser having knowledge that there would be damage to the cargo, and being chargeable with notice of the legal rights of the owners.[48]

Enforcement of Lien.—The shipper may enforce his lien by process in rem against the vessel in the admiralty.[49] Where the maritime lien or privilege is

transportation company from the fact that a man has loaded a barge belonging to the company, by means of his own men, without any knowledge by the company of what he has done, and then delivered bills of lading to the agent of a steamer of the line, the agent at the moment being very much engaged with other matters, just before the steamer, which it was expected by the shipper would tow the barge, sets off; no sufficient statement being made by the shipper, when so delivering the bills, what bills they are, and the agent himself having no knowledge of what has been done in the particular case, nor of the contents of the bills. The Keokuk (U. S.), 9 Wall. 517, 19 L. Ed. 744, distinguishing Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599.

Where, at the time complainant delivered goods on the wharf of a transportation company under a bill of lading reciting that the goods were to be shipped on board defendant company's vessel or vessels "now" lying at the port of S., complainant had knowledge that defendant's chartered vessel, the R. D., by which it was expected to ship the goods, was then either on the high seas or in a distant port, and the goods were never delivered to the master or officers of such vessel, the vessel was not subject to a maritime lien for defendant's breach of the contract of affreightment. Guffey *v.* Alaska, etc., Steamship Co., 130 Fed. 271, 64 C. C. A. 517.

40. The Hiram, 101 Fed. 138.

41. Miners' Co-Op. Ass'n *v.* The Monarch, 2 Alaska 383.

42. Steamer operated under a charter.—The Seaboard, 119 Fed. 375, citing Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341.

43. Bills of lading given by mistake.—The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455.

44. Bills of lading fraudulently obtained.—So held as to false bills of lading signed by the master without knowledge of the shipowner. Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455.

45. Priorities.—The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187, cited in Cole *v.* The Atlantic, Fed. Cas. No. 2,976, Crabbe 440; The E. Benjamin, Fed. Cas. No. 8,582, 4 Clark 25; The Planter, Fed. Cas. No. 11,207a, 2 Woods 490; The Illinois, Fed. Cas. No. 7,005, 2 Flip. 383; The Witch Queen, Fed. Cas. No. 17,916, 3 Sawy. 201.

46. Unreasonable delay.—The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187, cited in Knox *v.* Ninetta, Fed. Cas. No. 7,912, Crabbe 534; Packard *v.* The Louisa, Fed. Cas. No. 10,652, 2 Woodb. & M. 48.

47. The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187, approved in Cole *v.* The Atlantic, Fed. Cas. No. 2,976, Crabbe 440; Edwards *v.* The Robert F. Stockton, Fed. Cas. No. 4,297, Crabbe 580.

48. The G. B. Boren, 132 Fed. 887.

49. Enforcement of lien.—The Rebecca, Fed. Cas. No. 11,619, 1 Ware 187, cited in New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 343, 12 L. Ed. 465; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The T. A. Goddard, 12 Fed. 174.

created by the lex loci contractus, it will generally, although not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the lex fori.[50]

§§ 4338-4378. Freight, Lighterage and Demurrage—§§ 4338-4354. Freight—§ 4338. In General.—The shipper, consignee, or owner of the cargo contracts to pay the freight and charges.[51] "Freight" is the hire or compensation paid for the use of a ship for carrying goods.[52]

§ 4339. Persons Entitled to Collect Freight.—The owners of a vessel, and not the master, have the right to collect the freight money, if the master has no claim against the owners for his services or otherwise.[53]

Under Agreement between Consignee and Charterer.—Whatever stipulations may have been made between the consignees of a cargo and the charterer of a vessel which transports them for the appropriation of the return freights, the right of the master to collect them from the consignees, after delivery to them of the goods, at least to the amount due on the charter party, can not be questioned. The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raises an assumpsit against them to pay freights according to the stipulations of the bill, and this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer.[54]

Purchasers at Sale in Admiralty Suit.—After the owners of a cargo which had been loaded on a vessel had advanced money on the bill of lading signed by the master and the advance credited thereon, the vessel was sold in an admiralty suit. The new owners, without notice to or negotiations with the cargo owners and without a new bill of lading being executed by the master, ordered the vessel to proceed with the cargo to the destination, afterward presenting to the cargo owners a new bill of lading signed by themselves but not by the master, and having no credit thereon, which the cargo owners refused to accept. There was no implied contract of carriage in such case, but that the vessel owners in proceeding without further agreement to carry out the contract made by their predecessor were bound by its terms, which they knew, and were entitled to collect only the balance of freight due thereon.[55]

Right of Neutral Carrier of Enemy's Property.—The general rule is that the neutral carrier of enemy's property is entitled to his freight. The captain takes the property cum onere, being substituted in lieu of the owners.[56]

Vessel Subchartered and Cargo Consigned under Special Bills of Lading.—Where a vessel was chartered for a voyage to a foreign port and back, and the agents of the charterers at the foreign port subchartered her to other persons there, who loaded her with goods consigned to parties in the home port, under special bills of lading, which did not refer to the original charter party; the

50. The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

Lien existing only by some local statute.—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

Libelant not entitled to remedy by the lex loci contractus or place where cause of action accrued.—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

Libelant citizen of country whose courts can not give same remedy to citizens of United States.—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

Where court of admiralty not invested with jurisdiction.—The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772.

51. Freight, lighterage and demurrage.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

52. The Norman Prince, 185 Fed. 169.

53. Persons entitled to collect freight.—Richardson *v.* Whiting (Mass.), 18 Pick. 530. See Lewis *v.* Hancock, 11 Mass. 72.

54. Under agreement between consignee and charterer.—Adams *v.* Homeyer, 45 Mo. 545, 100 Am. Dec. 391.

55. Purchasers at sale in admiralty suit.—Chadwick *v.* Five Hundred and Seventy-Six Granite Blocks, 178 Fed. 140.

56. Right of neutral carrier of enemy's property.—The Fanny (U. S.), 9 Wheat. 658, 6 L. Ed. 184. But see The Commercen (U. S.), 1 Wheat. 382, 4 L. Ed. 116.

rights of the shipowners to the freight, payable by the consignees, and their lien for it upon the goods, depended entirely on the contract expressed in the bills of lading, and not upon any thing contained in the charter party.[57]

§ 4340. Persons Liable for Payment of Freight.—Where Goods Surrendered to Insurer.—The fact that the master on the wreckage of the vessel surrendered the cargo to the insurer without notice to respondent did not relieve the latter of liability for the freight; the insurer being responsible under its policy for the freight as well as the value of the cargo.[58]

Under Stipulation for Payment in Case of Loss.—The respondent shipped a cargo of flour, consigned to its own order under bills of lading providing that freight should be deemed earned, vessel or cargo lost or not lost. The flour was shipped under contracts of sale, and was insured by respondent in its own name for sufficient to cover the invoice price and freight. Respondent then indorsed the bills of lading and policies in blank, and attached them to drafts drawn on the purchasers for the selling price and cost of insurance, which were forwarded for collection. The vessel having been lost, that respondent was liable for the freight, whether its interest in the cargo was that of owner, or whether it merely retained a lien, since in either case the purchasers were to have possession only on payment of the drafts.[59]

Assignee of Consignee of Goods.—Where shipowners deliver the goods to the assignee of the consignee, the assignee, and not the consignee, is liable for the freight.[60]

§§ 4341-4343. When Freight Earned—§ 4341. In General.—The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to freight. Till then the freight is not earned. The conveyance and delivery is a condition precedent, and must be fulfilled.[61]

Offer of Delivery.—The freight is earned where a cargo is carried to the port of delivery, and the master offered to deliver it to the consignee who refused to receive it, on the ground that his government prohibited the landing of the cargo.[62]

Delivery of Part.—The master of a ship has no right to demand the freight upon the whole shipment when he is ready to deliver only a part of it.[63]

Delivery at Wharf.—Where plaintiff agreed to transport a cargo of goods and deliver them at a certain wharf, and on arrival at the designated place no

57. **Vessel subchartered and cargo consigned under special bills of lading.**—4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35.

58. **Persons liable for payment of freight.**—British, etc., Marine Ins. Co. *v.* Portland Flouring Mills Co., 124 Fed. 855, affirmed in 130 Fed. 860, 65 C. C. A. 344.

59. **Under stipulation for payment in case of loss.**—Decree, British, etc., Marine Ins. Co. *v.* Portland Flouring Mills Co., 124 Fed. 855, affirmed in 130 Fed. 860, 65 C. C. A. 344.

60. **Assignee of consignee of goods.**—Burton *v.* Strachan (N. Y.), 3 E. D. Smith 192.

61. **When freight earned.**—Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177; The Eliza Lines, 199 U. S. 119, 50 L. Ed. 115, 26 S. Ct. 8, 4 Am. & Eng. Ann. Cas. 406; The Tornado, 108 U. S. 342, 27 L. Ed. 747, 2 S. Ct. 746; Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220; Caze *v.* Baltimore Ins. Co. (U. S.), 7 Cranch 358, 3 L. Ed. 370; Burn Line *v.* United States, etc., Steamship Co., 162 Fed. 298.

Consignment of goods and passenger must be landed, else the carrier is not entitled to freight or fare. Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373, citing The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

By the American law freight is due only if the goods are carried to destination, and, even if prepaid, may be recovered back on a failure to make delivery unless expressly otherwise provided in the contract. Decree 150 Fed. 423, reversed in Burn Line *v.* United States, etc., Steamship Co., 162 Fed. 298.

62. **Offer of delivery.**—Morgan *v.* Insurance Co. (Pa.), 4 Dall. 455, 1 L. Ed. 907.

63. **Delivery of part.**—Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177.

wharf existed, the refusal of plaintiff to build one constituted no defense to an action for the freight.[64]

Agreement of Parties.—The general rule that delivery of the goods at the place of destination is necessary to the earning of freight may be varied by stipulations; but they must be in writing, and be signed by the parties, before they can control the operation of the law merchant.[65] A provision in a bill of lading that the freight shall be "considered as earned, steamer or goods lost or not lost at any stage of the entire transit," is valid and enforceable.[66]

Reasonable Time for Consignee to Receive Goods.—It seems that under a bill of lading, otherwise in the usual form, but having upon its face these clauses: "Goods to be received at the ship's tackles, when ready for delivery; freight payable before delivery, if required"—not merely safe arrival and notice thereof to the consignee, but reasonable time to enable him to receive his goods at the ship's tackles, is necessary to the earning of freight.[67]

Presented by Wrongful Act of Charterer.—The general rule, is that a shipowner, who is prevented from performing the voyage by a wrongful act of the charterer, is prima facie entitled to the freight that he would have earned, less what it would have cost him to earn it.[68]

Necessity for Entering on Voyage.—It is an inherent element in a contract of affreightment under a bill of lading, that the vessel shall enter on the voyage named, and begin the carriage of goods shipped, or, as it is technically called, break ground, before a claim to freight money can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods, in which case, the circumstances under which the contract was entered into continuing substantially the same so far as respects the vessel, the shipper cannot reclaim the goods without paying at least full freight.[69]

Acceptance at Intermediate Point.—In general, freight is not due and payable until delivery of the goods to the consignee at the port of destination or acceptance of the cargo at an intermediate port by the owner thereof.[70]

§ 4342. Freight Pro Rata Itineris.—The contract of affreightment is an entirety; and where there has been no complete fulfillment on one side, and no fault or waiver on the other, no freight money can be recovered.[71] As a general principle, freight is payable only on so much of a cargo as is delivered, and there is an equitable presumption that such is the contract of the parties, to overcome which a contrary intent must be expressed with reasonable clearness and certainty.[72]

Acceptance of Goods by Consignee.—The master is entitled to freight pro rata itineris in all cases where there has been a voluntary acceptance of the goods

64. **Delivery at wharf.**—McCaughn *v.* Milliot, 29 So. 818, 78 Miss. 976.

65. **Agreement of parties.**—Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177.

A stamp upon the back of the bill of lading, stating, amongst other things, "that the entire freight was payable prior to delivery, if required," which was put there by the ship's owner, but which there was no evidence was recognized by the shipper as part of his contract, cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177.

66. Decree, British, etc., Marine Ins. Co. *v.* Portland Flouring Mills Co., 124 Fed. 855, affirmed in 130 Fed. 860, 65 C. C. A. 344.

67. **Reasonable time for consignee to receive goods.**—Fay *v.* Alliance Ins. Co. (Mass.), 16 Gray 455.

68. **Presented by wrongful act of charterer.**—The Gazelle, 128 U. S. 474, 32 L. Ed. 496, 9 S. Ct. 139.

69. **Necessity for entering on voyage.**—The Tornado, 108 U. S. 342, 27 L. Ed. 747, 2 S. Ct. 746.

70. **Acceptance at intermediate point.**—Mitsui *v.* St. Paul Fire, etc., Ins. Co., 202 Fed. 26, 120 C. C. A. 280.

71. **Freight pro rata itineris.**—The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629; Mitsui *v.* St. Paul Fire, etc., Ins. Co., 202 Fed. 26, 120 C. C. A. 280.

72. Decree, 95 Fed. 837, affirmed in Christie *v.* Davis Coal, etc., Co., 110 Fed. 1006, 49 C. C. A. 170.

at the port of disaster. The rate is to be ascertained by comparing the portion of the voyage performed with the entire length of it.[73] But where the master refuses to repair his ship and send on the goods, or to procure other means for the purpose, and the owner of the goods then receives them, this is not such an acceptance of the goods as will entitle the shipowner to a pro rata freight.[74]

Vessel Detained by Inevitable Necessity.—When a vessel, bearing freight, is from inevitable necessity detained at an intermediate port, and the goods are there voluntarily accepted by the owner, freight is to be paid according to the proportion of the voyage performed, and the law will imply a contract to that effect.[75]

Shipment Too Large to Be Landed in One Day.—When the ship master has a larger shipment under one bill of lading than can be landed in the business hours of one day, he must take care not to land it in such quantities as to be unable to ascertain the pro rata freight. Unless he takes this care, the goods landed will be under his care and responsibility without additional expense to the consignee of them until they shall be ready for delivery.[76]

Less Damages Sustained by Owner.—Where libelant broke an entire contract of affreightment by refusing to transport all of a pile of lumber contracted to be carried, he was nevertheless entitled to recover for the lumber carried, less the damages sustained by the owner of the lumber by reason of the breach of contract.[77]

§ 4343. Goods Lost or Abandoned.—Under a provision in a charter party of a vessel as a private carrier of oil in cases that the cargo should be received, and delivered alongside within reach of the vessel's tackles, and that the ship should receive a stated sum for each case delivered whether full, part full or empty, proof that the vessel received the number of cases stated in the bills of lading, that none were stolen during the voyage, and that all on board were delivered alongside by her tackles into lighters, entitles her to freight on all shown by the bills of lading, although there may have been a shortage when the oil reached its destination.[78]

When a vessel and cargo are abandoned at sea by the master and crew, without intention to retake them, the shipowner can maintain no claim to the freight.[79] But where a vessel, abandoned at sea under circumstances which rendered such abandonment excusable, so that it did not operate to terminate the contract of affreightment, is brought into port by salvors, but by the action of the cargo owners the resumption of the voyage is prevented, the shipowner is entitled to be compensated for his loss of freight on principles of equity, but under such principles his damages can not go beyond compensation, and he is not entitled to recover the gross freight he would have earned under the contract, but only the estimated net freight, and from that should be deducted the net amount the ship earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.[80]

Without Fault of Master.—When some portion of a perishable cargo has suffered by decay without the fault of the master, and was for that reason left

73. **Acceptance of goods by consignee.**—Propeller Mohawk (U. S.), 8 Wall. 153, 19 L. Ed. 406; Caze *v.* Baltimore Ins. Co. (U. S.), 7 Cranch 358, 3 L. Ed. 370; The Societe (U. S.), 9 Cranch 209, 3 L. Ed. 707.

74. Adams & Co. *v.* Haught, 14 Tex. 243.

75. **Vessel detained by inevitable necessity.**—Adams & Co. *v.* Haught, 14 Tex. 243.

76. **Shipment too large to be landed in one day.**—Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177. See, also, The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

77. **Less damages sustained by owner.**—Hines Lumber Co. *v.* Chamberlain, 118 Fed. 716, 55 C. C. A. 236.

78. **Goods lost or abandoned.**—Steamship Den *v.* Standard Oil Co., 189 Fed. 1020.

79. The James Martin, 88 Fed. 649.

80. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195, modified, 132 Fed. 242, 65 C. C. A. 538, and reversed in 26 S. Ct. 8, 199 U. S. 119, 50 L. Ed. 115, 4 Am. & Eng. Ann. Cas. 406.

behind on the voyage, the shipowners are entitled to recover for the freight on all that was duly transported and delivered.[81]

Surrendered to Insurer.—Where a cargo was insured by the shipper for sufficient to cover its value and the freight, the fact that on the wrecking of the vessel the cargo was surrendered by the master to the insurer without notice to the shipper did not prejudice him, and constituted no defense to an action to collect the freight under the terms of the bills of lading.[82]

§ 4344. Amount Recoverable.—The amount of freight which the owner can recover from the shipper depends upon a fair construction of the contract.[83]

Usage and Custom.—The amount of freight may be determined by usage.[84]

Exchange on Foreign Bills.—On a bill of lading stipulating that the freight shall be paid in New York, "at the current rate of exchange for banker's sight bills on London," the amount of the freight being expressed in English money, the amount payable is not to be calculated in gold, but in currency at the current rate for bills on London; and to this is to be added interest at the New York rate from the time when the freight is payable.[85]

Rate Current at Commencement of Voyage.—A barge laden with coal to be carried from Philadelphia to Boston, which had started in tow, and proceeded down the river for two or three miles, when she was injured by floating ice, causing a delay in delivery, had entered upon the voyage, and was protected by a provision of the bill of lading excepting "accident or danger of the sea, river or steam navigation;" and, under a further provision of the contract by which she was to receive the market rate of freight, she was entitled to the rate current when the voyage was commenced, unless the delay was caused by her own negligence.[86]

Contract for Shipment in Bulk or by Ton.—When a bill of lading presented by the shipper, and signed by the agent of the ship, recites a shipment in bulk as so many tons, at so much freight per ton, it will be construed as a contract for carriage in bulk, and the freight is not subject to reduction because the cargo when delivered does not weigh out the quantity stated.[87] Where the captain of a vessel contracted with plaintiff to carry a full cargo of stone, which would be three hundred tons, at a certain price per ton, and afterward, by claiming that there was enough stone on the dock to make a full cargo, prevented the

81. **Without fault of master.**—So held as to a cargo of fruit where part of it was condemned and thrown away at an intermediate port into which the master was forced to put for repairs. The Collenberg (U. S.), 1 Black 170, 17 L. Ed. 89.

82. **Surrendered to insurer.**—Decree, British, etc., Marine Ins. Co. *v.* Portland Flouring Mills Co., 124 Fed. 855, affirmed in 130 Fed. 860, 65 C. C. A. 344.

83. **Amount of freight.**—Robinson *v.* Noble (U. S.), 8 Pet. 181, 8 L. Ed. 910.

84. **Usage and custom.**—A schooner contracted for a lump sum of $720, as freight to carry from a Cuban port to Mobile "round cedar logs, to consist of 60,000 feet." It appeared that there were two methods of measuring round logs, one of which was to square them, and so compute their contents, and the other to compute their entire contents as round logs. By the testimony of persons engaged in the shipping and timber business in Cuba, where the charter was made, it was shown without material contradiction that it was the custom in shipping from there to take the invoice measurements in which the logs were reduced to square measure as the basis for computing freight, and to add $2 per thousand feet to the freight to United States ports where the logs were round. It was also shown that the highest rate of freight paid to such ports for squared logs at the time of the contract was $10 per thousand feet. Held, that in the absence of any designation of the method of measurement in the contract it must be presumed to have been made with reference to such custom, especially in view of the stipulated rate of $12 per thousand feet. Peterson *v.* Eight Hundred and Sixty-Nine Cedar Logs, 127 Fed. 868.

85. **Exchange on foreign bills.**—Hus *v.* Kempf, Fed. Cas. No. 6,944, 10 Ben. 364.

86. **Rate current at commencement of voyage.**—Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606.

87. **Contract for shipment in bulk or by ton.**—Plantes' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

loading of a full cargo before the vessel sailed, the plaintiff was liable only for the contract freight on the number of tons actually carried.[88]

Goods Taken by Owner at Intermediate Point.—Where the cargo owner takes the cargo from a vessel before the completion of her voyage, under circumstances which do not entitle her to exemplary damages, she can recover only such damages as will compensate her for the net injury suffered, and from the estimated net freight she would have earned is to be deducted the net amount she earned, or should reasonably have earned during the time it would have taken her to complete the voyage.[89]

§ 4345. Deductions and Offsets.—Freight upon live animals is not estimated upon such as die on the passage, unless under a special agreement.[90] In an action for freight, the owner of the cargo may recover damages by way of a counterclaim for the injury sustained by reason of negligent navigation on the part of the carrier.[91] Where a master who is also owner of a vessel gives a shipper a bill of lading reciting the receipt of a certain amount of iron, and an agreement to deliver it to the consignees, the damages occasioned to the consignees, who, relying on the correctness of the recital, pay the shipper for more iron than is actually on board, may be recouped against a claim for the freight, which was to be paid by the consignees, subject, however, to limitation to the amount claimed for freight.[92]

Advancements Paid by Shipper.—In an action for freight on a cargo, a claim for advancements paid by the shipper for plaintiff's benefit on a similar cargo, never delivered, without the fault of the carrier, which according to custom the carrier, after paying, would have collected with his freight charges, cannot be set up as a counterclaim; the money paid by the shipper being paid for his own benefit.[93]

Expense of Unloading.—A canal boat laden with coal filled and sank, after reaching her dock, through leakage, and the negligence of her captain. The consignee, whose duty it was to discharge the cargo, did so after waiting two days, being put to additional expense because the boat was under water. He was justified in such action to save the cargo from further damage and possible loss, and was entitled to offset the increased cost of discharging against the carrier's claim for freight.[94]

For Loss Caused by Agent of Shipper.—Where a charter provided that the vessel's stevedore for loading and unloading should be approved by the charterer, and his agent refused to permit the master to discharge a stevedore for rough handling of the cargo in unloading the charterer was not entitled to make a deduction from freight on account of breakage by such stevedore.[95]

Where Damages Paid.—Where a cargo owner is allowed as damages against the vessel for loss of cargo its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss.[96]

Where Goods Shipped Short.—The libelant and the respondent entered into a verbal contract that one of the respondent's steamers should load and transport a quantity of marble. The marble was delivered, as agreed, alongside the steamer, which made the voyage with only a part of the cargo, insisting subsequently that

88. Clancy *v.* Dutton, 113 N. Y. S. 124, 129 App. Div. 23.

89. **Goods taken by owner at intermediate point.**—The Eliza Lines, 102 Fed. 184.

90. **Deductions and offsets.**—Wolcott *v.* Eagle Ins. Co. (Mass.), 4 Pick. 429.

91. Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805.

92. Relyea *v.* New Haven Rolling-Mill Co., 75 Fed. 420, 42 Conn. 579.

93. **Advancements paid by shipper.**—Neville *v.* Pennsylvania, etc., Co., 99 N. Y. S. 270, 113 App. Div. 768.

94. **Expense of unloading.**—Aldrich *v.* Cargo of 246 5/20 Tons of Egg Coal, 117 Fed. 757.

95. **For loss caused by agent of shipper.**—Steamship Den *v.* Standard Oil Co., 189 Fed. 1020.

96. **Where damages paid.**—Carolina Portland Cement Co. *v.* Anderson, 186 Fed. 145, 108 C. C. A. 257.

the libelant's agent should sign a bill of lading for the whole, describing the omitted portion as "short shipped," which bill the agent signed under protest. The libelant was entitled to recover from the steamer the amount exacted in excess of the freight earned.[97]

Where Ship Sold in Admiralty Suit.—After the owners of a cargo which had been loaded on a vessel at a Maine port, to be carried to New York, had advanced money on the bill of lading signed by the master, and the advance credited thereon, the vessel was sold in an admiralty suit. The new owners, without notice to or negotiations with the cargo orders and without a new bill of lading being executed by the master, ordered the vessel to proceed with the cargo to New York, afterwards presenting to the cargo owners a new bill of lading signed by themselves but not by the master, having no credit thereon, which the cargo owners refused to accept. An additional agreement made by the cargo owners to pay a further sum from the freight when the cargo was discharged to a creditor of the former vessel owner made for the purpose of securing the discharge of the vessel from the attachment but which did not accomplish that result did not entitle the cargo owners to deduct such sum from the freight as against the new owners who performed the carriage of it, it not appearing that the agreement was one which the creditor could enforce under the circumstances.[98]

Contradicting Bill of Lading.—While the bill of lading in respect to the quantity received is a receipt and entitled to great weight as an admission by the ship, and places upon her the burden of proof, it is not conclusive, and she cannot be held liable for a shortage if she fully satisfies the court that it is erroneous and that she delivered all the cargo she received.[99]

§ 4346. Change of Rates.—A carrier agreed to carry flour and grain at a given rate, "to continue in force till close of navigation, unless notice to contrary." A notice of a change of rates, to take effect in twelve days, was reasonable, without regard to the extent of the shipper's purchases, or the situation of his flour or grain purchased, or the carrier's information concerning the same.[1]

§§ 4347-4352. Lien for Freight—§ 4347. In General.—Shipowners, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made.[2] Where the consignee and owner of a cargo fails to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve

97. **Where goods shipped short.**—The Citta Di Palermo, 153 Fed. 378.

98. **Where ship sold in admiralty suit.**—Chadwick *v.* Five Hundred and Seventy-Six Granite Blocks, 178 Fed. 140.

99. **Contradicting bill of lading.**—James *v.* Standard Oil Co., 191 Fed. 827, affirming decree, 189 Fed. 719.

1. **Change of rates.**—Thayer *v.* Burchard, 99 Mass. 508.

2. **Lien for freight.**—The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 5 L. Ed. 696; Lane *v.* Penniman, 4 Mass. 91; Lewis *v.* Hancock, 11 Mass. 72; Cowing *v.* Snow, 11 Mass. 415. See Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151; Richardson *v.* Whiting (Mass.), 18 Pick. 530; Thomas *v.* Le Baron (Mass.), 10 Metc. 403; Welch *v.* McClintock (Mass.), 10 Gray 215.

As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo, for all the freight which becomes due and payable to him, whether it be a full or pro rata freight. Columbian Ins. Co. *v.* Catlett (U. S.), 12 Wheat. 383, 6 L. Ed. 664.

If the ship owner retains the possession of the ship, and the charterer is merely the freighter, the former has a lien upon the cargo for freight. Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 5 L. Ed. 696, which illustrates this rule, the charter party stipulating "that no goods shall be landed until the freight is paid." Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47.

Regarded as maritime lien.—Such a lien is regarded in the jurisprudence of the United States as a maritime lien. The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35.

its lien, is authorized to retain and store sufficient of the cargo to pay such freight, and the expense of storage and loss of use of the commodity must be borne by the owner.[3]

After Payment of Freight.—Although the master may retain the cargo until the freight be paid or tendered, he must be ready to deliver the cargo on payment or tender.[4]

Lien for Freights, Primages and Charges.—A provision of a bill of lading issued by a steamship company that "the carrier shall have a lien on the goods for all freights, primages, and charges" does not affect or change the nature of the lien, which is simply the maritime lien as understood in the jurisprudence of the United States, to preserve which the retaining of possession is essential, although such provision may in some cases preserve the lien where it would otherwise be deemed waived by other provisions relating to the time and manner of paying the freight.[5]

Includes Expense of Preservation of Goods.—A ship is responsible for the preservation of the cargo from the time of receiving it until it is delivered, and the captain has authority to incur any expense necessary to the fulfillment of that obligation, which is included in the ship's lien.[6]

Operates as Pledge or Mortgage.—A maritime contract for the transportation of goods operates as a pledge or mortgage of the goods to the shipper to secure payment of the freight earned.[7]

Reciprocal Liens between Ship and Cargo.—The shipowner contracts for the safe custody, due transportation, and right delivery of the merchandise, and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges. These obligations are reciprocal, and the law creates reciprocal liens for their enforcement,[8] unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter party or bill of lading.[9]

§ 4348. Time Lien Attaches.—The lien for freight commences as soon as the goods are delivered into the control of the master, or certainly as soon as they are put on board.[10]

§ 4349. Property Subject to Lien.—There is no lien on one cargo for freight which may accrue on another.[11] Freight is not a charge upon the salvage

3. The Asiatic Prince, 103 Fed. 676.

4. **After payment of freight.**—Lane *v.* Penniman, 4 Mass. 91; Lewis *v.* Hancock, 11 Mass. 72; Cowing *v.* Snow, 11 Mass. 415. See Richardson *v.* Whiting (Mass.), 18 Pick. 530; Manter *v.* Holmes (Mass.), 10 Metc. 402; Welch *v.* McClintock (Mass.), 10 Gray 215.

5. **Lien for freights, primages and charges.**—Portland Flouring Mills Co. *v.* Portland, etc., Steamship Co., 145 Fed. 687.

6. **Includes expense of preservation of goods.**—Symons *v.* 10,466 Barrels of Cement, 195 Fed. 1017.

7. **Operates as pledge or mortgage.**—Miners' Co-Op. Ass'n *v.* The Monarch, 2 Alaska 383.

8. **Reciprocal liens.**—Schooner Freeman *v.* Buckingham (U. S.), 18 How. 182, 15 L. Ed. 341; Vandewater *v.* Mills (U. S.), 19 How. 82, 15 L. Ed. 554; Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584. See, also, Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

9. **Waiver of lien.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

10. **Time lien attaches.**—The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662.

11. **Property subject to lien.**—The Societe (U. S.), 9 Cranch 209, 3 L. Ed. 707, in which it is said: "The court can perceive no principle on which a cargo to be delivered freight free can be burdened with the freight agreed to be paid on a cargo to be afterwards taken on board."

of cargo, in the hands of the underwriter, whether the assured is the owner of the ship or not.[12]

§ 4350. Displacement and Waiver of Lien.—The lien may be displaced by an inconsistent and irreconcilable provision in the charter party or bill of lading, making it the duty of the master to deliver the goods unconditionally before the consignee is required to pay the freight; or it may be waived.[13] The usual provision of a bill of lading that the cargo shall be delivered to the person named or his assigns, "he or they paying the freight," is designed for the benefit of the owner or master in recognition of his right to a lien, and does not impose on him the duty of insisting on payment of the freight before delivery, but he is free to waive his lien and hold the shipper, therefor.[14]

By Unconditional Delivery of Goods.—Where a cargo is transported by a vessel under a charter containing no clause binding the goods to the ship and the ship to the goods, and the cargo is delivered unconditionally, and without any understanding that it should be subject to a lien for charter money, the lien of the vessel on the cargo for her freight is lost.[15] But if the cargo is placed in the hands of the consignee, with an understanding that the lien for freight is to continue, a court of admiralty will regard the transaction as a deposit of the goods in the ware house, and not as an absolute delivery, and on that ground will consider

12. Columbian Ins. Co. *v.* Catlett (U. S.), 12 Wheat. 383, 6 L. Ed. 664.

13. **Displacement and waiver of lien.**—The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50.

But if it be only doubtful in the construction of a charter party whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt; his lien being given by force of the common law, which can not be taken from him, "though there is a special contract, unless there is something in that contract inconsistent with that lien, or unless it is waived by his implication." Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47.

A clause in a charter party, by which the owner binds the vessel, and the charterers bind the cargo, for the performance of their respective covenants, is sufficient to repel doubt arising upon the construction of other stipulations not plainly controlling them, as to whether the lien for freight was intended to be waived by the parties. The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50.

The lien may be waived without express words to that effect, if the charter party contains stipulations inconsistent with the exercise of such a right, or where it clearly appears that the shipowner meant to trust to the personal responsibility of the charterer. The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47.

Insolvency of the shipper occurring while the goods are in transit, or before they are delivered, will not absolve the carrier from an agreement to take an acceptance on time, instead of cash, for the freight, nor authorize him, when he had made such an agreement, to retain the goods until the freight is paid. A bill or note falling due before the unloading of the cargo, and protested and unpaid, is no discharge of the lien; and the shipowner, in such a case, may stand upon it as fully as if the acceptance had been given. The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662, so holding where the charterers' acceptance had been dishonored and he become a bankrupt.

14. Portland Flouring Mills Co. *v.* Portland, etc., Steamship Co., 145 Fed. 687.

15. **By unconditional delivery of goods.**—In re Cargo of Brimstone, Fed. Cas. No. 2,405, 8 Ben. 45; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Dupont, etc., Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584; 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662.

Such precedent delivery, if absolute and unconditional, displaces the lien for freight, because it is repugnant to it and incompatable with it, but where the payment or security of payment is to be concurrent or simultaneous with the delivery of the cargo the lien exists in full force, and the shipowner can not be required to make the delivery until the payment of freight, or security, as the case may be, is tendered. The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662.

the shipowner as being still constructively in possession so far as to preserve his lien.[16]

Delivery to Warehouse.—A vessel, by delivering her cargo of flaxseed in a warehouse at the end of the voyage, and taking a receipt therefor, which was retained until a libel was filed, did not thereby lose her lien on the cargo for freight.[17]

Stipulations as to Place and Time of Payment and Delivery.—A credit for the freight may be given for so great a period as to justify, in the absence of any provision for the delivery of the cargo, the inference that the shipowner intended to waive his right to a lien and to look solely to the personal responsibility of the charterers.[18]

§ 4351. Preserving and Enforcing Lien.—The ship is not bound to land an entire shipment in a day; and when landed on different days, if the shipper disregards the notice that such will be the case, and shall not be present to receive the goods, and has made no arrangement for the freight, then they may be stored in the shipowner's name, to preserve his lien upon them for freight, for safekeeping, at the consignee's expense and risk.[19] But the shipowner can not detain the goods on board the ship until the freight is paid, as the consignee or owner of the cargo would then have no opportunity of examining their condition.[20]

Enforcement of Lien.—As contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the shipowner may enforce his lien by a proceeding in rem in the proper court.[21] A master, having a cargo under a bill of lading for delivery to order, was ignorant as to who were the indorsees, and was therefore unable to notify them of his arrival. The day after arrival he libeled the cargo for freight, but on the third day he received a letter from the attorneys of the indorsees of the bill of lading, who, after naming the principles, said, "We have for them to offer to pay the freight, * * * and to demand delivery, as per bill of lading, on paying freight." The freight was not, however, paid or tendered, and five days later the master discharged the cargo upon the wharf, and caused another writ of seizure to be executed upon it. While the first seizure was premature, because made while the cargo was still on board, yet the proceedings taken by the master did not amount to a conversion, for which the consignees could claim even nominal damages against the ship.[22]

§ 4352. Subrogation to Lien.—Libelant as shipper of a cargo of flour, became bound for the freight, but only as surety for the consignees, who were the owners of the cargo and primarily liable for the freight. The vessel having stranded, her owner abandoned her to the insured as well as the cargo, a portion of which was salved and sold and the proceeds received by respondent, which was its insurer. Subsequently the insurer of the freight recovered the same from li-

16. 4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35.

17. **Delivery to warehouse.**—Davidson Steamship Co. *v.* 119,254 Bushels of Flaxseed, 117 Fed. 283.

18 **Stipulations as to place and time of payment and delivery.**—The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662. See, also, Raymond *v.* Tyson (U. S.), 17 How. 53, 15 L. Ed. 47.

A stipulation in a charter party requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter money remaining unpaid on the termination of the homeward voyage shall be "payable, one half in five, and one half in ten days after discharge" of the cargo, are not inconsistent with the right of the owner to retain the cargo for the preservation of his lien. The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662.

19. **Preserving and enforcing lien.**—Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177.

20. The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

21. **Enforcement of lien.**—4,885 Bags of Linseed (U. S.), 1 Black 108, 17 L. Ed. 35; The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

22. The Ravensdale, 75 Fed. 413.

belant, which thereupon brought suit to recover the amount from respondent, claiming to be subrogated to the carriers' lien for the freight upon the cargo and its proceeds. It was held, that such lien was lost by the abandonment of the cargo to the respondent, which the carrier had the right to make, and there was therefore no claim against the fund arising therefrom to support a right of subrogation.[23]

§ 4353. Actions to Recover Freight.—Nature of Action.—A claim for dead freight is not recoverable in an action in rem against the cargo.[24] A claim by a vessel owner for the extra cost of handling timber of larger dimensions than that specified in the charter can only be recovered in rem against the cargo in so far as it is a claim for the services of stevedores who would be entitled to a lien, and is not so recoverable where the stevedores were furnished by the charterer.[25] The demand of a shipowner for freight in a case of civil salvage is to be pursued against that portion of the proceeds of the cargo which is adjudged to the owners of the goods, by a direct libel or petition by way of libel; and not by a claim interposed in salvage cause.[26]

Limitation of Actions for Recovery of Freight.—The article 3499, of the Civil Code of Louisiana, which prescribes that "actions for the payment of freight of ships and other vessels are prescribed by one year," does not apply to a case where the plaintiffs were shipbrokers only and not shipowners, and where the contract was not one of affreightment.[27]

Burden of Proof.—The libelant steamship company brought suit to recover a balance of freight money for the carriage of a cargo of oil in cases, which was withheld by the charterer to cover a shortage in delivery. The cargo was discharged at Whampoa, China, into lighters provided by the charterer, in which it was taken fourteen miles up the river to Canton, where it was stored in warehouses. The tally on the ship was kept by Chinese tallymen employed by the captain, and showed a shortage, as did the tally at the warehouses. The libelant claimed that the whole number of cases was in fact delivered to the lighters, and the missing cases were stolen between the ship and warehouses, an incorrect and fraudulent tally having been made through collusion between the Chinese tallymen and lightermen. The burden rested upon it to prove such fact, and that, while the evidence established its probability, it was not sufficient to entitle the libelant to recover, in view of the fact that the captain failed in his duty to have the tally taken or supervised by white men, as he could have done and was advised to do.[28]

Evidence.—Where the defense to an action for the freight of a cargo is that it was carried under special charter by the day, and a bill of lading of the cargo had been introduced, evidence that it is not customary to give a bill of lading where the boat is chartered by the day is admissible.[29] An estimate of the quantity of lumber in a cargo, based on the carrying capacity of the vessel, should not be accepted in an action for the freight as against what appears to have been a reasonably accurate tally, made when the lumber was loaded; but such tally may be corrected by evidence that the shipper received a greater quantity from the vessel at the place of delivery.[30]

§ 4354. Recovery Back of Freight.—Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special

23. **Subrogation to lien.**—Portland Flouring Mills Co. *v.* Portland, etc., Steamship Co., 145 Fed. 687.

24. **Actions to recover freight.**—Hagan *v.* Cargo of Lumber, 163 Fed. 657.

25. Hagan *v.* Cargo of Lumber, 163 Fed. 657.

26. **Pursued by libel or petition by way of libel.**—The Sybil (U. S.), 4 Wheat. 98, 4 L. Ed. 522.

27. **Action for freight.**—Railroad Co. *v.* Lindsay (U. S.), 4 Wall. 650, 18 L. Ed. 328.

28. **Burden of proof.**—Village Steamship Co. *v.* Standard Oil Co., 171 Fed. 243, decree affirmed in 177 Fed. 1006, 100 C. C. A. 669.

29. **Evidence.**—Zimmerman *v.* Rainey, 56 N. Y. S. 199, 26 Misc. Rep. 795.

30. Murray *v.* Jump Co., 148 Fed. 123.

agreement to the contrary, to be refunded, if from any cause not attributable to the shipper, the goods be not carried.[31]

Vessel Unseaworthy at Commencement of Voyage.—In an action by a shipper of goods against the consignee of the cargo to recover money retained for freight, the plaintiff was at liberty to show the vessel not to have been seaworthy at the commencement of her voyage.[32]

Freight Earned, Ship Lost or Not Lost.—The general rule that freight prepaid, but which is not earned by delivery of the goods must be refunded, does not apply as between owner and charterer, where by reference in the charter party the bills of lading are incorporated therein, and they contain a provision that freight prepaid shall be considered as earned, ship lost or not lost.[33]

An agreement not to refund freight money in advance, in case goods are not carried through, can not be inferred from a clause in the bill of lading that the goods are to be delivered safely "dangers of the seas excepted;" the design of that clause being only to save the master and shipowner from being answerable for goods lost.[34]

Goods Damaged.—Where consignee of goods pays the freight in advance, and on delivery the merchandise was found to be seriously damaged by the negligence of the vessel, the freight so paid in advance could be recovered back.[35]

§ 4355. Lighterage.—Which party is chargeable with the expense of lighterage is governed by the terms of the contract of affreightment or the charter party, and in the absence any stipulation in respect to such expense, by the custom of the port of discharge.[36] A bill of lading provided that, unless the bill by express written agreement was to bear the cost of lighterage, it was agreed that the lighterage was for account and risk of the cargo, custom of the port notwithstanding. The bills contained a written clause that the freight was to be delivered by steamer or lighter at the steamer's option at a certain railroad in Rio de Janeiro, provided there was enough water and length to get alongside dock. The freight contract was indorsed, "These rates include delivery * * * providing there is water enough for craft to get alongside dock, and also include all derrick costs in discharging." The bill of lading did not provide that the cost of lighterage should not be at the expense of the cargo, but should be construed to mean that, if there was water and length enough to get the steamer alongside the dock, it was then at the steamer's option to discharge at the dock, or deliver by lighter at her own expense; the word "craft" meaning the steamer in question.[37]

31. **Recovery back where goods not carried.**—The Bird of Paradise (U. S.), 5 Wall. 545, 18 L. Ed. 662; The Kimball (U. S.), 3 Wall. 37, 18 L. Ed. 50; Griggs *v.* Austin (Mass.), 3 Pick. 20, 15 Am. Dec. 175; Brown *v.* Harris (Mass.), 2 Gray 359; Minturn *v.* Warren Ins. Co. (Mass.), 2 Allen 86; Benner *v.* Equitable Safety Ins. Co. (Mass.), 6 Allen 222; Chase *v.* Alliance Co. (Mass.), 9 Allen 311.

By the American law freight is due only if the goods are carried to destination, and, even if prepaid, may be recovered back on a failure to make delivery, unless expressly otherwise provided in the contract. Decree, 150 Fed. 423, reversed in Burn Line *v.* United States, etc., Steamship Co., 162 Fed. 298.

Where a vessel took freight and passengers for Kotzebue Sound, but wholly failed to make the voyage, and discharged both at Nome, the sailing point, and they were not afterward forwarded, held, that on the total failure of the voyage the passengers are entitled to have the return of their freight money. The Arthur B., 1 Alaska 403.

32. **Vessel unseaworthy at commencement of voyage.**—Dickinson *v.* Haslet (Md.), 3 Har. & J. 345.

33. **Freight earned, ship lost or not lost.**—Burn Line *v.* United States, etc., Steamship Co., 150 Fed. 423.

34. Griggs *v.* Austin (Mass.), 3 Pick. 20, 15 Am. Dec. 175.

35. **Goods damaged.**—The Konigin Luise, 173 Fed. 811.

36. **Lighterage.**—Mencke *v.* Cargo of Java Sugar, 187 U. S. 248, 47 L. Ed. 163, 23 S. Ct. 86.

37. Herr *v.* Tweedie Trading Co., 181 Fed. 483.

§§ 4356-4378. Demurrage—§ 4356. In General.—Definitions.—Ordinarily demurrage is the agreed additional payment by the charterer for the allowed detention of the vessel beyond the period specified in the charter party.[38]

Necessity for Pecuniary Loss.—It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure.[39] A ship is not entitled to an allowance or demurrage for delay under a contract for repairs where the vessel had no charter, and was not employed when the work was commenced, and was not offered a charter until after its completion.[40]

Demurrage in Nature of Penalty.—If a sum agreed to be paid for delay in completing repairs on a ship is regarded as a penalty, a court of admiralty will not enforce the payment where the facts are such that a court of equity would not.[41]

Damages in Nature of Demurrage.—An action can not be maintained for demurrage where the bill of lading says "no demurrage." Nevertheless, an action for damages in the nature of demurrage may be maintained where the consignee has been guilty of unnecessary and unreasonable delay.[42]

§ 4357. Charter Party Provisions.—A deliberate contract, made by the parties in a charter party, giving the charterer the right to designate the place of discharge, and providing that lay days shall commence when the vessel is ready to discharge, can not be varied or relaxed on the ground that its enforcement subjects the vessel to an unreasonable delay.[43]

Erased Clauses.—The erasure, before execution, from a printed form of a charter party, of the clauses fixing the number of lay days and the rate per day for demurrage, or the failure to fill the blanks therein, leaves the rights of the parties with respect to demurrage or damages for detention to be determined by the general rule as to reasonable dispatch.[44]

Charterer Required to Pay Towage.—A provision of a charter party requiring the charterer to pay towing charges from the mouth of a creek to the dock of the charterer thereon for discharge does not require the charterer to provide the tug to do such towing nor render it liable for delay in obtaining such tug.[45]

Construed in Connection with Telegram.—A bill of lading containing the words "no demurrage," and a contemporaneous telegram from the consignor, a quartermaster, to the consignee, another quartermaster, directing him to "be

38. **Demurrage.**—Morgan *v.* Garfield, etc., Coal Co., 113 Fed. 520.

Demurrage is, strictly, a sum due by express contract for the detention of a vessel, in loading and unloading, beyond the time allowed in the contract of affreightment, and may also apply to the improper detention or delay of a vessel. Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

Every improper detention of a vessel may be considered a demurrage and compensation in that way may be obtained for it. Southern R. Co. *v.* Melton, 65 S. E. 665, 133 Ga. 277.

39. **Necessity for pecuniary loss.**—The Conqueror, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree, 49 Fed. 99.

Necessity for loss of profits.—"Demurrage," in the proper sense of the term, is an allowance to a vessel in compensation for the earnings she is improperly caused to lose, and can only be allowed when profits have either actually been lost or may be reasonably supposed to have been lost. The Colombia, 197 Fed. 661, decree affirmed in Rasmussen *v.* Home Industry Iron Works, 199 Fed. 990, 117 C. C. A. 666.

40. The Colombia, 197 Fed. 661.

41. **Demurrage in nature of penalty.**—The Colombia, 197 Fed. 661.

42. **Damages in nature of demurrage.**—Philippine Trading Co. *v.* United States (U. S.), 47 Ct. Cl. 328.

43. **Charter party provisions.**—Anderson *v.* Moore & Co., 102 C. C. A. 362, 179 Fed. 68.

44. **Erased clauses.**—Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178.

45. **Charterer required to pay towage.**—Eaton *v.* Cargo of Lumber, 180 Fed. 513.

ready to unload promptly," may be taken together to constitute an agreement that reasonable diligence will be exercised in discharging the cargo.[46]

Provision as to Precedence in Discharging Freight.—Where a bill of lading, besides the general provision fixing the lay days for discharging, contained a clause providing that the vessel should have precedence in discharging over all vessels arriving or giving notice after her arrival, and should be compensated in demurrage for any violation of such provision, the provision for demurrage for a delay caused by a failure to discharge the vessel in her turn controlled the provision fixing the time allowed for lay days.[47]

Provision for No Demurrage.—An action can not be maintained for demurrage where the bill of lading says "no demurrage." Nevertheless, an action for damages in the nature of demurrage may be maintained where the consignee has been guilty of unnecessary and unreasonable delay.[48]

Contract Impossible of Performance.—Alleged impossibility of performing the conditions of a contract does not relieve the owners from fulfilling a provision requiring the collection of demurrage or an indorsement on the bill of lading before sailing.[49]

Provision for Demurrage Lien on Cargo.—A charterer is not exempted from the payment of demurrage for which he is made liable by the terms of the charter party because of a provision of the bill of lading giving a lien on the cargo for freight and demurrage.[50]

Provision for Payment on Default of Charterer.—Under a charter providing for payment of demurrage "for each and every day's detention by default of charterer" it was held that by the use of the word "default" was meant failure to perform some duty imposed by the contract.[51]

Provision for Continuous Discharge.—A provision of a bill of lading that the cargo shall be "received by the consignee immediately the vessel is ready to discharge, and continuously at all such hours as the customhouse or port author-

46. **Construed in connection with telegram.**—Philippine Trading Co. *v.* United States (U. S.), 47 Ct. Cl. 328.

47. **Provision as to precedence in discharging freight.**—Evans *v.* Blair, 114 Fed. 616, 52 C. C. A. 396.

Under a provision of a bill of lading for a cargo consigned to a railroad company, giving the vessel the right to be discharged in her turn, the fact that such cargo is owned by the company, while that of another vessel arriving later is merely consigned to its care, to be shipped over its road, does not entitle the company to give the latter preference in discharging. Evans *v.* Blair, 114 Fed. 616, 52 C. C. A. 396.

Customs of port.—The provision of a bill of lading that, after arrival and notice to the consignee and the expiration of 24 hours, the vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, requires such vessel to be given her turn subject to whatever customs or necessities exist at the port of discharge and which may fairly be presumed to have been within the contemplation of the parties. Ross *v.* Cargo of 3,408 Tons of Pocahontas Coal, 165 Fed. 722.

Precedence over transatlantic vessel.—Schooners which arrived at a port for discharge of coal cargoes under bills of lading providing that they should have precedence in discharging over all vessels arriving or giving notice after their arrival must be held to have contracted with reference to the facilities for coal discharging at that port, and are not entitled to claim a violation of contract because steamers of regular transatlantic lines arriving after them were, in accordance with contracts and long custom, given precedence in discharging at the company's wharves which were not used as discharging places for coal but for general cargoes. They were, however, entitled to precedence, over after-arriving vessels carrying coal cargoes, to discharge at any wharf of the company used for discharging coal, so long as they were not assigned to any particular berth, and, after such assignment, to precedence over any after-arriving vessel at such berth. Ross *v.* Cargo of 3,408 Tons of Pocahontas Coal, 165 Fed. 722.

48. **Provision for no demurrage.**—Philippine Trading Co. *v.* United States (U. S.), 47 Ct. Cl. 328.

49. **Contract impossible of performance.**—Gans *v.* Auchincloss, 166 Fed. 991.

50. **Provision for demurrage lien on cargo.**—Davis *v.* Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381, affirming decree, 182 Fed. 1004.

51. **Provision for payment on default of charterer.**—Washington Marine Co. *v.* Rainier Mill, etc., Co., 198 Fed. 142.

ities may give permission for the ship to work," means only that the discharge shall be reasonably continuous, considering the time, place, and circumstances, the nature of the cargo, the situation of the vessel, and prevailing conditions generally.[52]

Construction by Parties.—Where, after a vessel was loaded, upon a question of demurrage arising, the charterer's agent, under authority from his principal to indorse upon the bills of lading "when lay days commence and when vessel loaded," indorsed such dates, which were accepted by the master, such action amounted to a practical construction of the charter party by the parties, which was entitled to great, if not controlling, influence.[53]

Provision for Dispatch in Discharging.—A provision of a charter party for "dispatch for discharging" is to be construed with reference to the custom of the port where the discharge is made, which is fixed in large measure by the facilities at such port for discharging the kind of cargo carried.[54]

§ 4358. Right of Vessel to Charge in General.—Where Notice of Refusal to Pay Demurrage Given.—A vessel is presumed to have accepted the risks of delay where the charterer refused to pay demurrage and gave notice that he would not keep the vessel if demurrage were charged.[55]

Demurrage Not Claimed in Monthly Statements.—Where libelant furnished barges for the use of respondent's testator in transporting coal under a general arrangement by which bills for such service were presented and paid monthly, a claim for demurrage on account of the detention of a barge will not be allowed when not presented until after the death of the testator and more than a year after the service was rendered and the bill therefor paid, in which no such claim was made, although such claim was warranted by the terms of the bill of lading.[56]

Necessity for Provision in Bill of Lading.—Compensation may be recovered by the owner of a vessel for unreasonable detention thereof, though the bill of lading contain no demurrage clause.[57] Where a charter party or bill of

52. **Provision for continuous discharge.**—United States Shipping Co. *v.* United States, 146 Fed. 914.

Under a bill of lading providing that the consignee should receive the goods "immediately the vessel is ready to discharge and continuously at all such hours as the custom house or port authorities may give permission," the shipper was liable for any delay in discharging, due to its failure to receive the cargo from any cause except the fault of the shipowner. Tweedie Trading Co. *v.* Strong, etc., Co., 195 Fed. 929, reversing decree 157 Fed. 304.

53. **Construction by parties.**—Percy *v.* Union Sulphur Co., 173 Fed. 534.

54. **Provision for dispatch in discharging.**—The Cargo, 122 Fed. 881.

55. **Right of vessel to charge in general.**—Libelant furnished a number of barges for use as lighters by respondent's testator in his coal business in New York City and harbor. Such use necessarily involved more or less delay of the barges while waiting for the sale or the transfer of their cargoes to steamships, which was a part of defendant's business. A suggestion by libelant that he should expect demurrage for such delays was met by a prompt denial of liability, and notice by decedent that he would not keep the vessels on such terms. Thereafter the business continued as before, monthly bills being presented and paid for the hire of the barges, which contained no charges for demurrage, nor were any such charges made on libelant's books until after decedent's death, when a large sum was charged against him on that account. Held, that on such evidence, and in the absence of clear evidence to the contrary, libelant must be presumed to have accepted the risk of such delays as an incident of the business, and that he was not entitled to recover demurrage therefor. Decree, Hagan *v.* Tucker, 112 Fed. 546, affirmed in 118 Fed. 731, 55 C. C. A. 521.

56. **Demurrage not claimed in monthly statements.**—Hagan *v.* Tucker, 112 Fed. 546, affirmed in 118 Fed. 731, 55 C. C. A. 521.

57. **Necessity for provision in bill of lading.**—Jameson *v.* Sweeney, 61 N. Y. S. 494, 29 Misc. Rep. 584.

That no provision was made in relation to demurrage in a contract of affreightment does not show that no demurrage was to be charged, but the rights of the parties are to be determined by the general rule as to reasonable dispatch. Price *v.* Morse Ironworks, etc., Co., 120 Fed. 445.

lading contains no provision with respect to the lay days for discharging, an implied obligation arises on the part of the charterer or consignee to give the vessel reasonable dispatch, determined by the circumstances then existing; but in such case he is not an insurer against delay, nor liable because of delay caused by circumstances beyond his control, such as the presence of another vessel discharging at the dock where delivery is to be made, and which is the only one available, or by a temporary derangement of the dock machinery used for discharging, which he could neither anticipate nor prevent.[58]

Estoppel to Collect Demurrage.—Where a bill of lading expressly gave the shipowner the right to hold the shipper for any charge under the contract, the fact that such owner did not enforce its right, also given thereby, to collect demurrage for detention in discharging from the consignee, or by enforcing its lien on the cargo at the port of discharge, did not estop it from collecting such demurrage from the shipper, especially where the shipper consigned the cargo to itself, and, although it indorsed the bill of lading to another, remained the owner until actual delivery.[59]

§ 4359. Delay Fault of Vessel or Owner.—A boat owner is not entitled to demurrage for the time during which he refused to continue unloading because of the pendency of negotiations for security for the freight, where he might have discharged, and preserved his lien on the cargo by refusing to deliver.[60]

Failure to Arrive on Schedule Time.—Libelants of a cargo were not entitled to recover demurrage for delay in loading where the proof showed that whatever delay arose was owing to the failure of the steamer and tow to arrive as scheduled, by reason of which other vessels arrived, and were loaded in turn at the dock, in accordance with the customs of the port.[61]

Detention of Cargo for Nonpayment of Freight.—The owner of a vessel ordinarily retain the cargo for nonpayment of freight, and charge demurrage arising from such detention.[62]

Refusal to Receive Part of Cargo.—Where the master of a vessel refused to receive more cargo before all of the shipment contracted for had been loaded, whereupon a delay was occasioned to settle the matter, the ship was not entitled to collect demurrage therefor.[63]

Fault of Agent of Ship.—Where the stevedoring in discharging a vessel was done by an employee of the ship's agent, the charterer was not responsible for his delays.[64]

§ 4360. Delay Caused by Act of God.—Floods, Storms and Droughts.—Under a provision of a contract of affreightment requiring the shipper to load the cargo as fast as the vessels can receive the same, adverse weather conditions are not a defense to an action to recover demurrage for a failure to comply with such stipulation.[65] A provision in a charter made in Liverpool for the

58. Decree, Ionia Transp. Co. *v.* Two Thousand Ninety-Eight Tons of Coal, 128 Fed. 514, affirmed in 135 Fed. 317, 67 C. C. A. 671.

59. Estoppel to collect demurrage.—Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 146 Fed. 612.

60. Delay fault of vessel or owner.—Murray *v.* Jump Co., 148 Fed. 123.

61. Failure to arrive on schedule time.—McArthur Bros. Co. *v.* 622,714 Feet of Lumber, 131 Fed. 389.

62. Detention of cargo for nonpayment of freight.—Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318.

63. Refusal to receive part of cargo.—Decree, Wood *v.* Sewall, 128 Fed. 141, affirmed in 135 Fed. 12, 67 C. C. A. 580.

64. Fault of agent of ship.—Two Thousand Tons of Coal, 135 Fed. 734, 68 C. C. A. 372.

The charterer having arranged for a discharge at a particular wharf, the vessel's agent, on arrival, thought the berth unsuitable, and arranged for discharge at another dock, which was occupied, so that the vessel was delayed two days. Held that, in the absence of other evidence, the charterer was not liable for such delay which was caused by the shipowner and his agents. Two Thousand Tons of Coal, 135 Fed. 734, 68 C. C. A. 372.

65. Delay caused by act of God.—Atlantic, etc., Steamship Co. *v.* Guggenheim, 123 Fed. 330, decree affirmed in 147 Fed. 103, 77 C. C. A. 329.

carrying of a cargo of timber from Ship Island, excluding from the computation of lay days at the port of loading "any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers," does not apply to time lost by reason of the charterers failing to have the cargo ready at the usual place of storage, on account of a drought which was prevailing at the time of the charter, and which affected the rivers by means of which the cargoes were ordinarily brought from the interior, but did not in any way affect the delivery of cargoes from the usual place of storage to the ship.[66]

Act of Public Enemy.—A detention of a vessel for unloading, which is caused, not by any act of the shipowners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, can not be considered as caused by "default" of the charterers, within the meaning of a charter party stipulating for demurrage in case of their default.[67]

§ 4361. Negligence or Wrongful Acts of Third Persons.—Under a charter party providing that lay days for loading should commence at 6 o'clock a. m. the day after the vessel's report of readiness and that she should load in the customary manner at such wharf as she should be ordered by the charterer's agent, the charterer is liable for demurrage for time lost before she could be provided with a berth after such time commenced, although the delay was not due to any fault of the charterer, but to that of a third party.[68]

Strikes by Workmen.—The term "strike" in the exceptions to the running of lay days in a charter party excuses the charterers for delay caused by a refusal of all the available workmen to work except for an advance in wages demanded in the midst of loading a vessel.[69] An exception of strikes from the running

66. Jonasen *v.* Keyser, 112 Fed. 443, 50 C. C. A. 334.

Where a ship is chartered in Liverpool to carry a cargo of lumber from Ship island, and the charter party provides that "in the computation of days allowed for delivery should be excluded any time lost by reason of droughts, floods, and storms, or any other extraordinary occurrence, beyond the control of the charterer," such exception does not apply to a drought existing at the time of the charter in the region of the Pascagoula river, and which prevented the charterer from obtaining the timber, but which did not interfere with its delivery from Moss point, the usual place of preparing cargoes, and between which place and Ship island no drought could affect the delivery. 48 Fed. 117, reversed in Sorensen *v.* Keyser, 52 Fed. 163, 2 C. C. A. 650; Skantze *v.* Keyser, 52 Fed. 168, 2 C. C. A. 655; Wold *v.* Keyser, 52 Fed. 169, 2 C. C. A. 656.

67. **Act of public enemy.**—Decree, Burrill *v.* Crossman, 91 Fed. 543, 33 C. C. A. 663, reversed in 21 S. Ct. 38, 179 U. S. 100, 45 L. Ed. 106.

Where a vessel commenced discharging cargo in Rio de Janeiro on the day that the revolution began there in 1893, in which the insurgents captured government warships in the harbor, and there was thereafter more or less firing between such ships and forts and batteries on shore, and such condition of affairs was produced by the hostilities as to render it practically impossible to receive the cargo with the dispatch contemplated by the charter, either because of the intrinsic danger incident to unloading or the inability to procure the necessary men to do the work, such condition constituted an unavoidable hindrance, and, to the extent that it prevented compliance with the contract, excused performance, and relieved the charterers from liability under the provision requiring them to pay demurrage for detention by the default of themselves or their agent. Decree, 124 Fed. 838, reversed in Burrill *v.* Crossman, 130 Fed. 763, 65 C. C. A. 189.

68. **Negligence or wrongful acts of third persons.**—Pyman Steamship Co. *v.* Mexican Cent. R. Co., 164 Fed. 441.

69. **Strikes by workmen.**—Wood *v.* Keyser, 84 Fed. 688. Decree affirmed in 87 Fed. 1007, 31 C. C. A. 358; Actieselskabet Barfod *v.* Hilton, etc., Lumber Co., 125 Fed. 137; Marshall *v.* McNear, 121 Fed. 428.

A strike of the employees of the charterer, without grievance or warning, and an organized and successful effort on their part to prevent, by threats, intimidation, and violence, other laborers, who were willing to do so, from discharging a vessel, held to excuse the charterer for

days provided in a charter party includes a strike brought about by demands of the charterers that the laborers loading the vessel shall conform to certain reasonable rules and regulations.[70]

Strike of Coal Miners.—A delay in obtaining a berth at a port because of the large number of vessels unloading coal brought from foreign countries, owing to a domestic shortage caused by a strike of miners, was not caused by strikes, within an exception in the charter party.[71]

§ 4362. Liability of Charterer of Ship.—Under a charter party which placed the duty of discharging and delivering the cargo alongside upon the owners, neither the charterer nor cargo can be held liable for demurrage because of delay in discharging beyond the stipulated lay days, without proof that it was through the fault of one or the other.[72]

Under Cesser Clause.—The rule of construction of a charter party containing a cesser clause relieving the charterer from responsibility after the completion of loading and also providing that the charterer shall pay freight and demurrage for delay in discharging, and giving a lien therefor, is that the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurable, and where a ship was required to deliver her cargo of coal to a purchaser, and discharge the same upon a general pile, by which the lien was lost, the charterer may be held liable for the freight and demurrage.[73] A charter provided for demurrage, but a "cesser clause" therein provided that "the charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for in the bill of lading." The charter also provided that bills of lading should be signed as presented without prejudice to the charter party, but any difference of freight was to be settled on signing the bills of lading. The signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, from their failure to fulfill the conditions of the charter.[74]

a delay of a week in the performance of that work. Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, affirming decree, 70 Fed. 268.

70. The fact that charterers have for some time acquiesced in certain unreasonable customs of baymen loading their ships is no waiver of their right to require the abandonment of such customs, and a strike resulting from such demand is within the exceptions in the charter party. Hawkhurst Steamship Co. *v.* Keyser, 84 Fed. 693, affirmed in 87 Fed. 1005, 31 C. C. A. 347.

Strike on account of rain.—A vessel is not ready to discharge, within maritime rule 5, regulating the length of time within which a consignee of lumber should receive it, without liability for demurrage, and requiring him to receive, in questionable weather, "if the vessel is ready to discharge," where the stevedores refused to work on account of rain. Bowen *v.* Sizer, 93 Fed. 227.

71. Strike of coal miners.—Where, in consequence of a strike of the anthracite coal miners of Pennsylvania, large quantities of coal were brought to American ports from Wales and other coal mining regions by vessels, and because of the arrival of a large number of such vessels at a given port at about the same time, and the further requirement of consignees that they should discharge at certain railroad docks to facilitate the shipment of the coal to interior points by rail, delay was caused to many of the vessels in discharging, the strike can not be held a proximate cause of such delay, within the meaning of a charter provision exempting the charterer from liability for demurrage on account of delay caused by strikes. Decree, New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, affirmed in Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A., N. S., 126.

72. Liability of charterer of ship.—Decree, West Hartlepool Steam Nav. Co. *v.* 450 Tons of Kainit, 151 Fed. 886, affirmed in West Hartlepool Steam Nav. Co. *v.* Virginia-Carolina Chemical Co., 164 Fed. 836.

73. Under cesser clause.—Dewar *v.* Mowinckel, 179 Fed. 355, 102 C. C. A. 539.

74. Schmidt *v.* Keyser, 88 Fed. 799, 32 C. C. A. 121.

Where Charterer Has Right to Move Vessel from One Berth to Another.—A charter party gave the charterer the right to move the vessel from one discharging berth to another by paying towages. The master notified the charterer that the discharge at one place would be completed in the afternoon, and was directed to obtain a tug and move the vessel to another berth designated. He was unable to obtain a tug that night, and when the vessel reached the berth the next morning it was occupied, and several days' delay resulted. It was held, that the fault for the delay was not that of the vessel, but of the charterer, and that he was liable for demurrage.[75]

§ 4363. Liability of Consignee.—Where a consignee is interested in the cargo, and accepts it under a charter party made between the vessel and the consignor who provides for demurrage, he is liable therefor in case of his default.[76]

Provision in Charter Party for Payment of Freight.—Where a part of the freight had been paid by the consignor, and the consignee was required by the charter party to pay the balance, a provision in the bill of lading requiring the consignee to pay freight at the rate agreed on, in accordance with the terms of the charter party, referred to freight alone, and did not obligate the consignee to pay demurrage.[77]

Liability by Estoppel.—Where, pending the discharge of cargoes of coal, the consignees admitted their liability for demurrage, provided any was due, which, however, they denied, and the shipowners, in reliance thereon, allowed the cargoes to be discharged without asserting their lien, the consignees were estopped to defend a suit for demurrage on the ground that another was the proper party to be sued therefor.[78]

Consignee Acting as Broker.—Where the consignee of a cargo, named in the bill of lading, which ran to him or his assigns, did not assign the same, and received the cargo, and paid the freight, he cannot avoid liability for demurrage on the ground that he acted only as broker in the transactions.[79]

Where Duty of Discharging upon Vessel or Consignor.—The consignee of a cargo, under bills of lading which obligated it only to receive the cargo as delivered by the vessel, leaving the duty of discharging upon the vessel or the charterer, is not subject to the provisions of the charter party respecting the time for discharging or demurrage, nor, if liable for demurrage because of failure to receive the cargo as delivered, is such liability measured by the stipulated penalty provided in the charter party as between the owner and charterer, but is to be determined by evidence as to the actual damage resulting from its neglect or default.[80]

§ 4364. Liability of Purchaser of Cargo.—A written contract for the sale of cargoes of coal to be delivered from the ships, which contained no provision with respect to the rate of discharge, bound the purchaser only to receive the coal at a rate which was customary and reasonable under the circumstances; and, where it did so, it can not be held liable for demurrage which

75. **Where charterer has right to move vessel from one berth to another.**—Decree, 158 Fed. 203, affirmed in Hammett *v.* Chase, etc., Co., 165 Fed. 1005, 91 C. C. A. 663.

76. **Liability of consignee.**—Graham *v.* Planters' Compress Co., 129 Fed. 253.

77. **Provision in charter party for payment of freight.**—Graham *v.* Planters' Compress Co., 129 Fed. 253.

78. **Liability by estoppel.**—Taylor *v.* Fall River Ironworks, 124 Fed. 826.

Where the master of a canal boat presents bills of lading to the consignees which contain an agreement to pay demurrage, and the latter accept the cargo with knowledge of the contents of such bills, they will be estopped from denying a claim for demurrage on the ground that the goods were shipped under a different contract, not allowing demurrage. Gabler *v.* McChesney, 70 N. Y. S. 191, 60 App. Div. 583.

79. **Consignee acting as broker.**—Crowley *v.* Hurd, 172 Fed. 498.

80. **Where duty of discharging upon vessel or consignor.**—West Hartlepool Steam Nav. Co. *v.* 450 Tons of Kainit, 151 Fed. 886.

the seller was obliged to pay under the charter parties, requiring a more rapid discharge.[81]

§ 4365. Delay in Loading or Sailing.—Vessel Loaded in Turn.—A charterer is not liable for demurrage because seven days elapsed between the time the vessel was ready to load with lumber and the completion of her loading, the usual time for loading being from three to four days, where the delay was due to the fact that she was required to wait her turn in accordance with the custom of the port and the scarcity of labor, all the available men at the port being engaged in loading the vessels ahead of her.[82]

Caused by Nature of Goods Shipped.—The respondent, as agent for certain steamships, is not liable for demurrage, because the derricks of the libelant hired by a shipper to transport locomotives in parts to the steamships and by the respondent to hoist the same on board and into the holds at a stipulated price for each were not allowed to deliver the same as rapidly as they could have done, where the parts were received and stowed with reasonable skill and dispatch, and the delay resulted from the character of the cargo and the manner in which it was loaded on the derricks, and it further appeared that libelant furnished a larger number of derricks than could conveniently be discharged at the same time.[83]

Cargo Different from That Specified in Charter.—Demurrage is recoverable for delay in loading, due to the fact that the cargo was different from that specified in the charter.[84]

Failure of Shipper to Deliver Goods.—Under a charter for the carriage of cargoes of coke which provided that it should be loaded on the vessels "as fast as they can receive the same," the owner is entitled to demurrage for delay in loading caused by the failure of the charterer to have a supply of coke on hand at the port of loading.[85]

Goods Delivered at Another Wharf.—Where the bill of lading provided that the vessel should load continuously, working all the hatches at once, the owner of the vessel is entitled to recover for demurrage, where a portion of the cargo was not at the wharf at the place of shipment, and the vessel was compelled to cross the river to a place where such other portion of the cargo was furnished.[86]

Goods Delivered in Inconvenient Place.—The charter party merely providing the shipper should furnish the lumber at a certain rate per day, and the ship should employ her own stevedore, and it not appearing that when it was made the carrier knew how it was piled on a wharf, it was the shipper's duty to deliver it at a place convenient for loading directly into the ship.[87]

Goods in Unfit Condition for Loading.—A provision in a charter for carrying lumber that the cargo should be furnished "at the port of loading as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the lumber becoming wet, and unfit for loading, before it is forwarded to the ship.[88]

81. **Liability of purchaser of cargo.**—Furness, etc., Co. *v.* Leyland Shipping Co., 134 Fed. 815, 67 C. C. A. 461.

82. **Delay in loading or sailing.**—Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169.

83. **Caused by nature of goods shipped.**—Merritt, etc., Wrecking Co. *v.* Vogeman, 143 Fed. 142.

84. **Cargo different from that specified in charter.**—Hagan *v.* Cargo of Lumber, 163 Fed. 657.

85. **Failure of shipper to deliver goods.**—Decree 123 Fed. 330, affirmed in Atlantic, etc., Steamship Co. *v.* Guggenheim, 147 Fed. 103, 77 C. C. A. 329.

86. **Goods delivered at another wharf.**—Tweedie Trading Co. *v.* Thomsen & Co., 173 Fed. 710.

87. **Goods delivered in inconvenient place.**—Tweedie Trading Co. *v.* Craig, 144 N. Y. S. 64, 159 App. Div. 192.

88. **Goods in unfit condition for loading.**—Durchmann *v.* Dunn, 106 Fed. 950, 46 C. C. A. 62.

Causes beyond Control of Charterer.—Under a charter party providing for payment of demurrage by the charterer for delay in loading or discharging beyond the lay days specified, "except in case of * * * causes beyond the control of the charterer," the charterer is not liable for delay in loading caused by the refusal of the owner of the coal dock at which the vessel was directed to load, and which was the only one at which the charterer could reasonably load, to give her proper dispatch, which was a cause "beyond the control of the charterer," within the meaning of the exception.[89]

Caused by Towage between Ports.—Under a charter for the carriage of lumber to be loaded at two ports, requiring the charterer to pay the towage between the two, the time of such towage can not be charged in the lay days for loading, nor the time lost in obtaining a tug not due to any default of the charterer.[90]

Caused by Constituted Authority.—Where a vessel was chartered to load at a pier belonging to a town in a foreign port, in charge of the captain of the port, whose duty it was to assign vessels to berths at the pier, and he refused to permit the vessel to berth in her turn at the pier in a berth where she would project beyond the pier, resulting in a delay, such delay was caused by the "intervention of constituted authorities," within an exception in the charter party relieving the charterers from liability for demurrage.[91] A vessel is not entitled to demurrage for the time she is detained by a shipper by virtue of a legal seizure, although on a claim which was unfounded and subsequently dismissed, unless the proceeding was in bad faith or malicious.[92]

Failure of Shipper to Furnish Stevedore.—A charter party required the charterer to pay demurrage for each and every day's detention by his default, and provided: "Charterers' stevedore to be employed in loading and discharging at not to exceed current rates." It was the master's duty to load the vessel. The charterer designated a stevedore at the port of loading; but on arrival there, by reason of a strike, he declined to load, and the charterers' agent notified the master that he waived the privilege of naming the stevedore. It was only a privilege, which imposed no duty on the charterer to furnish a stevedore, and he could not be charged with demurrage because of his failure to do so, where the cargo was ready.[93]

Loading at Port Designated by Charterer.—A vessel, under charter to load at either one of three ports at the charterer's option, and which has been ordered to one where she can not be loaded without delay, is not bound to remove to another to save the charterer demurrage, and does not forfeit the right to demurrage because she demands for such removal a sum which the charterer refuses to pay.[94]

Liability of Charterer for Act of Agent.—Where the agents of the charterer of a vessel for the carriage of a cargo of coal directed her to report to a coal company for loading, the charterer became responsible for the acts of such company, and liable for demurrage because of its failure to give customary dispatch in loading.[95]

Caused by Refusal to Sign Bill of Lading.—A shipowner is not entitled to demurrage from a charterer for delay in the sailing of the vessel after she was

89. **Causes beyond control of charterer.**—Decree 164 Fed. 441, reversed. Pyman Steamship Co. *v.* Mexican Cent. R. Co., 169 Fed. 281, 94 C. C. A. 557.

90. **Caused by towage between ports.**—Hagan *v.* Cargo of Lumber, 163 Fed. 657.

91. **Caused by constituted authority.**—Adamson *v.* 4,300 Tons Pyrites Ore, 137 Fed. 998.

92. Watt *v.* Cargo of Lumber, 161 Fed. 104.

93. **Failure of shipper to furnish stevedore.**—Harrington *v.* American, etc., Lumber Co., 185 Fed. 475, 107 C. C. A. 575.

94. **Loading at port designated by charterer.**—Stoomvart Maatschaffy Nederlandsche Lloyd *v.* Lind, 170 Fed. 918, 96 C. C. A. 134.

95. **Liability of charterer for act of agent.**—Carleton *v.* Three Hundred Sixty-Seven Tons of Coal, 206 Fed. 345.

loaded, which was due to the claim of the master that the cargo was in excess of that actually loaded, and his refusal to sign bills of lading for the correct quantity.[96]

Charter Party Provision for Quick Delivery.—A provision of a charter for quick delivery on board should be given a reasonable interpretation with reference to the character of the cargo, as well as its destination and the manner of stowage required, in order to facilitate its discharge. A requirement that the cargo shall be delivered as fast as the ship can receive it does not render the charterer liable for demurrage because all her hatches are not used at the same time, where the size and weight of the packages and the facilities of the wharf are such as to render such use inconvenient.[97]

Under Bill of Lading Issued after Loading.—In the absence of intention to the contrary, the bill of lading, though issued after the vessel was loaded, providing "any detention on the part of the shipper in supplying cargo as fast as steamer can receive to be accounted for by payment of demurrage" at a certain rate, relates back and governs liability of the shipper for delay caused by him during the loading.[98]

Time Excepted in Charter Party.—A provision, in a charter for carrying a cargo of lumber, that the cargo should be furnished "as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the lumber becoming wet in distant yards, and unfit for loading, before it is forwarded to the ship.[99]

Holidays Not Excluded in Computing Time.—The Pennsylvania statute relating to holidays and half holidays does not make them obligatory, and where it is not shown that the stevedores engaged in loading a vessel refused to work on Saturday afternoons because of the statute such half days are not to be excluded in computing demurrage.[1]

§ 4366. Delay during Voyage.—Under a contract to transport bricks from New York to Colon, where there was a detention of two steamers at New York and of three at Colon by respondent, libelant was entitled to recover.[2] Where a vessel is detained on account of the illness of her master and steward, the hire ceases for the time lost to the charterer.[3] A firm of shipping agents chartered a vessel "as agents for charterers," but without disclosing any principal, to carry a cargo of lumber from Pensacola to "any safe port" in the western Mediterranean. Before time for entering on the voyage, they chartered to respondents at an increased rate of freight. It was held, that respondents were not bound as principals under the original charter, but were shippers charged with notice of such charter, and, while not held to the stipulations therein as to demurrage days and rate of demurrage, they were bound, within a reasonable time after loading, to name a safe Mediterranean port for delivery of cargo, and liable for the detention of the vessel necessarily resulting from their naming an unsafe port, for which the master refused to sign bills of lading.[4]

96. **Caused by refusal to sign bill of lading.**—Wood *v.* Sewall, 128 Fed. 141, affirmed 135 Fed. 12, 67 C. C. A. 580.

Where, after a cargo was loaded, the master refused to sign the bill of lading presented by the charterer, on the ground that it was incorrect, but, after several days delay, altered and signed the same, the charterer cannot be charged with demurrage for the time so taken. The Assyria, 98 Fed. 316, 39 C. C. A. 97.

97. **Charter party provision for quick delivery.**—Uren *v.* Hagar, 95 Fed. 493.

98. **Under bill of lading issued after loading.**—Tweedie Trading Co. *v.* Craig, 144 N. Y. S. 64, 159 App. Div. 192.

99. **Time excepted in charter party.**—Durchman *v.* Dunn, 101 Fed. 606.

1. **Holidays not excluded in computing time.**—Holland Gulf Steamshipping Co. *v.* Hagar, 124 Fed. 460; Uren *v.* Hagar, 95 Fed. 493.

2. **Delay during voyage.**—Tweedie Trading Co. *v.* New York, etc., R. Co., 166 Fed. 993.

3. Northern Steamship Co. *v.* Earn-Line Steamship Co., 169 Fed. 708.

4. Keyser & Co. *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 664.

§ 4367. Delay in Unloading.—Where the charter or bill of lading is silent as to the time of unloading and discharge, there is an implied contract to discharge the vessel within a reasonable time.[5]

Reasonable Rate of Discharge.—Where the wharves at a port are not all equally convenient for the discharge of every sort of cargo, in the absence of a custom establishing a uniform rate, a reasonable rate of discharge is not necessarily the same at all wharves, and, while a wharf may be so inconvenient as to render the consignee responsible for the delay in discharging thereat, the reasonable convenience required is not the highest degree of convenience either imaginable or actually existing.[6]

Customary Dispatch.—A charterer is liable for demurrage for failing to discharge the vessel with customary dispatch as required by the charter.[7]

Unloading in Turn.—Where, through the charterer's failure to discharge a vessel at her port of destination, she is obliged to proceed to another port, she can not be held to have contracted with reference to a custom of such port that she shall await her turn to discharge, and for delay caused thereby the charterer is liable in demurrage.[8] Where the charter of each of two schooners chartered to the same party to carry cargoes between the same ports required the vessel to load and discharge in turn with other vessels of the charterer, one which was chartered first, loaded and sailed first, and first arrived at the place from which they required to be towed was entitled to be first discharged, although the other, by telephone, first gave notice of her arrival.[9] Where a charter party required the vessel to be discharged at a fixed rate after she was ready to unload, whether in berth or not, a provision that, in case of strikes, or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging, such time is not to count, does not exempt the charterer from liability for delay caused by the vessel waiting her turn.[10]

Unloading from Single Hatch.—For a delay in unloading not occasioned by any insufficiency of carts to receive the cargo, but by reason of the vessel delivering from but one hatch, when she might have used two, no demurrage is recoverable.[11]

Causes beyond Charterer's Control.—Delay in the discharge of vessels laden with coal, due to the arrival at the same port at about the same time of a large number of such vessels, each under a separate charter to the same party, was not the result of "causes or accidents beyond the charterer's control," within a provision of the charter parties exempting it from liability for demurrage in such case.[12] A delay of six days before commencing to discharge a cargo of iron ore, consigned to the charterer and which he had sold to a manufacturer, caused by the refusal of a railroad company because of a dispute with the manufacturer to furnish cars in which to unload the ore, was not chargeable to the charterer on the lay days, under a provision of the charter party excepting "all

5. **Delay in unloading.**—70 Fed. 268, affirmed in Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

6. **Reasonable rate of discharge.**—The James Baird, 90 Fed. 669.

7. **Customary dispatch.**—Hinckley *v.* Wilson Lumber Co., 205 Fed. 974.

Customary dispatch at the port of New York for discharging a cargo of railroad ties held to require that the vessel be given a berth within 24 hours after she reported, and be discharged thereafter at the rate of 50,000 feet, board measure, each working day. Crowley *v.* Hurd, 172 Fed. 498.

8. **Unloading in turn.**—Lehigh Valley Coal Co. *v.* Ionia Transp. Co., 174 Fed. 798, 98 C. C. A. 506.

9. Farrow *v.* American Agricultural Chemical Co., 194 Fed. 1018.

10. New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, affirmed in Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A., N. S., 126.

11. **Unloading from single hatch.**—Ewan *v.* Tredegar Co., 88 Fed. 703.

12. **Causes beyond charterer's control.**—Decree, New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, affirmed in Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A., N. S., 126.

causes beyond the control of the shipper, the consignee or the charterer which may prevent or delay the loading or discharging." [13]

Caused by Unforeseen Obstacles.—The charterer is not bound to discharge the vessel in the customary time, regardless of unforeseen obstacles and unusual circumstances.[14] But where the time for the discharge of a vessel is stipulated in the charter or bill of lading, or is definitely fixed by it, so that it can be calculated beforehand, the charterer thereby agrees to discharge her within that time, and he takes the risk of all unforeseen circumstances.[15]

Caused by Public Authorities.—Where a contract of shipment requires the canal boat to be brought to the dock of the consignee, and requires the payment of a certain sum per day as demurrage on the failure of the consignee to unload within three days, the removal of the boat from the consignee's dock within the three days by the public authorities, caused by the temporary closing of the canal, will prevent a recovery of demurrage for the time the boat is prevented from returning to the dock.[16] Where the discharge of a vessel was stopped during five hours for want of a customhouse permit, which had been mislaid by a customs officer, and the permit was procured by the charterer very soon after the discharge was stopped for want thereof, and it did not appear that the stevedore was ready to proceed when the permit arrived, the charterer was not liable for such delay.[17]

Caused by Sinking of Vessel.—A vessel is entitled to recover demurrage for delay beyond the lay days allowed by the contract for discharging caused by her sinking at the dock through the negligence of the consignees.[18]

Caused by Inability of Vessel to Reach Wharf.—A consignee of cargo can not be held liable for demurrage because of delay in discharging, due to the inability of the vessel to reach the dock designated for discharge, owing to obstruction by dredges engaged in improving the waterway, in the absence of a contract covering such situation, and where the obstruction was not known when the dock was designated.[19]

Caused by Unsafe Approach to Wharf.—Under a charter providing that the wharf for discharging shall be selected by the charterer, where the ship can always safely lie afloat at any time of tide, the charterer is liable for the vessel's loss of time and expense due to an unsafe approach to a discharging wharf selected by him.[20]

Caused by Temporary Derangement of Dock Machinery.—Where a charter party contains no express provision for demurrage, or fixing the lay days for loading and discharging, an implied obligation arises on the part of the consignee for reasonable dispatch in discharging, and demurrage is recoverable for delay beyond a reasonable time under the circumstances surrounding the case, and without the fault of the vessel; but the consignee is not an insurer against delay in the absence of a charter provision to that effect, and there is no liability for demurrage where delay occurs from circumstances beyond his control, and which could not have been anticipated, such as a temporary derangement of the dock machinery used for unloading, where there was no other dock available.[21]

13. Pool Shipping Co. *v.* Samuel, 192 Fed. 57.

14. **Caused by unforeseen obstacles.**—Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, affirming decree 70 Fed. 268.

15. Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, affirming decree 70 Fed. 268.

16. **Caused by public authorities.**—Gabler *v.* McChesney, 70 N. Y. S. 191, 60 App. Div. 583.

17. Two Thousand Tons of Coal, 135 Fed. 734, 68 C. C. A. 372.

18. **Caused by sinking of vessel.**—Carroll *v.* Holway, 158 Fed. 328.

19. **Caused by inability of vessel to reach wharf.**—Roney *v.* Chase, etc., Co., 160 Fed. 268, reversed in 161 Fed. 309.

20. **Caused by unsafe approach to wharf.**—Crisp *v.* United States, etc., Steamship Co., 124 Fed. 748.

21. **Caused by temporary derangement of dock machinery.**—Ionia Transp. Co. *v.* Two Thousand Ninety-Eight Tons of Coal, 128 Fed. 514, affirmed in 135 Fed. 317, 67 C. C. A. 671.

Caused by Master's Absence from Vessel.—The master or shipowner can not recover demurrage, under a charter party, for delay in discharging caused by the master's absence from the vessel, so that she could not be moved to another dock upon the purchaser of the cargo refusing to receive it on the ground that it was in bad condition.[22]

Caused by Inadequate Facilities.—The charterer of a barge can not be held liable for demurrage because of delay in unloading a quantity of coal from the barge's hold, after she arrived at the place of loading, owing to the inadequacy of the charterer's facilities, where the coal was taken on by the master under a contract made with a third party after the charter, and without consulting the charterer.[23]

Caused by Unloading into Cars.—A provision of a shipping contract, requiring the shipper to receive cargo as fast as it could be discharged by the ship, is to be reasonably construed, and, where the parties knew that cargo was to be transported by rail from the dock, the shipper had the right to discharge into cars, although it involved a somewhat longer time.[24]

Failure to Provide Wharf.—A vessel under charter has the right to expect the charterer to provide sufficient dock room to enable her cargo to be discharged promptly and continuously, in the absence of any extraordinary conditions, and the charterer is liable for demurrage where there is delay through his neglect to provide such dockage.[25]

Failure to Use Special Facilities.—Where, by the bill of lading, the cargo is to be delivered "free of handling" at the private dock of a consignee known to have special facilities for unloading, the vessel will be entitled to demurrage for unnecessary delay of the consignee in beginning the discharge, although the total time consumed, including the delay, is not longer than would have been occupied in discharging at a public dock of the same port with the inferior facilities there afforded.[26]

Failure to Furnish Lighter.—A charterer is liable for demurrage for the time a steamer is obliged to wait before she can get a berth where she can lie and discharge, under a provision of the charter party requiring the charterer to provide lighters, if necessary, and where she can discharge at once if a portion of her cargo is lightered.[27]

Failure to Settle Prior Claim for Demurrage.—Demurrage can not be recovered from a charterer for delay in discharging, due to the refusal of the owner to discharge without settlement of a prior claim for demurrage at the port of loading.[28]

Facilities at Different Wharf.—The claim of a boat owner for demurrage on account of delay in discharging disallowed, where it appeared that he could have secured quick discharge by moving to a different location in the same yard.[29]

Designation of Wharf.—A designation by a charterer of a berth for a vessel, on notice of its arrival in port, was given within a reasonable time when delivered within two or three hours from such notice of arrival.[30] Where a bill of lading for a cargo requires its delivery to the consignee "or assigns," the master knows that the wharf of discharge may not have been selected; and the

22. **Caused by master's absence from vessel.**—Whitman *v.* Vanderbilt, 75 Fed. 422, 21 C. C. A. 422.

23. **Caused by inadequate facilities.**—Donaldson *v.* Severn River Glass Sand Co., 138 Fed. 691; S. C., 138 Fed. 694.

24. **Caused by unloading into cars.**—Tweedie Trading Co. *v.* New York, etc., R. Co., 194 Fed. 281.

25. **Failure to provide wharf.**—Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169.

26. **Failure to use special facilities.**—Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466.

27. **Failure to furnish lighter.**—Steamship Rutherglen Co. *v.* Houlder, 196 Fed. 916.

28. **Failure to settle prior claim for demurrage.**—Hagan *v.* Cargo of Lumber, 163 Fed. 657.

29. **Facilities at different wharf.**—Murray *v.* Jump Co., 148 Fed. 123.

30. **Designation of wharf.**—The St. Bernard, 105 Fed. 994.

fact that the consignee sells the cargo before its arrival, and designates the wharf of the buyer as the place for its discharge, does not change the rule as to demurrage for delay in being provided a place to discharge.[31]

After Notice of Arrival.—Under a charter party providing for lay days to begin running at the port of loading on the day following the receipt of the captain's written notice of readiness, accompanied by a surveyor's certificate, but containing no provision as to notice at the port of discharge, the charterer's contention that it was not required to unload until the day following the receipt of notice of readiness, which could not be given on a holiday, was not sustainable.[32]

Necessity for Protest against Delay.—Protest by a master of a vessel detained on demurrage is, if ever, necessary only where the owner has cause of complaint, or is about to take some step which may prejudice the shipper.[33]

Refusal of Consignee to Accept Cargo.—A consignee of lumber, shipped to him under an executory contract to purchase, is not liable for demurrage, where the delay was due to his refusal to accept the lumber without an abatement of price, because it was not of the specified quality.[34] Where, though the consignee is not liable for demurrage under the bill of lading or charter party, he improperly refuses to take part of the cargo within a reasonable time after arrival, he thereby becomes liable for damages arising from the delay.[35] Where the consignor of cargo hires the vessel for its carriage, he is liable for demurrage on account of delay in discharging caused by the refusal of the consignee to receive the cargo, and can not require the vessel owner, without his consent, to look to a new consignee for any part of it.[36]

Under Cesser Clause.—The cesser clause of a charter party, saying "Charterers' responsibility to cease when vessel is loaded and bills of lading are signed," does not relieve the charterers from liability for demurrage under provisions of the charter requiring them to pay demurrage for any delay in delivery by their fault or that of their agent, and declaring that the vessel is to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, where the bills of lading, which do not mention demurrage or refer to any other provisions of the charter than those concerning freight and average, have been assigned, and the delay in unloading is made by the assignees of the bills of lading, who thereby became consignees of the cargo, since the rights of the shipowners against those consignees depend altogether upon the contract created by the bills of lading, except so far as that contract refers to the charter party.[37]

Sundays and Holidays.—In a provision of a bill of lading which entitles the ship to discharge "continuously," the word must be construed to mean continuously during working days, and "working days" exclude Sundays and holidays usually observed, and include only the usual working hours of days on which usual work is only prevented by weather.[38]

Demurrage in Nature of Penalty.—A clause of a charter party or bill of lading providing that, after arrival and notice to the consignee, the vessel shall have precedence in discharging over all vessels arriving or giving notice after

31. The Viola, 90 Fed. 750.

32. **After notice of arrival.**—Holman *v.* Gans Steamship Line, 186 Fed. 96, 108 C. C. A. 208. See Perry *v.* Spreckles' Sugar-Refin. Co., 110 Fed. 777.

No particular form is required for a notice to a consignee of the arrival of a vessel to be discharged by him, but it is sufficient if he actually receives such notice from a third person, and a notice given on Sunday is also sufficient. Carroll *v.* Holway, 158 Fed. 328.

33. **Necessity for protest against delay.**—Brown *v.* Ralston, 36 Va. (9 Leigh) 532.

34. **Refusal of consignee to accept cargo.**—Conkling *v.* Brooklyn Lumber Co., 41 N. Y. S. 801, 10 App. Div. 404, 75 N. Y. St. Rep. 1200.

35. Graham *v.* Planters' Compress Co., 129 Fed. 253.

36. Sheridan *v.* Penn Collieries Co., 128 Fed. 204.

37. **Under cesser clause.**—Decree, Burrill *v.* Crossman, 91 Fed. 543, 33 C. C. A. 663, reversed in 21 S. Ct. 38, 179 U. S. 100, 45 L. Ed. 106.

38. **Sundays and holidays.**—Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 156 Fed. 88.

her arrival, and stipulating for special demurrage in case of a violation of such provision, is in the nature of one for a penalty, which should not be imposed unless the case comes clearly within the purpose which it intended to accomplish; and where the original consignee of the cargo, to whom notice of arrival was given, refused to receive it, and the master was instructed by the shipper to deliver to another, the latter became from that time the consignee, for the purposes of such clause, and the special demurrage is not recoverable because precedence in discharging was given to another vessel, through the action of the original consignee, after its refusal to accept the cargo.[39]

Damages in Nature of Demurrage.—A consignee and owner of a cargo is liable to the owner of the vessel for damages in the nature of demurrage for unreasonable delay in discharging the cargo after arrival, though the bill of lading contains no stipulation as to demurrage and prescribes no time within which the cargo shall be discharged.[40]

Delay after Unloading.—A contract of shipment, making the consignee liable for demurrage in a certain sum per day for failure to unload a canal boat in a given time, does not authorize a recovery for the time after the boat was unloaded in which it was detained in the canal, though the vessel was not unloaded within the period allowed therefor, and the break in the canal did not occur until the expiration of such time.[41]

§ 4368. Effect of Custom and Usage.—Known to Charterer.—Where a charter party provided that a certain number of working days should be allowed for loading the vessel in the port, and that the custom of each port was to be observed in all cases, and the vessel was delayed more than the days allowed owing to the members of labor organizations refusing to work on days generally recognized as working days, a contention that, the practice of such labor organizations being known to the shipowners, the delay should be excused, under the clause relative to customs of ports, is without merit, since the custom of labor organizations in the port, and their manner of refusing to work, being known to the charterer of a ship, if he wished to protect himself from the results of their refusal to work on days generally regarded as working days he should so provide in his charter party.[42]

As to Assigning Vessel to Particular Dock.—Where there is no provision in the bill of lading on the subject, the consignee has, under the custom of most or all of the Atlantic ports, the privilege of determining at which of its docks the vessel should discharge, and her right to her turn was limited to such dock. This privilege, however, is not absolute; and whether the assigning her to a particular dock, where she was delayed awaiting her turn, while other vessels arriving after her were discharging at the consignee's other docks, renders the consignee liable to demurrage, depends on whether such assignment was just and reasonable, and based on some reasonable necessity.[43]

39. **Demurrage in nature of penalty.**—Continental Coal Co. *v.* Bowne, 115 Fed. 945, 53 C. C. A. 427.

40. **Damages in nature of demurrage.**—Washburn *v.* Empire Brick, etc., Co., 137 N. Y. S. 489, 152 App. Div. 563.

The vendee of the consignee of a cargo is liable to the owner of the vessel for damages resulting from unreasonable delay by the vendee in unloading. Washburn *v.* Empire Brick, etc., Co., 137 N. Y. S. 489, 152 App. Div. 563.

Where a contract of affreightment required a vessel only to deliver the cargo at the port of New York, although it contained no specific provision for demurrage, she is entitled to recover damages in the nature of demurrage for delay resulting from her being ordered by the cargo owner to discharge at a berth, which she could not then reach, because of dredging work being done by the government. Decree 160 Fed. 268, reversed in Roney *v.* Chase, etc., Co., 161 Fed. 309.

41. **Delay after unloading.**—Gabler *v.* McChesney, 70 N. Y. S. 195, 60 App. Div. 590.

42. **Effect of custom and usage.**—Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1.

43. **As to assigning vessel to particular dock.**—Evans *v.* Blair, 114 Fed. 616, 52 C. C. A. 396.

As to Rate of Discharging.—A custom of a port as to the rate of discharging a certain kind of lumber from a vessel, to govern the rights of parties under a contract otherwise indeterminate, must not only be established and reasonable, but also certain and definite.[44]

As to Preference in Discharging.—A provision of a charter that the vessel should be loaded by a coal company "in turn" must be strictly construed, and it shuts out a practice of the company to give preference to its own vessels, or to sell coal to local customers from the supply which would otherwise have been available for loading at its docks, to the delay of the chartered vessel.[45]

As to Discharging in Turn.—A custom of a port for vessels to discharge in turn and that a vessel is not entitled to demurrage during the days she is awaiting her turn is reasonable and enforceable.[46]

Contract Prevails over Usage.—An agreement of an owner in a charter party to load cargo according to custom of port is not governed by the custom of port as to time of loading, where the charter party allows a specified number of running lay days, Sundays, and holidays, even if used, excluded, for loading.[47] A custom existing in San Francisco between shippers and shipowners, requiring a consignee to designate a berth for the discharge of cargo, can not prevail over the terms of contracts requiring the delivery of certain quantities of coal respectively "at the wharf" and "on wharf as customary," to the Quartermaster's Department of the United States Army at Honolulu, at which place the custom is to discharge freight upon the wharves, so as to render the government liable for the delay in reaching a berth, which was caused by the conditions existing in Honolulu Harbor to the ships chartered by the vendor to carry out his contract.[48]

44. As to rate of discharging.—Such a custom can not be found on testimony that the rate is "from 17,000 to 20,000" feet per day, or "from 25,000 to 30,000" feet. Such testimony can only establish the usual or average time for unloading, and is valuable only as showing the limits, under ordinary circumstances, of a reasonable rate of discharging lumber of that kind at such port, and does not obviate the necessity of considering the particular circumstances of each case. The James Baird, 90 Fed. 669.

45. As to preference in discharging.—Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178. See In re Cargo of 3,408 Tons of Pocahontas Coal, 175 Fed. 548.

In a charter of a vessel to carry railroad ties a provision that from the time the vessel is reported ready not less than 1,500 ties shall be furnished per running day "for loading at port of loading, and prompt dispatch for discharging at port of discharge," entitles the ship to demurrage for delay in unloading caused by other vessels being previously at the consignee's dock, though, by the custom of the port, vessels are obliged to take their turn. Ten Thousand & Eighty-Two Oak Ties, 87 Fed. 935.

46. As to discharging in turn.—The consignee of a cargo of lumber who had a wharf in connection with his lumber yard had the right to require the vessel to discharge at such wharf without liability for demurrage because of delay in awaiting her turn, where the charter party provided for "customary dispatch" in discharging and the custom of the port required her to wait her turn without demurrage. Gilbert Transp. Co. *v.* Borden, 170 Fed. 706, 96 C. C. A. 26.

While, in the absence of qualifying circumstances, it is usual and customary at the port of Boston for a consignee to have a berth provided at which a vessel may discharge her cargo within 24 hours after her arrival, by the custom of the port the presence at the designated wharf of other vessels, which arrived earlier, is considered such qualifying circumstance, and in such case vessels are required to wait their turn to discharge without demurrage for the delay so caused. Held, that such custom was a reasonable one within reasonable limits, and under ordinary circumstances, and that a vessel loaded with lumber was not entitled to demurrage because of a delay of 15 days, caused by so waiting her turn to discharge, it not appearing that the wharf was too small for the ordinary business of the owner, nor that he willfully or negligently permitted a large number of vessels to collect for discharging at the same time. The Viola, 90 Fed. 750.

47. Contract prevails over usage.—Holman *v.* Gans Steamship Line, 186 Fed. 96, 108 C. C. A. 208.

48. Judgment, Moore & Co. *v.* United States (U. S.), 38 Ct. Cl. 590, reversed in 25 S. Ct. 202, 196 U. S. 157, 49 L. Ed. 428

§ 4369. Demand for Demurrage.—A provision of a charter party that the charterer shall pay demurrage "day by day" for detention of the vessel through his default does not require the owner to demand demurrage at the end of each day.[49]

§ 4370. Rate and Amount.—Special Provision of Charter Party.—A special provision of a charter party that the freight on the dressed lumber shipped should be subject to a deduction of one-fifth can not extend to the construction of maritime rules relating to demurrage, so as to entitle the consignee to a deduction in measurement for dressed lumber in computing the demurrage due, except on clear evidence that it was so intended.[50]

Agreed Rate for Other Days.—A rate of demurrage agreed upon in a charter party for a certain number of demurrage days will be adopted by the court as the measure of damages for further detention of the ship in the absence of other evidence, but it is open to either party to show that it is not the true measure.[51]

Agreed Rate for Other Vessels.—Where there is an agreed rate of demurrage for a class of vessels to which an injured vessel belongs, it may be taken as the basis for computing the damages recoverable for the delay while she was being repaired.[52]

Bill of Lading Different from Original Contract.—Where libelant contracted to transport coal for respondent consignee, who was the owner, under a verbal agreement as to the terms of freight, and that the demurrage rate should be a certain amount per day, and libelant did not call respondent's attention to the fact that the shipper had inserted in the bill of lading a provision for demurrage at a certain rate a ton of cargo for each day's detention, until after the coal had been delivered, and respondent did not discover such change until delivery had been completed, the shipper having no authority to make a new contract for respondent, the latter was liable for the demurrage only at the rate specified in the original contract.[53]

Rules of Maritime Association of Port.—Under a charter fixing the rate of demurrage to be paid by the charterer at "customary" dollars per day, the rate recoverable for delay in discharging in New York is not governed by the rules of the maritime association of the port, in the absence of proof that the rate thereby fixed is the customary rate.[54]

Earnings of Vessel.—The measure of damages for detention of a vessel, in loading or unloading, beyond the time stipulated in her charter, is the probable net earnings of such vessel during the period of her detention, and an inquiry into a subsequent period is inadmissible.[55] Where no rate of demurrage is fixed by the bill of lading, the amount may be computed by dividing the gross freight earned on the voyage by the number of days it should have taken, and multiplying the quotient by the number of days she was delayed, making proper additions or deductions for any difference in her expenses during the time of such delay.[56]

49. **Demand for demurrage.**—Washington Marine Co. *v.* Rainier Mill, etc., Co., 198 Fed. 142.

50. **Rate and amount.**—Bowen *v.* Sizer, 93 Fed. 227.

51. **Agreed rate for other days.**—Dewar *v.* Mowinckel, 179 Fed. 355, 102 C. C. A. 539.

52. **Agreed rate for other vessels.**—Thompson *v.* Winslow, 130 Fed. 1001, affirmed in 134 Fed. 546, 67 C. C. A. 470.

53. **Bill of lading different from original contract.**—Decree 125 Fed. 432, affirmed in Burns *v.* Burns, 131 Fed. 238, 65 C. C. A. 224.

54. **Rules of maritime association of port.**—Randolph *v.* Wiley, 118 Fed. 77.

55. **Earnings of vessel.**—Huron Barge Co. *v.* Turney, 79 Fed. 109.

In the absence of contract, the charter price per day of a vessel under a time charter is not the measure of demurrage recoverable for delay in discharging cargo taken by the charterer for another, but rather the probable net earnings of the vessel during the time lost in the usual course of its employment. United States Shipping Co. *v.* United States, 146 Fed. 914.

56. Tweedie Trading Co. *v.* Strong, etc.,

Delay Proximate Cause of Damage.—Where it does not appear that the fouling of a vessel's bottom was caused by the harbor in which she was detained, the owners can not recover for it in addition to demurrage.[57]

Remote and Speculative Damages.—To lose an opportunity to carry a cargo for other persons is remote and speculative, and not direct, damages in a case of a vessel's detention.[58]

Discharging in Turn.—Where other vessels were given precedence in discharging over such schooners in violation of their bills of lading, they were entitled to be compensated in demurrage only at the rate provided in the contract, regardless of the number of the vessels so given precedence which were discharging at the same time.[59]

Power of Master to Settle.—Where a charter party provides a liability for demurrage for delay in unloading at a foreign port, which is within easy cable communication with the owner, the master can not settle the claim for such demurrage for less than the sum due.[60]

Acceptance of Demurrage under Protest.—The acceptance by a master of demurrage under protest leaves the settlement of the amount rightfully due an open question, and the owner is entitled to urge his claim in accordance with his own views, without regard to the grounds of the master's protest.[61]

§ 4371. Lay Days.—Vessel at Wharf.—Where a contract of carriage requires a vessel to discharge her cargo at a specified wharf, lay days for discharging do not commence to run until she obtains a berth at such wharf, unless wrongfully prevented by the shipper.[62] Under a bill of lading requiring a vessel to deliver a cargo of coal at a specified dock, the voyage is not completed, and

Co., 195 Fed. 929, reversing decree 157 Fed. 304.

Where a vessel, after she was loaded and ready to sail, with full crew on board, was detained through the fault of the subcharterer, who was not bound by the stipulations of the original charter as to rate of demurrage, and there is no evidence as to her future employment or ability to obtain it, but her gross yearly earnings are shown, such earnings will be considered, together with the demurrage stipulated for in her charter, in fixing the amount of damages recoverable for the delay. Keyser & Co. *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 664.

57. Delay proximate cause of damage.—Maday *v.* United States (U. S.), 43 Ct. Cl. 90.

58. Remote and speculative damages.—Maday *v.* United States (U. S.), 43 Ct. Cl. 90.

59. Discharging in turn.—Ross *v.* Cargo of 3,408 Tons of Pocahontas Coal, 165 Fed. 722.

60. Power of master to settle.—Randall *v.* Brodhead, 70 N. Y. S. 43, 60 App. Div. 567.

61. Acceptance of demurrage under protest.—Holland *v.* Gulf Steamshipping Co. *v.* Hagar, 124 Fed. 460.

62. Lay days.—Tweedie Trading Co. *v.* Barry, 205 Fed. 721, 124 C. C. A. 15, reversing decree 194 Fed. 286.

Where a contract of carriage requires the vessel to discharge her cargo at a specified wharf, lay days for discharging do not commence to run until she obtains a berth at such wharf. Tweedie Trading Co. *v.* Barry, 194 Fed. 286.

A schooner was chartered to carry a cargo of sulphur from Sabine Pass, Tex. The charter provided that lay days for loading should commence "from the time the vessel is ready to receive * * * cargo and notice thereof is given. * * * Vessel to take turn in loading * * * if required." The latter clause was written in, while the former was in the printed form. Such provisions were expressly called to the attention of the owner's agents, who also knew that the charterer was chartering other vessels, and that it had been one loading berth at Sabins Pass. When the schooner arrived for loading and gave notice of her arrival, there were other vessels ahead of her, and she was obliged to wait her turn. Held, that her lay days did not commence until she received her berth; there being no unnecessary delay. Union Sulphur Co. *v.* Percy, 180 Fed. 1, 103 C. C. A. 355, reversing decree 173 Fed. 534.

Under a charter party requiring the charterer to discharge the vessel at New York with "customary dispatch" the lay days for discharging began to run when the vessel reached the berth designated by the charterer, although she was obliged to wait her turn to enter, there being no proof of any custom of the port to require her to wait her turn or that the charterer should be allowed any particular time in case the berth was full. Swan *v.* Wiley, etc., Co., 161 Fed. 905.

the lay days for discharging do not commence to run, until she reaches such dock and is in condition to discharge, unless she is prevented from reaching it through the active fault of the charterer or consignee.[63]

Ready to Load or Discharge.—Where a charter required the ship to receive cargo "from the charterer's shippers," and provided that lay days should not commence until she was "in every respect ready to load or discharge," such days for loading do not commence to count until she is not only ready to load, but is at the berth where the shipper's cargo is lying, where she is delayed in reaching such berth by the rules of the port, and without fault of the charterer.[64]

Upon Entry at Custom House.—A provision in a charter, "Lay days not to commence to count until 12 o'clock noon after the steamer is entered at the custom house and in every respect ready to load," though negative in form, is positive in effect, and means that the lay days shall commence to count at that time; and where, by a further clause, the ship was required to load "when, where, and as directed" by the charterer, and she was ready on her part, and her master had given the required notice, the lay days commenced to count from the succeeding noon, and the responsibility for a further delay in commencing to load rests upon the charterer, although caused by a custom of the port which compelled her to await her turn to get to the berth assigned her.[65]

Delivery at Different Ports.—Where two bills of lading were given requiring delivery of part of a cargo at different ports, they constitute independent contracts, and hence the consignee was entitled, under maritime rule 4, to one full calendar day after the vessel's arrival at the most distant port to furnish a berth for discharge before being liable for demurrage.[66]

Necessity for Notice.—A notice of readiness to load or discharge required by a charter party to start the running of the lay days is unnecessary and may be considered waived, where the charterer was ready and the work was commenced at once.[67]

Ready to Load or Unload.—Under a provision of a charter party that lay days for loading should commence on notice of readiness by the master, to render such notice effective to start the lay days to running the vessel must have been at her wharf, ready to load, when it was given.[68]

63. Decree Ionia Transp. Co. *v.* Two Thousand Ninety-Eight Tons of Coal, 128 Fed. 514, affirmed in 135 Fed. 317, 67 C. C. A. 671.

Wharf owned by charterer.—A schooner was under charter providing that her lay days for loading should commence "from the time the vessel is ready to receive * * * cargo and notice thereof is given. * * * Vessel to take turn in loading * * * if required." She arrived in the loading port and gave notice of her readiness to receive cargo. The only berth fitted to load her cargo was owned and controlled by the charterer, and she was required to await her turn, which involved a delay of several days. Held, that her lay days commenced from the time she arrived and gave notice. Percy *v.* Union Sulphur Co., 173 Fed. 534.

64. Ready to load or discharge.—Bacon *v.* Ennis, 110 Fed. 404, decree reversed in Carbon Slate Co. *v.* Ennis, 114 Fed. 260, 52 C. C. A. 146.

65. Upon entry at custom house.—Decree Bacon *v.* Ennis, 110 Fed. 404, reversed in Carbon State Co. *v.* Ennis, 114 Fed. 260, 52 C. C. A. 146.

66. Delivery at different ports.—Bowen *v.* Sizer, 93 Fed. 227.

67. Necessity for notice.—Washington Marine Co. *v.* Rainier Mill, etc., Co., 198 Fed. 142.

68. Ready to load or unload.—Dantzler Lumber Co. *v.* Churchill, 136 Fed. 560, 69 C. C. A. 270.

A charter party fixed the demurrage for each days detention of the vessel "by the default" of the charterers or their consignees. It made no provision for "dispatch" or "quick dispatch" in loading or discharging the cargo, but fixed the minimum amount to be loaded or discharged each day, and provided that the lay days should commence "from the time the captain reports himself ready to receive or discharge cargo." Held, that under the later provision the lay days did not commence until the vessel was ready and in position to receive or discharge cargo, and that the contract did not bind the charterers for demurrage for a delay of the vessel in obtaining a wharf at which to discharge, notwithstanding a notice of readiness to discharge from the captain, where, as the owners knew or should have known, all the wharves at the port of destination were public, and under the exclusive control of a harbor master, who directed the movements and position of

Same—Whether in Berth or Not.—A provision of a charter party that lay days for unloading shall commence "when steamer is ready to unload and written notice given, whether in berth or not," must be given effect; and delay in waiting for a berth is chargeable against the charterer, although the lay days do not commence merely by notice given of the steamer's arrival in port, but only when she is actually ready to unload, so far as she can be made so by those in charge.[69]

Sundays and Holidays.—Where a Sunday intervenes between the expiration of the lay days for discharging a vessel and the time when the discharge is completed, it is to be counted as a day of detention.[70] The object of providing in a charter party for one clear day after notice of the readiness of the vessel to receive cargo before the lay days shall commence is to allow the charterer such time for preparation, and, unless made so by the terms of the charter or custom of the port, Sunday is not to be counted as such a day, and, where notice of readiness is given on Saturday, the lay days do not commence until Tuesday.[71] Under a charter party stipulating that lay days shall count according to the custom of port, and that twenty running days, Sundays and holidays excepted, shall be allowed for loading and discharging, the holiday time, as fixed by the statute of port of loading, making Saturday afternoon a holiday, will not be included in the running days.[72] A charter party providing for the allowance of a designated number of running days, Sundays and holidays excepted, for loading and discharging, is not affected by a statute of the country of the port

all vessels thereat, and by the rules of the port each vessel was required to wait her turn. Flood *v.* Crowell, 92 Fed. 402, 34 C. C. A. 415.

69. Whether in berth or not.—New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, affirmed in Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A., N. S., 126.

While under the modern rule, which gives the charterer of a vessel for the carriage of coal, ore, grain, or other like commodities, for which special facilities for loading and discharging are in general use, the option to select the berth at which the vessel shall load or discharge within reasonable limitations, and which subjects her to the necessary delay in awaiting her return without demurrage, the customary charter provisions that lay days shall commence when the vessel is "ready to unload and discharge" and "written notice is given" have no effect, except from the time the vessel reaches the precise berth where she is ordered; but a provision in a coal charter that the time for discharging should commence when the vessel was ready to unload and written notice given, "whether in berth or not," was evidently intended to relieve the vessel from the burden of such rule, and the clause must be given effect in accordance with its plainly expressed meaning, and the lay days for discharging commenced when the vessel gave notice that she was ready to unload and was ready, whether at her designated berth or not. Decree, New Ruperra Steamship Co. *v.* 2,000 Tons of Coal, 124 Fed. 937, affirmed in Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A., N. S., 126.

70. Sundays and holidays.—Washington Marine Co. *v.* Rainier Mill, etc., Co., 198 Fed. 142.

71. The Assyria, 98 Fed. 316, 39 C. C. A. 97.

72. Holidays.—A charter party provided for loading or discharging according to custom of port, and allowed 20 running days, Sundays and holidays excepted, for loading and discharging. A statement of the lay days used in loading was submitted to the master by the charter, which concluded with the words, "November 14, steamer cleared; does not count according to custom of port." The master signed the statement, adding, "Written under protest, on account of Saturday being counted a half day." He testified that all he knew about the custom as to clearance day was derived from the agents of the charterer. Held, that the failure to protest as to the date of clearance did not conclude the owner's contract rights. Holman *v.* Gans Steamship Line, 186 Fed. 96, 108 C. C. A. 208.

A provision of a charter party that "holidays" should not be counted as lay days for loading must be construed in accordance with the presumed intention of the parties to exclude only such days as were holidays in the usual and ordinary sense, which were customarily observed by a cessation of work, and did not entitle the charterers to exclude a series of holidays subsequently appointed by the Governor on account of a financial panic for the sole purpose of deferring the maturity of financial obligations, and which were not observed, nor intended to be observed, by a cessation of labor or traffic. Kerr *v.* Schwaner, 177 Fed. 659, 101 C. C. A. 285.

of discharge, which provides that lay days begin to run from second weekday morning after notice has been given on a Sunday or holiday.[73]

Rainy Days.—A provision of a charter party for the carriage of a cargo of wheat to be loaded at Portland, Or., that "rainy days" should not be counted as lay days for loading, is presumed to have been made with reference to the established rule of that port and excludes only days on which, on account of rain and with reference to the facilities of the port in the way of covered docks, etc., for the protection of vessels while loading, cargo could not be safely and conveniently loaded.[74]

Strikes of Employees.—Where a charter provided that a certain number of working days should be allowed for loading the vessel, detention caused by strikes or "estoppage of labor" not included, days on which those loading the vessel refused to work owing to storms, and days when the labor organizations withdrew their members to attend a funeral and for the celebration of Labor Day, should not be excepted from the days allowed for loading; all days save Sundays and legal holidays being working days, and there having been no forced stoppage, within the meaning of the charter party.[75]

Days Allowed for Loading.—Where a charter provided that a vessel should proceed to Pensacola and there load, the cargo to be delivered alongside, and that 14 working days should be allowed the charterer for loading the vessel, a contention that under the terms of the charter party the duty of the charterer was ended when the cargo was delivered alongside, and that all delays in loading and stowing the cargo were at the risk of the shipowner, was without merit.[76]

Days Lost in Putting Up Gear of Vessel.—Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being, under the terms of the charter party, a part of the charterer's duty, should be included in the lay days.[77]

Time Designated by Charterer.—Where respondent, the owner of a cargo of coal to arrive, contracted with libelant to receive the same alongside and transport it to another port, and also notified libelant to have his barges ready on a certain date when the cargo was expected, libelant was entitled to compute lay days from that date, and to demurrage for the excess after the lay days expired before the cargo arrived and his barges were loaded.[78]

Delay Caused by Negligence of Charterer.—Where charterers neglected to advise their agents at the port of destination of their agreement to attend to the entering of the ship at the custom house upon her arrival, by reason of which such agents refused to act, and a delay of three days was caused in having the ship entered, the owners were entitled to include such days in the lay days allowed by the charter for discharging.[79] Under a charter of a vessel to carry a cargo of wheat to be loaded by the charterers within a time specified, which contained a provision that lay days for loading should not be counted during any time the bringing of the cargo to the port of loading was delayed by railroad accidents, or any other hindrance beyond the charterer's control, where the charterers loaded only with a particular grade of wheat which they had with other grades stored on lines of a railroad company, they were not entitled to the benefit of such provision, on the ground that the company did not furnish sufficient cars to bring in that particular wheat within the time fixed by the charter, when their notice to the company was only to furnish cars generally,

73. Holman *v.* Gans Steamship Line, 108 C. C. A. 208, 186 Fed. 96.

74. **Rainy days.**—Kerr *v.* Schwaner, 101 C. C. A. 285, 177 Fed. 659.

75. **Strikes of employees.**—Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1.

76. **Days allowed for loading.**—Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1.

77. **Days lost in putting up gear of vessel.**—Wood *v.* Keyser, 84 Fed. 688, decree affirmed in 87 Fed. 1007, 31 C. C. A. 358.

78. **Time designated by charterer.**—Guinan *v.* Weaver Coal, etc., Co., 128 Fed. 203.

79. **Delay caused by negligence of charterer.**—Hagar *v.* Elmslie, 107 Fed. 511, 46 C. C. A. 446.

and it did furnish sufficient to bring in double the quantity required, but in part of different grades, which the charterers loaded on other vessels.[80]

Where Charterer Fails to Designate Place of Discharge.—Where by the terms of a charter party the charterer is to name the berth for discharging, he should be ready to receive the cargo when the vessel is ready to deliver, even if she can not do so, either because he has not named the berth, or because he has named a berth to which she can not get, or to which she is prevented from getting through no fault of hers.[81] Where the consignee of a ship's cargo is given the right by the charter party to designate the place of discharge at the port of delivery, either at a safe wharf or alongside, it is his duty to exercise such right within a reasonable time after notice of the arrival of the vessel at the port, and his failure to do so is a waiver of the right, and entitles the ship to consider her voyage at an end, and give notice of her readiness to discharge, which will start her lay days to running.[82]

§ 4372. Indemnity.—If the master, after beginning to unload, intends to discontinue until security is given for demurrage, he should give such timely notice thereof as will enable the charters to furnish the required security without delaying the progress of the work, or adopt a means by which prompt discharge can be made and the lien of the vessel retained.[83]

§ 4373. Waiver and Release of Demurrage.—Where a charter expressly provides the lay days for loading and discharging, and fixes the amount of demurrage to be paid for overtime consumed by the charterer, the owner can not be held to have waived such provision, except upon clear evidence.[84] An agreement between a master and a charterer that the latter shall mail a check to the master for the freight earned at once on being advised that the discharge of cargo has been completed to another port to which the vessel was to proceed is a waiver of strict performance of a provision of the charter party making the freight due at once on discharge, and where the check was so mailed on the day the discharge was completed, and was received and collected by the master, he can not claim demurrage for the time between the discharge and payment, nor can he maintain a libel against the cargo for the freight, filed in the meantime.[85]

Failure to Protest against Delay.—Where a shipper bound himself to unload in twenty days after notice of the arrival of the vessel and to pay demurrage, and the master gave notice of the vessel's arrival and his readiness to deliver, the failure to protest against the shipper's delay was not evidence of an assent to the delay; no protest under the agreement being necessary.[86]

A receipt in full for all claims under a charter executed by a master at the port of discharge on payment to him of only the freight due does not release the charterers from a claim for demurrage which was also made at the time by the

80. Kerr *v.* Schwaner, 101 C. C. A. 285, 177 Fed. 659.

81. **Where charterer fails to designate place of discharge.**—The Edward T. Stotesbury, 187 Fed. 111, 109 C. C. A. 31, reversing decree Eaton *v.* Cargo of Lumber, 180 Fed. 513.

Where a charter party required delivery of the cargo of lumber at the port of New York, and provided that the lay days for discharging were to begin when "captain reports his vessel ready to discharge cargo in New York Harbor," he may give the notice when ready in such harbor, notwithstanding a further provision that the charterer shall pay towage from mouth of Newtown creek and return, which does not bind the charterer to have her discharge at a berth in such creek, but merely gives him the option to do so. The Edward T. Stotesbury, 187 Fed. 111, 109 C. C. A. 31.

82. Dewar *v.* Mowinckel, 179 Fed. 355, 102 C. C. A. 539.

83. **Indemnity.**—Ten Thousand & Eighty-Two Oak Ties, 87 Fed. 935.

84. **Waiver and release of demurrage.**—Henningsen *v.* Watkins, 110 Fed. 574.

85. The Cargo, 122 Fed. 881.

86. **Failure to protest against delay.**—Brown *v.* Ralston, 25 Va. (4 Rand.) 504.

master, and rejected, where the master was compelled to give such receipt in order to collect the freight, and did so under protest.[87]

The delivery of cargo and collection of freight money is not a waiver of a claim for demurrage.[88]

§ 4374. Lien.—The vessel has a lien on the cargo for demurrage, enforceable in admiralty.[89]

Cargo Damaged.—The right of a vessel carrying cargo "free of handling" to a lien for demurrage for delay of the consignee in beginning to discharge is not affected by the fact that the delay arose from the refusal of the consignee to receive the cargo because damaged in transit by an excepted peril, and the fact that during the delay the consignee was negotiating with the owner to purchase the damaged cargo at a reduced price.[90]

Effect of Delivery of Cargo.—When cargo has been absolutely delivered to the consignee before service of process thereon, the lien for demurrage is lost.[91] Discharging cargo after giving notice of a claim for demurrage is not a waiver of the lien, where such cargo is placed on the dock, and kept separate from other goods, so as to be capable of identification.[92]

§§ 4375-4378. Actions—§ 4375. Libel.—A claim in a libel for demurrage should be specific, stating the number of days and the dates for which the demurrage is claimed.[93] A libel for demurrage, which alleges merely that the goods were consigned to respondent and received by libelant for delivery to him, does not state a cause of action, the rule being that a mere consignee, who is not the shipper or carrier of the goods, nor interested therein, is not ordinarily liable for demurrage.[94]

A libel which alleges that libelant hired a lighter to persons engaged in furnishing a cargo of lumber to be loaded on a vessel, and that the lighter was detained by the master of the vessel, not on account of the hirers, but for the benefit of the vessel, for fourteen days after the expiration of the time allowed by the custom of the port for unloading it, but which contains no averment as to whose duty it was to unload it, and avers no contract with the vessel or her master, is insufficient to state a cause of action in rem against the vessel for the demurrage.[95]

§ 4376. Defenses.—A provision of a charter allowing the charterer a certain number of lay days for loading and discharging, and requiring the payment of demurrage for any additional time taken, is an absolute and unconditional engagement on the part of the charterer, who can not be relieved therefrom except on the ground that the delay was due to the fault or negligence of the owner, or those for whom he is responsible; and such fault or negligence is an affirmative defense in a suit to recover the stipulated demurrage, the burden of pleading and proving which rests upon the charterer.[96] Under a contract for

87. Durchman *v.* Dunn, 101 Fed. 606.

88. Judgment, Elphicke *v.* Iroquois Furnace Co., 102 Ill. App. 138, affirmed in 65 N. E. 784, 200 Ill. 411.

89. **Lien.**—Warehouse, etc., Supply Co. *v.* Galvin, 71 N. W. 804, 96 Wis. 523.

Where, by a contract for the purchase of coal, it was to be shipped by the sellers from England, and delivered to the purchaser at New York, the sellers were authorized to contract for the carriage of the coal either as owners from whom the title had not passed or as agents for the purchaser, and by such contracts to subject the coal to a lien for demurrage. Taylor *v.* Fall River Ironworks, 124 Fed. 826.

90. **Cargo damaged.**—Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466.

91. **Effect of delivery of cargo.**—Two Hundred & Sixteen Loads & Six Hundred & Seventy-Eight Barrels of Fertilizer, 88 Fed. 984.

92. Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466.

93. **Actions.**—The Cargo, 122 Fed. 881.

94. Merritt, etc., Wrecking Co. *v.* Vogeman, 127 Fed. 770.

95. Dunwody *v.* The Campbell, 106 Fed. 542, 45 C. C. A. 464.

96. **Defenses.**—Hagar *v.* Elmslie, 107 Fed. 511, 46 C. C. A. 446.

the carriage of a number of cargoes of coke between certain ports by two vessels, which provided that the vessels should be kept a regular period apart as much as possible, where the vessels were accepted and loaded when tendered, and the freight was paid, without any protest or objection, although they were not kept a regular period apart, and no damage is shown to have resulted, the shipper can not set up such breach of the contract in defense to an action for demurrage.[97]

Smaller Claim Presented.—Complainant, on a libel for demurrage, is not precluded from proving the exact loading and discharging times by having previously presented a bill for a smaller amount.[98]

Breach of Charter Party.—Where two vessels, chartered to carry a number of cargoes of coke between two ports, were accepted and loaded under the charter when tendered, and the freight was paid without objection, the charterer can not set up a claimed breach of the charter in failing to keep the vessels at regular intervals apart as a defense to an action for demurrage for delay in loading where such alleged breach did not cause or contribute to the delay or otherwise cause damage to the charterer.[99]

§ 4377. Presumptions and Burden of Proof.—In the absence of proof to the contrary, it will be assumed that the rate of demurrage charged by a carrier of an interstate shipment is in accord with that established by law.[1]

Burden of Proof.—The burden is on him who seeks to recover damages for the failure to discharge a vessel in the customary time to prove that the charterer did not exercise reasonable diligence to discharge her under the actual circumstances of the particular case.[2] But proof that the vessel was delayed in unloading beyond the customary time for discharging such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his diligence thereunder.[3]

§ 4378. Limitations and Laches.—Time does not begin to run against a suit for demurrage for delay in discharging until the lay days allowed have

97. Atlantic, etc., Steamship Co. *v.* Guggenheim, 123 Fed. 330, decree affirmed in 147 Fed. 103, 77 C. C. A. 329.

98. Smaller claim presented.—Eikrem *v.* New England Briquette Coal Co., 125 Fed. 987.

99. Breach of charter party.—Decree 123 Fed. 330, affirmed in Atlantic, etc., Steamship Co. *v.* Guggenheim, 147 Fed. 103, 77 C. C. A. 329.

1. Presumptions and burden of proof.—Barker-Bond Lumber Co. *v.* Pennsylvania R. Co., 131 N. Y. S. 624, 74 Misc. Rep. 63.

2. Burden of proof.—70 Fed. 268, affirmed in Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

In the absence of any provision on the subject in the bill of lading, a consignee is under the duty of receiving the cargo as discharged within a reasonable time, but to entitle the owner to demurrage he has the burden of proving that there was unreasonable delay. Tweedie Trading Co. *v.* Barry, 205 Fed. 721, 124 C. C. A. 15, reversing decree 194 Fed. 286.

In the absence of a charter provision on the subject, to establish the liability of a charterer for demurrage on account of delay in loading or discharging, the owner has the burden of proving either that the vessel was not loaded or discharged in accordance with the custom of the port, or that there was unnecessary and unreasonable delay through the fault or negligence of the charterer. Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169.

A counterclaim by respondent for failure to receive bricks shipped promptly on their reaching the port of shipment will be dismissed, where respondent did not show any agreement to receive, except when formal declarations were made by libelant of an option to take the bricks at a certain time, on which proper action was taken. Tweedie Trading Co. *v.* New York, etc., R. Co., 166 Fed. 993.

3. Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, affirming decree 70 Fed. 268.

In a suit for demurrage for delay by a cargo owner in discharging, where the contract fixed no time for discharging proof by libelant that the actual time taken exceeded a reasonable time casts on the respondent the burden of showing a legal excuse therefor to avoid liability. Tweedie Trading Co. *v.* Barry, 194 Fed. 286.

expired.[4] In an action for demurrage, commenced three and one-half years after the transactions, the mere lapse of time is insufficient to bar the action, in the absence of some special reason, such as loss of testimony.[5] But where, the owner of a vessel delayed his action for demurrage for six years, the claim was presumably stale.[6]

4. Limitation and laches.—Davis *v.* Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381, affirming decree 182 Fed. 1004.

5. Tweedie Trading Co. *v.* Thomsen & Co., 173 Fed. 710.

6. Jameson *v.* Sweeney, 66 N. Y. S. 494, 32 Misc. Rep. 645.

CHAPTER XXXIX.

Carriage of Passengers.

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§ 4379. Nature of Liability of Vessel.—Ill Passenger.—A carrier by water must take as passengers all who offer themselves, ill or well, provided it can furnish the necessary accommodations, and the passenger is willing to pay for what he demands; but, where one who is ill presents herself to a common carrier for transportation by water, it is her duty to state the fact that she is ill and make special arrangements for her transportation as a person in need of medical attention, and the carrier is not bound to receive her as an ordinary passenger.[1]

§ 4380. What Law Governs.—An action in an admiralty court of the United States to recover for injuries sustained by an American passenger on a foreign ship on the high seas is governed by the general maritime law as administered in this country, which gives a remedy against the ship's owners where the injury was due to the negligence of those in charge of her navigation.[2]

Locus of Tort.—The locus of a tort is determined by the place where the injury and damage arose, rather than where the negligent act which produced such injury was committed; and a libel to recover damages for the death by drowning of libelant's intestate, as the result of a collision and the sinking upon the high seas of a vessel sailing under the French flag, and on which the deceased was a passenger, alleged to have been due to negligent navigation, which does not allege that the drowning occurred upon the vessel, fails to show that

1. **Ill Passenger.**—Connors *v.* Cunard Steamship Co., 90 N. E. 601, 204 Mass. 310, 26 L. R. A., N. S., 171, 17 Am. & Eng. Ann. Cas. 1051.

2. **What law governs.**—Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in 125 Fed. 732, 60 C. C. A. 500. See ante, "What Law Governs Relationship," § 2117.

the cause of action arose upon French territory, so as to render the law of France applicable thereto, conceding that the carrying of the French flag extended the jurisdiction of such law to the ship.[3]

Persons Formerly Employed on Ship—Being Returned Home as Part of Their Compensation.—Citizens of the United States, who shipped as horsemen on an English ship to care for horses and mules during a voyage from New Orleans to South Africa under a contract that they should be returned free to an American port, subjected themselves to the English law, and during the time of their service were to be considered and treated as British subjects; but their terms of service ended at the end of the voyage in South Africa, the passage home being a part of their compensation, and on the voyage home they were passengers, and their rights as such were governed by the laws of the United States.[4]

Limited Liability Acts.—See post, "Limited Liability Act," §§ 4494-4530.

§ 4381. Statutory Regulation in General.—Congress has power to provide for the better security of the lives of passengers on board vessels.[5]

As to Failure of Pilot, Engineer, Mate or Master to Observe Regulations.—Under Rev. St., § 4413 (U. S. Comp. St. 1901, p. 3020), which provides that every pilot, engineer, mate, or master of any steam vessel who neglects or willfully refuses to observe the regulations established pursuant to § 4412 shall be liable for all damages sustained by a passenger by such neglect, a recovery is only authorized against pilots, engineers, mates, and masters, as distinguished from owners.[6]

§ 4382. Regulation as to Steam Vessels.—The provisions of act Cong. Jan. 18, 1897, c. 61, 29 Stat. 489 (U. S. Comp. St. 1901, p. 3029), that all vessels above 15 tons burden carrying passengers and propelled by gas, fluid, naptha, or electric motors are subject to the provisions of Rev. St., § 4426 (U. S. Comp. St 1901, p. 3029), relating to inspection, and requiring engineers and pilots therefor, and declaring that all vessels so propelled, without regard to tonnage, are subject to section 4412 (page 3020) and so much of sections 4233 (page 2893) and 4234 as the board of supervising inspectors shall deem applicable and practicable for such navigation, do not regulate to steam vessels employed in inland navigation.[7]

Inspection.—Where a steamship had a portion of her guards torn away by a collision with a bridge pier, but an examination by competent men disclosed no injury to her hull or machinery, and only slight repairs were necessary, and she had been regularly inspected and pronounced stanch and seaworthy only

3. **Locus of tort.**—Rundell *v.* La Campagnie Generale Transatlantique, 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92.

4. **Persons formerly employed on ship—Being returned home as part of their compensation.**—The European, 120 Fed. 776, 57 C. C. A. 140.

5. **Statutory regulation in general.**—See ante, "Interstate and International Commerce, Part VI.

The Act of 7th July, 1838 (5 Stat. at L., 304).—See Waring *v.* Clarke (U. S.), 5 How. 441, 12 L. Ed. 226.

The number and mode of carrying passengers on board a merchant vessel is regulated by the Federal Statutes. Rev. Stat., §§ 4252, 4270, inclusive. The Strathairly, 124 U. S. 558, 31 L. Ed. 580, 8 S. Ct. 609.

Paraphernalia for preserving life and extinguishing fires.—A canal boat laden with coal for transportation, having on board the master with his family, is not a "barge carrying passengers" within the meaning of § 4452, Rev. Stat., which requires that such a barge while in tow of a steamer, shall be provided with "fire buckets, axes, life preservers and yawls." Transportation Line *v.* Cooper, 99 U. S. 78, 25 L. Ed. 382.

A remission by the secretary of the treasury under § 5294 of the Revised Statutes of penalties.—The Laura, 114 U. S. 411, 29 L. Ed. 147, 5 S. Ct. 881.

Liability of vessel, owner and master.—See The Strathairly, 124 U. S. 558, 31 L. Ed. 580, 8 S. Ct. 609.

6. **As to failure of pilot, engineer, mate or master to observe regulations.**—Beck *v.* Johnson, 169 Fed. 154.

7. **Regulations as to steam vessels.**—Beck *v.* Johnson, 169 Fed. 154.

three months before, the fact that no reinspection was applied for after the accident does not constitute a failure to comply with Rev. St., § 4417 [U. S. Comp. St. 1901, p. 3024], regarding inspection, which will render her owners liable for injuries to passengers or their effects under § 4493 [U. S. Comp. St. 1901, p. 3058], creating such liability, where they have failed to comply with any of the provisions of that title, when it is not shown that any injury in fact resulted which impaired the strength or safety of the vessel.[8]

As to Officers and Crew.—Under Rev. St., § 4463 (U. S. Comp. St. 1901, p. 3045), providing that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew sufficient at all times to manage the vessel, etc., not only must the vessel have a full complement of licensed officers and adequate crew with reference to all the exigencies of the intended route, but the officers and crew must be competent for any exigency that is likely to happen.[9]

§ 4383. Regulations as to Dangerous Articles.—Gasoline Contained in Tank of Automobile.—Under Rev. St., § 4472, prohibits passenger steamers from carrying as freight certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain restrictions. By Act Feb. 20, 1901, c. 386, 31 Stat. 799 [U. S. Comp. St. 1901, p. 3050], the section was amended by adding the following provision: "Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same. * * *" Under this provision gasoline contained in the tank of an automobile being transported on a steam vessel was carried as freight, within the meaning of the statute; that an automobile in which the motive power was generated by passing an electric spark through a compressed mixture of gasoline and air in the cylinder, causing intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run on and off the boat under its own power, was a violation of the statute.[10]

§ 4384. Regulations as to Immigrants and Other Passengers from Foreign Ports.—Delivery of List of Passengers to Collector.—Section 4266, Rev. Stat. U. S., requires the master of any vessel arriving in the United States from any foreign place to deliver a list of all passengers taken on board at any foreign port to the collector of the district in which such vessel shall arrive.[11]

Obligation to Carry Persons Applying for Passage.—Where a ship acts as a common carrier, its obligation is the same as other carriers.[12]

§§ 4385-4390. Contracts, Fares, Passage and Tickets.—See ante, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

§ 4385. In General.—Contracts for Carriage of Passengers.—A contract for the transportation of passengers by a steamship on the ocean is a mari-

8. **Inspection.**—The Longfellow, 104 Fed. 360, 45 C. C. A. 379.

9. **As to officers and crew.**—Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

10. **Gasoline contained in tank of automobile.**—The Texas, 134 Fed. 909.

11. **Delivery of list of passengers to collector.**—The Strathairly, 124 U. S. 558, 31 L. Ed. 580, 8 S. Ct. 609.

12. **Obligation to carry persons applying for passage.**—Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447. As to right to refuse to carry a party to a port from which he has been banished by revolutionists, see Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

time contract, and there is no distinction in principle between it and a contract for the like transportation of merchandise.[13]

§ 4386. What Constitutes Contract and Consideration.—Where plaintiff's husband purchased a ticket for her involving transportation over defendant's line, and thence by steamship to destination, defendant agreeing to wire for a stateroom on the steamship, such agreement was a part of the contract of carriage, which inured to plaintiff's benefit, and was not nudum pactum.[14] The provisions of § 2 of the Harter Act, Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], do not apply to passenger tickets.

§ 4387. Operation and Effect.—Laws Applicable—Harter Act[15]—Loss of Ticket.—If carriers by steamboat require passengers to buy tickets before going on board, and to deliver them up on landing, the loss of a ticket by a passenger falls on him, and not on the carriers, and it is his duty on landing to pay the amount of the fare.[16]

§ 4388. Performance or Breach of Contract.—Notice of Intention to Embark.—The sending of eight days' notice of intention to embark, as required by steamship passenger tickets to secure passage, is a condition precedent to securing passage; and, unless compliance therewith is shown, a complaint for refusal to transport should be dismissed.[17] Where an embarkation slip, sent to plaintiff in Russia prior to the receipt of a ticket entitling her to passage to Iowa, required her to notify defendant steamship company of her intention to sail fourteen days in advance of the sailing date, or berths would not be reserved, plaintiff's failure to give such notice was no defense to an action against the steamship company for the negligence of its agent in failing to promptly mail plaintiff's ticket to its agent at the port of embarkation, resulting in delay to plaintiff's damage.[18]

Passenger's Taking Passage Prevented by Government Inspector.—The holder of a steamship ticket can not recover in tort from the steamship company by reason of the vessel leaving before the agreed time, by which the ticket holder is prevented from taking passage thereon, when such act is the result of the act of the government inspector, under Rev. St. U. S., § 4465, which declares that it should not be lawful for any steamer to receive more passengers than stated in its certificate of inspection, in refusing to allow the vessel to receive any more passengers.[19]

Liens against Vessel for Breach of Contract.—There can be no maritime lien against a vessel for breach of a contract of carriage where she never in fact entered on the performance thereof, and neither the libelants nor their baggage were ever received on board, or placed in the care or control of the master.[20]

§ 4389. Rescission.—Right of Passenger to Rescind Contract of Coinage before Sailing.—Passengers who have paid their passage on a vessel can not be held to their contract, but are entitled to rescind and recover their passage

13. **Contracts for carriage of passengers.**—The Moses Taylor (U. S.), 4 Wall. 411, 18 L. Ed. 397, 32 How. Prac. 460.

14. **What constitute contract and consideration.**—Central, etc., R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253.

15. **Laws applicable—Harter Act.**—La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in Deslions *v.* La Compagnie Generale Transatlantique, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

16. **Loss of ticket.**—Standish *v.* Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66.

17. **Notice of intention to embark.**—Rabinowitz *v.* Cunard Steamship Co. (App. Term), 119 N. Y. S. 625.

18. Zabron *v.* Cunard Steamship Co., 151 Iowa 345, 131 N. W. 18, 34 L. R. A., N. S., 751.

19. **Passenger's taking passage prevented by government inspector.**—Hughson *v.* Winthrop Steamboat Co., 181 Mass. 325, 64 N. E. 74, 58 L. R. A. 432.

20. **Liens against vessel for breach of contract.**—The Eugene, 87 Fed. 1001, 31 C. C. A. 345, reversing decree 83 Fed. 222.

money, where, before sailing, the vessel is reported in the press as rotten and unsafe, and they are justified by their information and her appearance in believing her so, though she may in fact have been staunch and seaworthy.[21]

§ 4390. Actions—Affidavit of Defense.—In an action by a steamship company to recover passage money, an affidavit of defense is sufficient which avers that the defendant contracted for a particular stateroom, but that the company refused to permit her to occupy it; that the stateroom for which she contracted was a comfortable one, but that she was compelled to occupy a room at the stern of the vessel near the machinery; that the said room was most uncomfortable; that the motion there was very great, and the rattle of the machinery there was such as to prevent her from sleeping; that in consequence of the discomforts of the room, and the disturbance occasioned by the movement and noise of the machinery, defendant was able to sleep but very little during the entire voyage, and in consequence suffered nervous sickness, causing her much pain and suffering, which continued the entire voyage, and after her arrival in this country.[22]

Issues and Venue.—In an action against a steamship company for refusal to transport passengers, evidence that defendant was not permitted under the immigration laws to transport such persons could not be presented under a general denial, because the terms of their tickets constituted at most a warranty or a condition subsequent, breach of which must be separately pleaded.[23]

Sufficiency of Evidence.—In a suit against a steamship company for its refusal to transport emigrants, and for taking away their tickets purchased for them by plaintiff, evidence is insufficient to show that they duly presented themselves for transportation, where it tends rather to prove the contrary, and to show that they were rejected or refused, not by defendant, but by a physician at the place where they proposed to embark.[24]

§§ 4391-4398. Accommodations on Vessel.—See ante, "Accommodations and Duties during Transit," §§ 2490, 2524.

§ 4391. In General.—It is the duty of the owners of a vessel to provide suitable accommodations for her passengers [25] and to keep her in a clean condition.[26] And the vessel is liable for a violation of the implied agreement to furnish reasonable accommodations [27] and for overcrowding and sickness resulting therefrom.[28] But a person rightfully on board who is not a passenger is not

21. **Right of passenger to rescind contract of coinage before sailing.**—The Guardian, 89 Fed. 998.

22. **Affidavit of defense.**—North German Lloyd Steamship Co. *v.* Wood, 18 Pa. Super. Ct. 488.

23. **Issues and venue.**—Rabinowitz *v.* Cunard Steamship Co. (App. Term), 119 N. Y. S. 625.

24. **Sufficiency of evidence.**—Rabinowitz *v.* Cunard Steamship Co. (App. Term), 119 N. Y. S. 625.

25. **Accommodations on vessel.**—The Oregon, 133 Fed. 609, 68 C. C. A. 603.

26. **Duty to keep vessel clean.**—The Oregon, 133 Fed. 609, 68 C. C. A. 603.

27. Pacific Steam Whaling Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

A steamship is liable in damages to passengers who, although they were sold second-class tickets, were given only the accommodations of steerage passengers, and who suffered great discomfort from lack of proper food and water and from being overcrowded in unclean and badly ventilated quarters. While the obtaining of an inspector's certificate permitting the vessel to take more passengers than she actually carried may relieve her from prosecution for the statutory penalty for carrying an excessive number, it does not relieve her from liability to passengers for a violation of her implied agreement to furnish them with reasonable accommodations. Decree, The Valencia, 110 Fed. 221, affirmed in Pacific Steam Whaling Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

28. Where a steamship company having accommodation for and authorized to carry only 375 steerage passengers sells tickets to and receives 475 such passengers, and by reason of such overcrowding the passengers are delayed and injured, the company is responsible for such damage, since such crowding beyond the point at which the passengers could be safely carried is a breach of the con-

entitled to demand passenger's accommodations, although he is entitled to demand the exercise of ordinary care towards him on the part of the vessel and crew.[29]

Permission of Inspector to Overcrowd Vessel.— When permission of inspector was obtained to crowd a vessel beyond the limit of accommodation provided for passengers, such permission is not a defense to an action for damages to passengers sustained by reason of such overcrowding.[30]

Inspection Certificates and Indorsements Thereon.—An indorsement on an inspector's certificate that a steamship had been provided with accommodations for additional passengers should be rejected as evidence of the fact that such accommodations had been provided, when all the testimony shows conclusively that there were no such accommodations on the ship.[31]

§ 4392. Stateroom, Berth and Bedding.—A steamship company is liable to a passenger for failure to furnish the latter with a berth on a steamer running at night, where it fails to notify the passenger of its liability to supply such berth on his application therefor at the time of purchasing his ticket.[32] Where there was evidence that subsequent to plaintiff's purchase of his ticket and application for a berth on defendant's steamer, and defendant's refusal to furnish the berth, other parties were given berths, and that by reason of defendant's refusal plaintiff was compelled to sit up all night, the granting of a nonsuit was error.[33] A passenger on defendant's steamer, who purchases a ticket entitling him to a berth, is not entitled to the exclusive use of a stateroom containing two berths, although there were some vacant staterooms.[34]

First-class transportation, including all-night travel on passenger steamer, carried with it the right to stateroom accommodations as a matter of common knowledge, for, by custom and usage, a passenger contracts for such accommodation when securing a first-class passage.[35] A contract for a first-class carriage of the passenger implies that the accommodation furnished will be consistent with ordinary decency. Where the defendant gave notice that "a lady and child" would also occupy the stateroom; but it gave no notice that the "child" was a lad in the age of adolescence, the use of the word "child" was very misleading. And it can not be said as a matter of law that the contract of carriage was performed when a woman passenger was exposed to the necessity of robing and disrobing in a little room occupied by a strange lad of 14 or 15 years of age, and for a period of a week. Even if the steamship was

tract to safely carry them. The Valencia, 110 Fed. 221, decree affirmed in Pacific Steam Whaling Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

29. Libelant was employed by the owners of a steamer to go with her from Mobile to Cuba, and there operate a gasoline launch under directions of the master, his pay to start at once, but he was to perform no service until he reached the Cuban port. Held, that he was not a passenger entitled to accommodations as such. The Vueltabajo, 163 Fed. 594.

30. Permission of inspector to overcrowd vessel.—The Valencia, 110 Fed. 221, affirmed in Pacific Steam Whaling Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

31. Inspection certificates and indorsements thereon.—The Valencia, 110 Fed. 221, decree affirmed in Pacific Steam Whaling Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

32. State room, berth and bedding.—Patterson *v.* Old Dominion Steamship Co., 53 S. E. 224, 140 N. C. 412, 5 L. R. A., N. S., 1012, 111 Am. St. Rep. 848.

33. Patterson *v.* Old Dominion Steamship Co., 53 S. E. 224, 140 N. C. 412, 5 L. R. A., N. S., 1012, 111 Am. St. Rep. 848.

34. Basnight *v.* Norfolk, etc., R. Co., 60 S. E. 899, 147 N. C. 169.

35. Central, etc., R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253.

Where a ticket entitled plaintiff to a first-class passage over defendant's railroad to S., and thence by steamship to N., the passage on the steamer requiring plaintiff to spend the entire night, defendant having contracted, but failed to reserve a stateroom on the steamship by wire, such failure constitute a breach of the contract. Central, etc., R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253.

crowded, and no better accommodations could be given, it was the duty of the defendant when making its contract to give notice of the exact situation.[36]

Duty to Supply Deck or Steerage Passengers with Bedding.—A vessel is not bound, in the absence of special contract, to furnish bedding for steerage or deck passengers.[37] And passengers who come aboard a vessel mainly engaged in the carriage of freight, after the cabin room is all taken, and who for two days, while loading is going on, make no claim to cabin accommodations or for bedding, are to be considered as impliedly agreeing that their ship room and quarters are to be deck, and that such accommodations are to be deemed reasonable.[38]

Damages Where Stateroom Resold under Right Reserved.—But where plaintiff rented of defendant a stateroom on one of its steamers for overnight, but failed to notice a stipulation on the back of his ticket whereby the right was "reserved to resell rooms not called for thirty minutes after departure," and did not call for his room within that time, and it was resold, whereupon the purser refused to give him his money back, or another room, and he was compelled to sit up all night, he was not entitled to exemplary damages.[39] But he was entitled to the use of the room, or to have the money paid therefor refunded.[40]

§ 4393. Food and Water.—Fare Furnished on Long Voyage.—Where the fare furnished passengers on a long sea voyage is such as is usually provided, and is sufficient in quantity, and properly cooked, and the passengers do not really suffer, they have no ground for the recovery of damages because it is not so good as might have been furnished or as is provided on vessels making short voyages.[41]

Food of Deck Passengers.—In the absence of special contract to the contrary, a vessel is bound to furnish a sufficient quantity of suitable food for deck passengers, and is liable in damages for the master's failure to do so when it is within his power.[42]

Delay of Vessel.—It is the duty of the owners of a vessel to supply her with sufficient food and provisions to meet the contingencies of accident to the vessel and the resulting delay in the voyage, from whatever cause such accident and delay may arise.[43]

Putting Passengers on Short Allowance.—Under the Act Aug. 2, 1882, 22 Stat. 186 [U. S. Comp. St. 1901, p. 2931], to regulate the carriage of passengers by sea from a foreign port to a port of the United States, which provides in section 4 that if any such passengers shall at any time during the voyage be put on

36. Lignante *v.* Panama R. Co., 147 App. Div. 97, 131 N. Y. S. 753.

Plaintiff's husband, desiring passage from Colon to New York on defendant's steamer, was informed that he could not get accommodations for both in the same stateroom, but that his wife would be assigned to a stateroom in which there were two other passengers, "a lady and child." He asked if she would have a berth and was answered in the affirmative. After boarding the steamer, he found that his wife had been assigned to an unscreened sofa in a stateroom; the berths being given to a lady and her son, apparently between 14 and 15 years old. Plaintiff objected to this arrangement and demanded other accommodations, but none were given. She refused to sleep in the stateroom with the boy and was obliged to sleep on steamer chairs for a time, and finally on a sofa in the corner of the main saloon of the vessel. Held that, defendant having given no notice that the "child" was a lad in the age of adolescense, it could not be said that defendant performed its contract of carriage as a matter of law. Lignante *v.* Panama R. Co., 131 N. Y. S. 753, 147 App. Div. 97.

37. **Duty to supply deck or steerage passengers with bedding.**—The Centennial, 131 Fed. 816.

38. The Nicaragua, 81 Fed. 745.

39. **Damages where stateroom resold under right reserved.**—Clark *v.* New York, etc., R. Co., 83 N. Y. S. 162, 40 Misc. Rep. 691.

40. Clark *v.* New York, etc., R. Co., 83 N. Y. S. 162, 40 Misc. Rep. 691.

41. **Fare furnished on long voyage.**—The President, 92 Fed. 673.

42. **Food of deck passengers.**—The Nicaragua, 81 Fed. 745.

43. **Delay of vessel.**—The Oregon, 133 Fed. 609, 68 C. C. A. 603.

short allowance for food and water, except in cases of necessity, the master shall pay each passenger $3 for each and every day of such short allowance, the furnishing to passengers, without necessity, of bad or improper food, which was unfit to eat, was equivalent to putting them on short allowance, and entitled them to recover as damages an amount equal to that fixed by the statute.[44]

During Quarantine.—See post, "Effect of Quarantine," § 4394.

Proof That Food Unsuitable.—It is not necessary to call a survey on the remaining stores of a ship, at an intermediate point at which the passenger left her because of the quality of the food and water, in order to show that the food was unsuitable.[45]

§§ 4394. Effect of Quarantine.—The stipulation, in a contract for transportation across the ocean, that "during the whole journey * * * passengers will be supplied with good and sufficient food, as well as with suitable lodging, and this arrangement stands equally good in the event of any unavoidable delay or accident, interrupting the journey," covers delay required by quarantine regulations; and the carrier is liable for injuries to the health of a passenger; resulting from its failure to provide sufficient and suitable food and lodging during the quarantine.[46]

§ 4395. Delivery of Telegram.—Without evidence showing that it was a custom of a common carrier of passengers by water to receive telegrams for delivery to its passengers, or that it knew or permitted it to be done by its officers, such carrier is not liable for the nondelivery of a telegram addressed to a passenger on board its steamer, and by direction of the captain accepted by the purser for delivery.[47]

§ 4396. Liability for Personal Injuries.—A carrier by water is liable to a passenger for personal injuries incurred by reason of its negligent failure to

It is the duty of a passenger steamer making a voyage between Nome, Alaska, and Seattle, by the outside course, which is in the open sea, without a stopping place for 1,700 miles of the way, to carry provisions sufficient for her passengers for at least 20 or 30 days in addition to the usual time required for the voyage, to meet the contingency of accident and the resulting delays. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

Evidence considered, and held to entitle passengers of a steamship on a voyage from Nome, Alaska, to Seattle, to recover damages from the owners on the grounds that the vessel was not kept clean, and that the provisions supplied were insufficient in quantity, and to a large extent unfit for food, it being shown by a preponderance of the evidence that the vessel started with provisions sufficient to last not more than from 8 to 12 days, the usual time for the voyage being 8 days; that a large part of the meat was spoiled; and that on the breaking of the rudder, which caused a delay of 10 days, the passengers were placed on a short allowance; much of the food also being in such condition that many were unable to eat it, the result being that they suffered from hunger during the remainder of the voyage. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

44. Putting passengers on short notice.—The European, 120 Fed. 776, 57 C. C. A. 140.

45. Proof that food unsuitable.—Passengers on a sailing vessel testified that the food was of bad quality and the water brackish. A few other cabin and some steerage passengers stated that the food was "excellent," as did also the captain's wife. The latter testimony was contradicted by a witness who stated that during the voyage the captain's wife had said she would die if she did not get better food, and spoke of growing thin because of it, and that other witness for the claimant had frequently complained of the food. Complaints were made during the entire voyage, and all the cabin passengers left the boat at an intermediate port, but there was no survey then called on her remaining stores. There was evidence that most of the beef and pork was bad and the other stores inferior. The rice sometimes had weevils in it. Held, that this was sufficient, in the absence of a survey, to show that the food was unsuitable, in view of the payment of $125 for passage when first-class passage by steamer was only $200. The D. C. Murray, 89 Fed. 508.

46. Effect of quarantine.—Larsen *v.* Allan Line Steamship Co., 80 Pac. 181, 37 Wash. 555.

47. Delivery of telegram.—Davies *v.* Eastern Steamboat Co., 47 Atl. 896, 94 Me. 379, 53 L. R. A. 239.

equip its boat with or to provide the passenger with necessary and reasonable accommodations.[48]

§ 4397. Actions.—A passenger on a vessel may sue her in rem in admiralty for damages for failure to furnish proper accommodations.[49]

Instructions.—In an action for breach of a railroad contract for transportation, including a steamship voyage by its failure to reserve stateroom accommodations on the boat, an instruction that, if defendant did not agree to furnish a stateroom, the jury should find for defendant, unless they further found that it was impracticable for plaintiff to travel on the boat without a stateroom, and, if she could not so travel, then it would be a violation of her contract, etc., was proper.[50]

Evidence.—Allegations of a libel by steerage passengers on a voyage from Seattle to San Francisco to recover damages for breach of contract on the ground that the ship failed to furnish them with proper food, quarters, and bedding, are not sustained by the evidence, where it fails to satisfy the mind that the alleged representations for a breach of which the action was brought was made.[51]

§ 4398. Damages.—Elements of Damage.—Where plaintiff's husband had purchased a ticket for plaintiff from B. by way of S. to N., including transportation by rail to S. and by steamship from S. to N. and the agent agreed to telegraph for stateroom accommodations on the boat, which he failed to do, the jury, in determining damages, were properly permitted to take into consideration the fact that, to the knowledge of defendant's agent, the trip was part of plaintiff's bridal trip, and the delay incident to going by way to S., in order to take the trip by water.[52]

Amount of Damages Generally.—Damages arising from breach of a contract to furnish transportation accommodations on a steamship, resulting in inconvenience and indignity to the passenger in transit, are not limited to the price of the passage.[53] Steerage passengers who purchased tickets from Alaskan ports to Seattle, and were compelled to occupy the steerage with a large number of foreign fishermen, who were drunk and disorderly, and kept the place in a filthy condition, which the officers of the vessel made no effective effort to remedy, and who were not furnished with sleeping accommodations nor suitable or wholesome food, were entitled to recover damages from the steamship company in the sum of $300 each.[54]

Failure to Furnish Bedding to Deck or Steerage Passenger.—See ante, "Stateroom, Berth and Bedding," § 4392.

Stateroom Resold under Reserved Right.—See ante, "Stateroom, Berth and Bedding," § 4392.

§§ 4399-4401. Voyage and Discharge at Destination.—See ante, "Receiving and Discharging Passengers," §§ 2435, 2489.

48. Defendant corporation advertised to carry passengers from Nome, Alaska, to points down the coast in the early spring, and undertook to transport them in a gasoline launch. The boat was not heated, was insufficiently supplied with provisions, and the feed pipes were in such leaky condition that the engine froze up and the boat drifted out to sea and was caught in the ice, resulting in serious suffering and injury to the passengers during four or five days before they were landed. Held, that defendant was liable to them for such injuries as a common carrier. North Coast Lighterage Co. *v.* Greenwood, 162 Fed. 25; North Coast Lighterage Co. *v.* Sullivan, 162 Fed. 28.

49. **Actions.**—The Vueltabajo, 163 Fed. 594.

50. **Instructions.**—Central, etc., R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253.

51. **Evidence.**—The Centennial, 131 Fed. 816.

52. **Damages.**—Central, etc., R. Co. *v.* Knight, 3 Ala. App. 436, 57 So. 253.

53. **Amount of damages generally.**—Lignante *v.* Panama R. Co., 131 N. Y. S. 753, 147 App. Div. 97.

54. Northwestern Steamship Co. *v.* Ransom, 174 Fed. 913.

§ 4399. Duties and Liabilities.—Low Water.—Low water in a river is no defense to a failure of a carrier to carry a passenger to his destination, where the carrier could have informed itself and anticipated such condition.[55] Where the undisputed testimony was that a river steamer abandoned its voyage on account of low water, and the contest was whether this was caused by the act of God, a requested charge was not applicable which stated that, if the carrier carried its passenger till it was forced to stop by low water, this constituted the "act of God," and excused it from carrying him further until the stage of water should be sufficient.[56]

Ice Blockade Preventing Completion of Voyage.—Where a steamship company contracted to carry a passenger to a certain port, an ice blockade, preventing the port from being reached, was not an act of God, excusing the breach.[57]

Duty to Furnish Safe Landing Place.—It is the duty of operators of steamboats to furnish a safe landing place for passengers, and the neglect to comply with this rule is not excused on the ground that the landing was made at a wharf owned by a third person, as the use of the wharf made it a part of the means of landing.[58]

Discretion of Master as to Where Landing Shall Be Made.—Where the master of a vessel agrees to transport a passenger to a point as near the mouth of a certain river as will admit of a safe landing, it is for the master to determine, in good faith, where the landing shall be made.[59]

Duty to Remain in Port Reasonable Time.—A vessel which contracts to carry passengers to a port, where they are to procure boats to land themselves and their stores, is bound, on reaching such port, to remain a reasonable length of time to enable the passengers to procure boats and to make their landing, and is only excused from so remaining by act of God or the public enemies.[60]

Entire Contract—Carriage by Chartered Vessel and Another.—Where a charterer of a steamer contracts to transport a passenger from the port of origination to his final destination, although part of the transportation is to be upon a vessel other than that of the charterer, the contract is entire, for through transportation, for the completion of which the steamer is bound. And she will be liable for failure to make right delivery by procuring such passenger on some other vessel for the completion of the voyage.[61]

Landing at Port Next to Destination.—Where a steamship ticket provided

55. **Low water.**—Smith *v.* North American Transp., etc., Co., 56 Pac. 372, 20 Wash. 580, 44 L. R. A. 557.

56. Smith *v.* North American Transp., etc., Co., 56 Pac. 372, 20 Wash. 580, 44 L. R. A. 557.

57. **Ice blockade preventing completion of voyage.**—Bullock *v.* White Star Steamship Co., 70 Pac. 1106, 30 Wash. 448.

58. **Duty to furnish safe landing place.**—Buddenberg *v.* Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970.

59. **Discretion of master as to where landing shall be made.**—Torrey *v.* Kelly, 121 Fed. 542, 57 C. C. A. 604.

60. **Duty to remain in port reasonable time.**—The President, 92 Fed. 673.

61. **Entire contract—Carriage by chartered vessel and another.**—The charterer of a demised steamer contracted with libelants to transport them and certain cargo from San Francisco to points on the Yukon river, the carriage to be made by such steamer to St. Michaels, and by a connecting river steamer for the remaining distance. On arrival at St. Michaels the charterer had no river vessel there, and after some delay the master of the steamer put libelants and their goods on shore, against their protest, refusing to forward them, although transportation up the Yukon was available on other boats. Held, that the contracts were entire, for through transportation, for the completion of which the steamer was bound, and that she was liable in damages for failure to make right delivery by placing libelants on some river vessel for the completion of the voyage. The National City, 117 Fed. 822, 55 C. C. A. 44.

The fact that the master offered to return libelants to San Francisco free of charge on condition that they would sign a release of damages did not exonerate the steamer from liability for the cost of their return passage after they had been compelled to abandon their further journey because of their inability to pay the rates demanded for transportation up the river. The National City, 117 Fed. 822, 55 C. C. A. 44.

that, if the passenger could not be safely landed at the port of destination, he might be landed at the next port reached by the vessel, the carrier was not entitled to land a passenger at a port intermediate between that of departure and that of destination, though such port was the last one before reaching the port of destination, and though it was there learned that the port of destination was icebound and inaccessible.[62]

Deportation Act of Law.—Where, after a family of immigrants had been excluded by the government for a contagious disease, the steamship company agreed to become responsible for them on proper security being furnished, in accordance with a modified order by the government, but thereafter deported them without giving a reasonable time to furnish such security, the steamship company could not defend an action for damages so caused, on the ground that the deportation was an act of the law.[63]

Duty to Return Passenger Where Voyage Fails.—Where a carrier agreed to take a passenger to Dawson, Alaska, via the Yukon River, but his steamer proceeded no further than Ft. Yukon, because of low water and the carrier did not contend that it would have gotten him through before the following summer, it was bound to bring him home.[64] This is not a parallel case with that in which passengers were delayed on railroads where cars are running on frequent and regular time.

§ 4400. Actions.—Evidence—Admissibility and Materiality.—In an action for breach of a contract of carriage, for landing plaintiff at a point short of his destination, where defendant had introduced evidence that, before reaching the port of destination, it had learned that that port was inaccessible because of ice, evidence as to the persons from whom it received such information was immaterial.[65]

Weight and Sufficiency.—The vessel rules as to weight and sufficiency of evidence apply in libels by passengers against vessels or actions against their owners for breach of contract to the discharge at destination. Instances are given in the footnotes, where the evidence was held to show the making of a contract to land libelant as near to the mouth of a river as could be safely done;[66] to show that the defendant contracted as principal for the prompt conveyance of plaintiff across the Isthmus of Panama and to charge him with damages for a detention;[67] to show that the contract as made was performed;[68]

62. **Landing at port next to destination.**—Bullock *v.* White Star Steamship Co., 70 Pac. 1106, 30 Wash. 448.

63. **Deportation act of law.**—Kahaner *v.* International Nav. Co., 117 Fed. 979.

64. **Duty to return passenger where voyage fails.**—Smith *v.* North American Transp., etc., Co., 56 Pac. 372, 20 Wash. 580, 44 L. R. A. 557.

65. **Evidence—Admissibility and materiality.**—Bullock *v.* White Star Steamship Co., 70 Pac. 1106, 30 Wash. 448.

66. Evidence in a libel by a passenger against a vessel for an alleged breach of contract in not landing him at the mouth of a certain river examined, and held to show the making of a contract to land libelant merely as near to the mouth as could be done with safety. Torrey *v.* Kelly, 121 Fed. 542, 57 C. C. A. 604.

67. Defendant owned steamships sailing between New York and the eastern port of the transit route across the Isthmus of Nicaragua, and was part owner of steamships sailing between the western port of the transit route and San Francisco. He was furnished by the corporation managing the transit route with passage tickets for the conveyance of persons across the isthmus by their steamboats and carriages, which he sold to passengers who embarked in his steamships from New York and returned those which he did not sell; but was not an agent of, or employed by, the transit road. Upon the door of the office at New York, occupied by defendant's agent, and which he frequently visited, was posted an advertisement, headed "Vanderbilt's Line between New York and San Francisco," and signed, "Allen, Agent," in which the route by the steamships on both oceans and across the isthmus was described and commended. The agent at that office sold to plaintiff, for a gross sum, three tickets, which severally imported that he was entitled to be carried to and across the isthmus and thence upon a particular vessel on her next voyage to San Francisco, and delivered to him a card, signed by himself, describing the route, and stating that

to support a refusal to direct a nonsuit in an action for landing plaintiff at a point short of her destination;[69] to support a finding that it was not reasonably practicable for plaintiff to finish the journey to his destination or to return to the port from which he started.[70]

§ 4401. Damages and Recovery of Passage Money.—Right to Return of Passage Money.—Where a vessel took passengers for Kotzebue Sound, but wholly failed to make the voyage, and discharged the passengers at Nome, the sailing point, and they were not afterwards forwarded, on the failure of the voyage, the passengers were entitled to have the return of their passage.[71]

Measure of Damages for Failure to Afford Opportunity to Land.—In an action against a vessel for damages by reason of a failure to afford passengers an opportunity to land on reaching their port of destination, and their carriage to a distant port, the measure of recovery is the actual damage sustained, which includes the fare paid, and, where the passenger returns to the port at which he took passage, the cost of such return, together with a reasonable sum as compensation for the loss of time necessarily resulting from the breach of the contract.[72]

§§ 4402-4428. Personal Injuries—§§ 4402-4416. Care Required and Liability.—See ante, "Degree of Care Required," §§ 2290, 2342.

§ 4402. In General.—See ante, "Carriers by Water," § 2424. A carrier by water is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient and suitable vessels, and other necessary or appropriate means of transportation, as well as in the management of the same, in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and in accordance

passengers are speedily conveyed across the isthmus by the Nicaragua transit. Held sufficient to authorize a jury to find that the defendant contracted as principal for the prompt conveyance of the plaintiff across the isthmus, and to charge him with damages for a detention. Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469.

68. Evidence in a libel by a passenger against a vessel for breach of contract in not landing him as near to the mouth of a river as could be done with safety examined, and held to show that the contract was complied with by the master. Torrey *v.* Kelly, 121 Fed. 542, 57 C. C. A. 604.

69. Refusal to direct nonsuit.—Plaintiff's evidence showed that she was an aged lady, and was landed at a point not her destination, by one of defendant's steamships, on which she was a passenger, on a stormy day, and was left unprovided with fuel and shelter, and that she only reached home after two days' exertions, and the exposure causing serious illness. There was evidence that the officers of the boat told her that another boat would pick her up, and take her to her destination, and that the other boat refused so to do, and that she was wetted in being landed. Held not error to refuse to direct a nonsuit in favor of the defendant in an action to recover for such injuries. Sievers *v.* Dalles, etc., Nav. Co., 64 Pac. 539, 24 Wash. 302.

70. Plaintiff purchased a ticket and was a passenger on defendant's boat from S. to D.; but, the defendant being unable to carry plaintiff through to D. that winter, under the representations of the boat captain that he would take plaintiff to a good place to cut wood, where there was a cabin suitable for occupancy, plaintiff went ashore at a place on the Yukon river in Alaska, and stayed all winter. The cabin was not habitable, and plaintiff became sick. Held, in an action for failure to carry plaintiff to D., that the evidence was sufficient to support a finding that it was not reasonably practicable for the plaintiff to finish the journey to D. or return to S., and hence the finding for plaintiff was not contrary to an instruction that plaintiff could not recover for the loss of time or sickness caused by remaining on the Yukon if it was reasonably practicable for him to return to S. or go on to D. Sloan *v.* North American Transp., etc., Co., 64 Pac. 150, 24 Wash. 221.

71. Right to return of passage money.—The Arthur B., 1 Alaska 403.

72. Measure of damages for failure to afford opportunity to land.—The President, 92 Fed. 673.

with the usual course of things be expected to occur.[73] But a ship is not bound to the same strict responsibility for the safety of passengers as in the case of goods.[74] For instance, a carrier by water is liable for an injury which occurred as a result of requiring steerage passengers to come on the upper deck to receive their food in weather so stormy as to make it dangerous.[75]

No Implied Warranty of Seaworthiness.—While a carrier of passengers by sea is bound to exercise the highest degree of care, prudence, and foresight, it is not an insurer of their safety, and there is no implied warranty, as in case of the carriage of goods, that the ship was seaworthy at the beginning of the voyage, and whether she was technically so or not is immaterial in a suit by passengers to recover for injuries received.[76]

§ 4403. Consequences Not Reasonably Anticipated from Act.—A carrier by water is not required to guard against dangers which a prudent man would not expect to occur naturally and in accordance with the usual course of things,[77] as, for instance, where a glass upon which a passenger rested his hand broke and cut him, the screen of which he had accidentally displaced;[78] where little girls in playing ran against a bucket of hot gruel carried by the steward and splashed it on a passenger sitting at the table;[79] where a child was injured by placing his hand in an unprotected hawse hole;[80] where a passenger was run down and trampled upon by his fellow passengers as a result of the striking of the steamboat against the pier;[81] or where a pas-

73. Care required and liability.—Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; International Mercantile Marine Co. *v.* Smith, 145 Fed. 891, 76 C. C. A. 423.

74. Decree, Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in 125 Fed. 732, 60 C. C. A. 500.

75. Requiring passenger to receive food on upper deck.—A steamship was negligent in requiring steerage passengers to come onto the upper deck to receive their food while crossing the ocean in weather so stormy as to render it dangerous, and is liable for the injury of a passenger while so on deck by being thrown down by a wave, or by reason of the wet and slippery condition of the deck. Decree, 139 Fed. 810, affirmed in The Prinzess Irene, 151 Fed. 17, 80 C. C. A. 483.

76. No implied warranty of seaworthiness.—The Oregon, 133 Fed. 609, 68 C. C. A. 603.

77. Consequences not reasonably anticipated from act.—Kohn *v.* International Mercantile Marine Co., 180 Fed. 495.

78. Libelant, a passenger, while on deck during a rough sea, to escape an unusually large wave, which washed over the deck, stepped upon a bench and rested his hand upon a glass ventilator or skylight, which broke and his hand was cut by the glass. There was a frame, with cross-rods, over the sash, to protect the glass; but it was displaced by libelant and fell to the deck before his injury. Held, that the vessel was not negligent; the injury being accidental. The Caracas, 163 Fed. 662.

79. A boy about three years of age, a passenger in the steerage, was scalded while sitting at the supper table by hot gruel splashed on his face from a bucket carried by the steward. The evidence was contradictory whether some little girls playing ran against the bucket, or whether the steward slipped upon the floor, made wet by the drippings of a water cooler near by. The steward was a competent and a careful man. Held, whichever of the above was the cause, no fault of the ship was proved. The Anchoria, 77 Fed. 994, decree affirmed in 83 Fed. 847, 27 C. C. A. 650.

80. Child placing hand in hawse hole.—Plaintiff, a child nine years of age, a passenger on defendants' steamship, was standing in charge of his mother near the rail as the vessel approached her dock. In the confusion attending the landing of the vessel, plaintiff placed his left hand in a hawse hole through which a heavy cable had been passed, extending to a tug, and, as the cable moved or tightened, three of plaintiff's fingers were crushed or ground off by the rope's friction against the rim of the hole. Held, that the shipowners were not negligent in failing to construct a permanent guard about the hawse hole, nor in failing to keep the passengers away from it; the contingency of injury in the manner plaintiff was injured being too remote to impose a duty of guarding against it. Kohn *v.* International Mercantile Marine Co., 180 Fed. 495.

81. The running down and trampling upon a passenger by his fellow passengers is not a consequence to be reasonably anticipated by the striking of the steamboat against the pier of a drawbridge; it appearing that the vessel was

senger was injured by the slipping of the steward on a wet place on the floor about the water cooler.[82]

§ 4404. With Respect to Machinery, Appurtenances and Crew.—A carrier by water is bound to see that its officers, agents, and servants use the utmost care and diligence in keeping the vessel constantly provided with suitable machinery, boats and appurtenances, and competent officers and crew in controlling and managing the use of vessel appurtenances, and in making all the arrangements to protect its passengers against any danger that might reasonably be anticipated from the action of winds and seas, of the officers and crew, or of other passengers.[83]

Apparatus or Machinery Not Part of Operative Means of Transportation.—The rule that a carrier of passengers by water, for hire is bound to exercise the utmost human care, vigilance and foresight, to protect a passenger from any injury from the machinery and appliances of the vessel, and from the management of the same, is only applicable when applied to such of the machinery and appliances as constitutes the operative means of transportation, within a defective construction or negligence in management would be likely to occasion danger to the passenger.[84] Where a steerage passenger on an ocean steamship was injured by the parting of a wire rope used in hoisting ashes from the hold, while he was leaning against the jamb of a door leading to what was known as the "stokehole fidley," watching the hoisting of the ashes, and it was not usual for passengers to be in such position, plaintiff was not entitled to the exercise of the utmost human care, vigilance, and foresight to protect him, but was only entitled to the exercise of ordinary care to guard him from injury.[85]

Gross Negligence in Management of Boilers.—Skill is required for the proper management of the boilers and machinery of a steamboat; and the failure to exert that skill, either because it is not possessed, or from inatten-

going very slowly, and that her collision with the pier was owing to the fact that because of a high wind and rising tide she had drifted out of her course. Southern Transp. Co. *v.* Harper, 45 S. E. 458, 118 Ga. 672.

82. Existence of wet place on floor about the water cooler.—The existence of a wet place on the floor about the water cooler in the steerage, caused by carelessness of passengers in using the cooler, is not proof of such negligence as will render the ship liable for personal injuries caused by the slipping of the steward thereon so as to spill hot gruel upon a passenger. The probability of such an accident is too remote to make the failure to keep the floor constantly dry negligence in the protection of passengers. Decree, 77 Fed. 994, affirmed in The Anchoria, 83 Fed. 847, 27 C. C. A. 650.

83. With respect to machinery, appurtenances and crew.—Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Negligence in handling lines on crowded boat.—A steamer running as a ferryboat between Newport News and Sewell's Point, one of the landings for the Jamestown Exposition, on what was called its "workmen's trip" early in the morning, as usual on such trips carried its full complement of 500 passengers, who were so crowded that they were obliged to stand close together on both decks. Libelants, who were carpenters working at the Exposition, stood with many others on the bow end of the main deck. The lines used to make fast the boat were coiled across such part of the deck. On reaching the landing when the lines were drawn out, libelants' feet were caught in the coils, and they were seriously injured. They testified that they did not see the ropes, owing to the crowd in which they were packed. Held, that those operating the vessel were chargeable with negligence which rendered it liable for the injuries in permitting the passengers to crowd, without warning, within the coils of the lines, or in not so coiling or handling the lines as to remove the danger; that libelants under the circumstances were not guilty of contributory negligence. The Annie L. Vansciver, 161 Fed. 640.

84. Apparatus or machinery not part of operative means of transportation.—Ganguzza *v.* Anchor Line, 89 N. Y. S. 1049, 97 App. Div. 352, affirmed in 76 N. E. 1095, 184 N. Y. 545.

85. Ganguzza *v.* Anchor Line, 89 N. Y. S. 1049, 97 App. Div. 352, affirmed in 76 N. E. 1095, 184 N. Y. 545.

tion, is gross negligence. And the owners are liable for an injury to a passenger resulting from such negligence.[86]

§ 4405. Care of Docks and Passage Ways.—Obstructions on Decks.—Where a structure on the promenade deck of a passenger vessel, consisting of a chain box extending on both port and starboard sides from deckhouse to rail, covering a necessary part of the steering gear, was common in vessels of the size and age of the vessel, and had long been well known on vessels used for passenger traffic, negligence of the owner could not be predicated on the construction of the vessel, though there was evidence that a sloping cover for the steering chain would have been less dangerous.[87] Where a passenger came on board during daylight, and went to her stateroom, a few feet from such an obstruction, and then left the stateroom, and went to the other side of the deck, near the corresponding obstruction, where she remained for some hours, the failure of the owner to warn the passenger of the obstruction was not actionable negligence, and it was not liable for injuries sustained by her by stumbling over the obstruction near her stateroom before 8 p. m. of a clear, mild day, when the sun set at about 7:30 p. m.[88]

Unguarded Hole in Dock.—A carrier by boat is negligent towards its passengers in leaving unguarded a hole in the floor of its dock two feet long and four inches wide.[89]

Injury Caused by Slipping.—A steamship company is liable for injury to a passenger, caused by a mat slipping as she entered a doorway, where the mat was too small to fit properly into its place.[90]

Degree of Care in Washing Deck.—The degree of care appropriate to boilers or to the sufficiency of the hull of a steamship is very different from the degree of care required with reference to the washing of the decks, and where a passenger on a steamship was injured by slipping and falling while walking on the wet deck, which she claimed was not kept in proper condition, the court, in an action to recover for the injury, properly refused to charge that defendant owed the plaintiff "very great care," and charged that it was bound to exercise reasonable care under the circumstances.[91]

Accident Not Reasonably to Be Anticipated.—See ante, "Consequences Not Reasonably Anticipated from Act," § 4403.

§ 4406. Personal Injuries from Want of Proper Accommodations.—See ante, "Accommodations on Vessel," §§ 4391-4398.

Acts of Officers or Crew.—It is the duty of a vessel to protect a passenger from harm or injury through the acts of employees and a failure to do so renders it liable for the resulting damages.[92] Thus, a carrier is liable for an injury caused by a seaman negligently falling upon a passenger.[93]

86. **Gross negligence in management of boilers.**—The New World (U. S.), 16 How. 469, 14 L. Ed. 1019.

87. **Obstructions on decks.**—Savage *v.* New York, etc., Steamship Co., 185 Fed. 778, 107 C. C. A. 648.

88. Savage *v.* New York, etc., Steamship Co., 185 Fed. 778, 107 C. C. A. 648.

89. **Unguarded hole in dock.**—White *v.* Seattle, etc., Nav. Co., 78 Pac. 909, 36 Wash. 281, 104 Am. St. Rep. 948.

90. **Injury caused by slipping.**—Mohns *v.* Netherlands-American Steam Nav. Co., 182 Fed. 323.

91. **Degree of care in washing deck.**—Pratt *v.* North German Lloyd Steamship Co., 184 Fed. 303, 106 C. C. A. 445, 33 L. R. A., N. S., 532.

92. **Acts of officers or crew.**—The Western States, 151 Fed. 929.

93. **Seaman falling on and injuring passenger.**—A seaman on respondent's steamship, being required to go aloft, instead of using the standing ladder in the side rigging, which was reasonably safe, and which he had used on previous occasions, unnecessarily climbed the foretopmast backstay, a wire rope three-fourths of an inch in diameter, and while at work thereon slipped and fell on the deck, killing himself and falling upon and seriously injuring libelant who was a passenger. Held, that the injury was the result of the seaman's negligence, and that respondent was liable therefor. Ramjak *v.* Austro-American Steamship Co., 186 Fed. 417, 108 C. C. A. 339.

Disrespectful Treatment of Passenger.—It is the duty of a vessel to accord to a passenger respectful treatment by its officers and servants, and disrespectful treatment by a master of a woman passenger, on her making complaint that she had been assaulted and robbed in her stateroom, may properly be considered in aggravation of the damages.[94]

Assaults on Passengers.—A steamship company must protect its passengers from assaults by its servants, though outside the scope of their employment. And where a steamship employee renews an assault on a passenger after having been ordered below, the company is liable, though the passenger voluntarily engaged in the prior difficulty.[95]

False Arrest and Imprisonment.—Where a passenger on a steamship was arrested by a watchman, without justification, dragged down the saloon stairway by the collar, pushed inside the freight room, and kept there in custody of another watchman for an hour, the shipowners are liable in admiralty as for a false arrest and imprisonment.[96]

§ 4407. Acts of Other Passengers.—It is the duty of a vessel to protect a passenger from harm or injury through the acts of other passengers, and a negligent failure to do so renders it liable for the resulting damages.[97] It has the power to make reasonable regulations as to the places which passengers may occupy and as to their conduct while on board, and is bound to use the utmost skill and care of prudent men in taking precaution to prevent any passengers from being injured by the ignorant, negligent or reckless acts of other passengers.[98] For instance, the carrier is liable for an injury caused by the falling of a suspended boat which was broken from its fastenings by the careless acts of other passengers;[99] and for injuries caused by permitting passengers to carelessly use firearms on shipboard.[1]

Consequences Not Reasonably Anticipated.—See ante, "Consequences Not Reasonably Anticipated from Act," § 4403.

§ 4408. Negligence or Misconduct of Third Party Contributing Cause.—If a carrier by water fails in his duty, he is responsible for the consequences of his negligence, although the negligence or misconduct of the third party contributes to the injury.[2] As, for instance, where a passenger was in-

94. **Disrespectful treatment of passenger.**—The Western States, 151 Fed. 929.

95. **Assaults on passengers.**—Marks *v.* Alaska Steamship Co. (Wash.), 127 Pac. 1101.

96. **False arrest and imprisonment.**—Ragland *v.* Norfolk, etc., Steamboat Co., 163 Fed. 376.

97. **Acts of other passengers.**—The Western States, 151 Fed. 929.

98. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

99. The owners of a steamboat, managed and navigated by their servants for the carriage of passengers for hire, on the side of which hangs a small boat suspended over a part of a deck where it is proper for passengers to be, are bound to use the utmost care, consistent with the nature and extent of their business, to keep this boat so secured as to guard against injury by its falling upon any passenger from any cause, including careless or irregular acts of other passengers, which may reasonably be anticipated. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

1. **Careless use of firearms by passengers.**—A carrier of passengers by water is bound to exercise the utmost vigilance and care in maintaining order on its vessel and to protect its passengers against injury by the careless use of firearms or other violence from whatever source arising, which could reasonably have been anticipated in view of all the existing circumstances and the number and character of the persons on board; and where the officers permitted passengers to discharge firearms on board in a reckless manner the owner is liable to a passenger injured thereby without his fault or negligence. Northern Commercial Co. *v.* Nestor, 138 Fed. 383, 70 C. C. A. 523.

2. **Negligence or misconduct of third party contributing cause.**—Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

jured by a gang plank which was loosened by the act of a third person.[3]

§ 4409. Persons to Whom Duty to Use Care Owed.—Persons Going on Board to Engage Passage.—The liability of a steamship for the safe carriage of persons whom she undertakes to convey on board from the shore in her boats as passengers is the same whether such persons had previously engaged passage or were going on board for that purpose.[4]

Licensee on Wharf Awaiting Passengers from Incoming Vessel.—A steamship company owes no duty to persons on its pier waiting for passengers from an incoming vessel, except to have the pier in a reasonably safe condition and to exercise ordinary care in docking the vessel, so as to render it reasonably safe for persons to remain on the pier.[5]

Stevedore Required to Live on Vessel.—Where plaintiff, a stevedore, was injured while the vessel was passing through a drawbridge, and his duties required him to live on the vessel, his employment being continuous while the boat was en route, he was not entitled to the care required of the owner of the vessel with reference to passengers, but only to that required as to servants.[6]

Carpenter Being Returned to Shore on Tug.—A ship carpenter employed on a steamer, being taken by a tug to New York after the completion of his work on the steamer, is not a passenger.[7]

§ 4410. Officers and Employees for Whose Negligence Liability Attaches.—Where the agents of a steamship company were charged with the duty of transferring its passengers by tugs or tenders from the port of embarkation, and putting them on board its ships, for which they received a commission, paying the expenses themselves, and they employed a steam tender and two persons in charge thereof, and these persons, while plaintiff was being transferred, assaulted him, and confined him to a room of the tender, apart from the other passengers, the steamship company was liable in damages for their acts.[8]

Negligence of Contractor in Possession of a Wharf.—A passenger on the boat of a navigation company, lying at a wharf on premises in possession of defendant contractors, engaged in blasting, is not prevented from recovering for injuries caused by the negligent prosecution of such work by an agreement between the latter and the navigation company that the company should use the wharf at its own peril.[9]

§ 4411. Intoxicated Passenger.—Where the captain of a steamship discovered a passenger lying in a drunken and helpless condition on the floor, and, with knowledge of his helplessness, lifted him to his feet, and left him without any support, whereupon he fell and broke his arm, the captain did not exercise the full degree of care required by rendering assistance sufficient in the case of a sober man, but was bound to exercise such care as he could

3. **Gang plank loosened by third person.**—A steamboat company is liable for an injury to a passenger caused by a loose gang plank, though it had securely fastened the plank, and there was a reasonable opportunity for persons other than its employees to loosen it. Croft *v.* Northwestern Steamship Co., 55 Pac. 42, 20 Wash. 175.

4. **Persons going on board to engage passage.**—In re Kimball Steamship Co., 123 Fed. 838, reversed in Weisshaar *v.* Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84.

5. **Licensee on wharf awaiting passengers from incoming vessel.**—Order, 94 N. Y. S. 1102, 107 App. Div. 237, reversed in Duhme *v.* Hamburg-American Packet Co., 77 N. E. 386, 184 N. Y. 404, 112 Am. St. Rep. 615.

6. **Stevedore required to live on vessel.**—Lambert *v.* La Conner, etc., Transp. Co., 79 Pac. 608, 37 Wash. 113.

7. **Carpenter being returned to shore on tug.**—The Downer, 171 Fed. 571.

8. **Officers and employees for whose negligence liability attaches.** — Barrow Steamship Co. *v.* Kane, 88 Fed. 197, 31 C. C. A. 452.

9. **Negligence of contractor in possession of a wharf.**—Judgment, 86 Fed. 62, reversed in Smith *v.* Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108.

to avoid an accident in the situation presented to him.[10]

§ 4412. Medical Attention.—"Upon large passenger steamers a physician or surgeon is always employed, whose duty it is to minister to the passengers and crew in cases of sickness or accident. Of course, this would be impracticable upon an ordinary freighting vessel, where the master is presumed to have some knowledge of the treatment of diseases, and in ordinary cases stands in the place of a physician or surgeon." [11]

Medical Care and Attention to Injured Passenger.—A passenger on a vessel, injured, while on a voyage, without his fault, through the negligence of the officers, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person could afford him.[12] But the errors, mistakes, or negligence of a ship's doctor in caring for a passenger are not imputable to the ship, where it was not guilty of negligence in selecting him.[13]

§ 4413. Acts in Emergency.—Where a vessel with passengers on board was sunk as the result of a collision, those in charge were bound to use the utmost exertions in their power to avert injury to the passengers from the impending peril, which duty continued until the passengers were safely landed, but the vessel is not liable for injuries resulting from errors of judgment in the emergency on the part of those in charge who were in general competent.[14] And where a steamer ran upon a rock in the night, it was negligence for those in charge to permit passengers to leave in a small boat without a competent seaman in charge, which rendered the vessel liable to one of such passengers for the loss of his effects, and for physical injuries resulting from his exposure for several hours in the open boat, with only his underclothing to protect him from the cold.[15]

§ 4414. Election to Continue Voyage against Advice of Pilot.—A hasty exchange of opinions between a pilot and master of a river steamer, in the face of immediate danger, as to the best means of avoiding such danger, though the pilot advises the stopping of the vessel, which is not done, does not constitute a deliberate election by the master to continue the voyage against the advice of the pilot, within the meaning of Rev. St. § 4487, so as to render the owners absolutely liable for damages thereafter arising to the persons or baggage of passengers, and especially where it was at the time too late to avoid the injury which resulted.[16]

10. **Intoxicated passenger.**—Doherty *v.* California Nav., etc., Co. (Cal. App.), 91 Pac. 419.

11. **Medical attention.**—The Iroquois, 194 U. S. 240, 48 L. Ed. 955, 24 S. Ct. 640.

12. **Medical care and attention to injured passenger.**—Northern Commercial Co. *v.* Nestor, 138 Fed. 383, 70 C. C. A. 523.

13. The Napolitan Prince, 134 Fed. 159.

14. **Acts in emergency.**—The City of Boston, 159 Fed. 261.

Claimant was a passenger on petitioner's ferryboat which was sunk as the result of a collision in the evening. On discovering that the vessel was sinking, immediately after the collision the master ran her ashore into shallow water. A member of the crew went through the cabin on the lower deck, and notified claimant and all other passengers, who were few in number, that the boat was sinking, and to go up to the upper deck, and remained until he supposed all had preceded him there. Claimant did not go with the others, and, becoming confused, remained until the water entered and she became wet, but was afterwards assisted to the upper deck by some man who discovered her, and later was sent ashore in a boat with the other passengers. She suffered injury from the wetting and exposure, but it did not appear that those in charge knew of her having been in the water. Held, that there was no negligence on the part of the vessel which rendered it liable for the injury. The City of Boston, 159 Fed. 261.

15. The Erastus Corning, 158 Fed. 452.

16. **Election to continue voyage against advise of pilot.**—Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246.

§ 4415. Landing or Discharge of Passengers.—Safe Means of Discharging Passengers.—A carrier by water must provide a reasonably safe means of discharging its passengers,[17] must instruct and assist passengers in their use,[18] and must sufficiently fasten the vessel while discharging passengers;[19] and it is liable in damages for a personal injury to a passenger resulting from its failure to do so.

Transferring Passenger at Night.—A carrier should take notice of the danger of transferring a passenger from steamboat to the shore at night while the boat is in motion, and in so doing he assumes a risk of the consequences.[20]

§ 4416. Care Required of Tenant of Wharf.—The degree of care which the law requires shall be exercised, for the protection of passengers, by a steamboat company plying the waters of Casco Bay with its boats, after it ceases to be a common carrier, and becomes merely a tenant of a wharf at which it makes landings, and over which its passengers pass in going to or departing from its boats, is that of reasonable diligence.[21]

§ 4417. Release of Right of Action.—When a woman has been severally, injured in getting aboard a steamer, by the alleged carelessness of the servants of the boat, in putting out an improper sort of gang plank, the fact that she is unwilling to pay fare for her passage, and that the captain makes no demand of fare from her, is no release of her right of action against the owners of the boat for the injuries done her, unless she at the time understands it to be so and consents that it shall be so. This is true even though the passage be one lasting two days and a half.[22]

Under Limited Liability Act and under Harter Act.—See ante, "Personal Injuries," §§ 4402-4428.

§ 4418. Limitation of Liability.—See ante, "Conditions and Limitations in Tickets," §§ 2218-2230; "Contracts, Fares, Passage and Tickets," §§ 4385-4320.

17. **Safe means of discharging passengers.**—A gang plank consisting of a plank 10 feet long, 16 inches wide, and 1 inch thick, with cleats nailed on one side, but having no railing, rope, or other guard, and which, when extended from the deck of a steamer to a wharf, sloped downward at an angle of about 30 degrees, does not furnish a reasonably safe means for discharging passengers, nor can its use be justified by custom; and the vessel is liable in damages for the injury of a passenger by falling from it into the water. Burrows *v.* Lownsdale, 133 Fed. 250, 66 C. C. A. 650.

18. Libelant took passage on respondent steamer for Newport News, at which port the boat stopped in passing. On reaching there the boat went alongside a pier, the gangway railing was removed, and a deck hand stepped out on the pier and made a line fast. Libelant followed four or five other passengers to the gangway, and they each stepped out on the pier. Seeing the hand removing the line from the cleat, libelant asked him if he was not going to put out the gang plank, and, being told he was not, libelant attempted to step up on the pier, but lost his balance and fell, receiving serious injury between the vessel and the pier. It appeared that the vessel stopped at another pier at Newport News, which was the usual passenger landing, but libelant did not know and was not informed of such fact. Held, that the vessel was negligent in impliedly inviting passengers to land at the pier, and failing to instruct or assist them or to provide proper facilities; that libelant under the facts shown was not chargeable with contributory negligence which would preclude his recovery of damages. The Ocracoke, 159 Fed. 552.

19. A steam ferryboat which, while discharging passengers on a dock or float, by reason of being insufficiently secured swung away from the float, leaving a space of several inches, is liable for an injury to a passenger, who in attempting to pass from the vessel, and in the exercise of due care, stepped into such space, or was thrown by the lurching of the vessel, and fell between the vessel and dock. The City of Portsmouth, 125 Fed. 264.

20. **Transferring passenger at night.**—Le Blanc *v.* Sweet, 31 So. 766, 107 La. 355, 90 Am. St. Rep. 303.

21. **Care required of tenant of wharf.**—Bacon *v.* Casco Bay Steamboat Co., 37 Atl. 328, 90 Me. 46.

22. **Release of right of action.**—Packet Co. *v.* Clough (U. S.), 20 Wall. 528, 22 L. Ed. 406.

§ 4419. Contributory Negligence and Assumption of Risk.—A passenger by water is required to exercise reasonable care for his own safety[23] and if he fails to do so and is injured thereby his contributory negligence is a good defense in an action for such injury. And where such contributory negligence is the direct proximate cause of the accident, the carrier is not liable for a failure to comply with rules of the supervising inspector;[24] such passenger is bound to use a greater care in the dark than if it was light.[25]

Instances of Contributory Negligence.—A passenger by water carriage who stood leaning against the gate across the front of a ferryboat when through some movement of his or lurch of the boat the gate opened and he fell overboard and drowned,[26] and a passenger who was injured by a fall in descending a slippery incline at a boat landing, instead of walking on a rough gang plank or a row of cleats with which the incline was provided,[27] or by tripping on a large rubber hose attached to a hydrant on defendant's wharf, where the accident occurred in the daytime, and there was nothing to prevent his seeing the hose,[28] is guilty of contributory negligence.

Instances Where Passenger Not Guilty of Contributory Negligence.—A passenger injured by stepping into a hole in the floor of a dock while waiting for a boat and who did not remain in the waiting room until the boat arrived, and who deviated some 30 feet from a straight line between the waiting room and the entrance slip to the boat,[29] and a passenger injured by falling on the slippery deck of the steamer when stepping from the door of the saloon, although she had taken a long step,[30] was not guilty of contributory negligence as matter of law. So also a passenger is not negligent in remaining on

23. Contributory negligence and assumption of risk.—Elder Dempster Shipping Co. *v.* Pouppirt, 125 Fed. 732, 60 C. C. A. 500, reversing 122 Fed. 983. See ante, "Contributory Negligence," chapter 24.

24. A steamer left her dock with a barge in tow to which was attached a yawl made fast to the stern of the barge by a five-foot line. A deck hand remained seated in the yawl until the boat arrived at an island where he left the yawl and stood on the barge near the line. Subsequently he went forward on the barge to get water, and, while doing so, decedent, who was intoxicated, hauled the yawl to the stern of the barge and boarded her, without knowledge of the master. The deck hand, on returning, ordered decedent out of the yawl, and, in his attempt to do so, decedent slipped or stumbled and was precipitated into the river. His companion, also in the yawl, grabbed him, but could not retain his hold, and in spite of prompt efforts at a rescue, he was drowned. Held, that decedent's contributory negligence was the proximate cause of his death, and not the failure of the steamer to comply with Inspector's Rule 8, § 4, providing that every barge carrying passengers in tow, and engaged in excursions, shall be supplied with two yawl boats one of which must be manned and towed in such a manner as to best afford prompt relief in case of accident or disaster, and that the owners of the steamer were therefore not liable for decedent's death. Gretschmann *v.* Fix, 189 Fed. 716.

25. If the place where plaintiff alighted from a coach on a ferryboat and stepped into an open chute was dark, she was bound to use greater care than if it was light. Weill *v.* New York, 132 N. Y. S. 609, 147 App. Div. 634.

26. Claimant's intestate, while a passenger on petitioner's ferryboat, crossing East river from Manhattan to Brooklyn, stood leaning against the gate across the front end of the boat, near the end where the gate was fastened by being let into a four-inch groove at the side rail, when through some movement of his or a lurching of the boat the end of the gate was pulled out from the groove and he fell overboard and was drowned. The evidence showed that the gate was in good repair and that similar gates had been used by petitioner on its boats for many years without accidents. There was also a conspicuous sign near by warning passengers to keep "hands off the gates." Held, that petitioner was not guilty of negligence which rendered it liable for the death, but that it was attributable to the negligence of the deceased. The Southside, 155 Fed. 364.

27. Plant Inv. Co. *v.* Cook, 85 Fed. 611, 29 C. C. A. 377.

28. Strutt *v.* Brooklyn, etc., R. Co., 45 N. Y. S. 728, 18 App. Div. 134.

29. Instances where passenger not guilty of contributory negligence. — White *v.* Seattle, etc., Nav. Co., 78 Pac. 909, 36 Wash. 281, 104 Am. St. Rep. 948.

30. Gillum *v.* New York, etc., Steamship Co. (Tex. Civ. App.), 76 S. W. 232.

the hurricane deck after the captain of the boat has given general orders to the passengers on that deck to go below, where he does not hear such orders, and has no information that they have been given.[31]

Assumption of Risk by Voluntarily Taking Position of Danger.—A passenger who voluntarily leaves a place of safety on a ship without necessity, and goes to a part of the ship where there is danger, of which he has knowledge, or which is obvious, assumes the increased risk therefrom, and he can not recover from the ship or its owners for an injury so received because he was not given warning, which, under such circumstances, was unnecessary.[32]

Assumption of Risk of Insufficient Accommodation.—Where a company operating a passenger steamship has an unusually large passenger list, much larger indeed than the ordinary sleeping facilities of the steamer could accommodate, thereby creating an emergency to meet which the officers offered passengers who insisted upon going on the boat under the circumstances, cots or mattresses, instead of the steamship's usual sleeping facilities, a passenger who accepts such offer is chargeable with knowledge that it is a mere makeshift for the occasion, has opportunity equal with the steward to inspect the condition of the mattresses and if he chooses to take it, rather than sit up, assumes whatever risk its condition may involve.[33]

Last Clear Chance.—In an action by a passenger against a carrier by water

31. Evers *v.* Wiggins Ferry Co., 92 S. W. 118, 116 Mo. App. 130.

A passenger on a boat, who is directed by the collector of fares to go upon the hurricane deck, and accordingly goes there and finds a great many other passengers on the deck, and is not ordered to go below, and fails to hear any order to go below given to passengers generally, is rightfully upon the hurricane deck, although it is not constructed or designed for the accommodation of passengers. Evers *v.* Wiggins Ferry Co., 92 S. W. 118, 116 Mo. App. 130.

32. Assumpsit of risk by voluntarily taking position of danger. — Decree, Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in Elder Dempster Shipping Co. *v.* Pouppirt, 125 Fed. 732, 60 C. C. A. 500.

Libelant was one of three passengers on a freight vessel on which he had been for some three months. Before making port on the return voyage, the crew were engaged in tearing down a temporary structure built on the deck for the housing of cattle on the outward voyage and throwing the timbers over the side. After being on the bridge with the other passengers watching the work for the greater part of a day, libelant toward evening went upon the deck and stood near the rail where the men were at work, and while there he was struck and injured by a long timber which had been shoved over the rail endwise in the usual manner until it overbalanced, the motion of the ship causing the upper end to swing forward when the other end struck the water. Held, that the proximate cause of the injury was the act of libelant himself in going without necessity to a place of danger, and that the officers of the ship were guilty of no negligence which rendered the owners liable therefor. Decree, Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in 125 Fed. 732, 60 C. C. A. 500.

33. Assumption of risk of insufficient accommodation.—Libelant's intestate purchased tickets for passage, meals, and berths for himself, wife, and daughter on respondent's steamship from a lake port in Canada. On presenting them he was told that berths could not be furnished, not having been reserved, and the vessel having an extraordinary number of passengers, owing to its being the close of the summer season, when an unusual number of passengers were returning from the lake resorts. He insisted on going, and was then told that if he would accept a cot or mattress for himself, his wife and daughter would be furnished with a berth. He accepted the offer, and the officers procured a number of mattresses from a dealer, one of which he took, and on which he slept. On reaching port the next morning, he was taken with a chill, which developed into pneumonia, from which he died a few days later. Suit was brought under the Canadian statute giving a right of action for wrongful death, it being alleged the death was caused by the dampness of the mattress; no claim being made on the ground of breach of contract. Held that, under the facts shown, respondent was not chargeable with negligence, the officers of the vessel having done all that was reasonably possible to meet an extraordinary emergency, but that in accepting the accommodations offered, with knowledge of the conditions existing, deceasd assumed whatever risk was involved. Van Anda *v.* Northern Nav. Co., 111 Fed. 765, 49 C. C. A. 596, 55 L. R. A. 544.

for personal injuries, where the injured party was guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured passenger's negligence.[34]

§§ 4420-4426. Procedure—§ 4420. Pleading.—A petition for an injury to a passenger caused by the falling of a gang plank, alleging that the plank was negligently supported on defendant's boat, and was not properly fastened thereto, is sufficiently definite and certain.[35]

Failure to Furnish Accommodations.—A complaint, in an action for permanent injuries to plaintiff's health, which alleges that because of defendant's failure to furnish him, as a passenger, sufficient wholesome food and clean, warm quarters, with bedding, during his journey across the ocean, he suffered great pain from cold and hunger, and became sick; that by reason of said suffering his health has been permanently injured; that he has lost the power of hearing in both ears, and been rendered entirely deaf for the balance of his life, states a cause of action.[36]

§§ 4421-4423. Evidence—§ 4421. Presumptions and Burden of Proof.—See ante, "Presumptions and Burden of Proof," §§ 2837, 2853.

Burden of Proof of Negligence Generally.—In an action by a passenger against a carrier by water for a personal injury, the burden of proving negligence is on the plaintiff. Thus, in a libel in admiralty for the wrongful death of a passenger, libelant must affirmatively prove that the owners of the vessel were negligent, whereby their decedent was killed.[37] And where a ship carpenter employed on a steamer, while being taken by a tug to New York after completion of his work on the steamer, fell into a hatch in the after deck of the tug, he could not recover without showing negligence on the tug's part.[38]

Burden of Proof of Contributory Negligence or Freedom Therefrom.—In New York in an action for personal injury by a passenger against a carrier by water, the plaintiff must show that he was free from contributory negligence.[39] And in a libel in admiralty for the wrongful death of a passenger, libelant must affirmatively prove that decedent was free from contributory negligence.[40]

Presumption of Negligence from Proof of Happening of Accident.—In an action against a carrier by a passenger for personal injuries while the burden is upon the passenger suing to maintain the affirmative of the issue,

34. **Last clear chance.**—Where the officer in charge of a boat sent ashore from a ship to bring off passengers stated that she was overloaded, and requested some of the passengers to get out and wait until he could return, but, on their refusal to do so, made no further attempt to exercise his authority, but started, carrying 18 persons and a quantity of baggage, whereas the boat's capacity was 14 persons, and made no effort to return when, after reaching rough water, it became apparent that the boat was in great danger, and she swamped, and some of the passengers were drowned, the officer was chargeable with gross negligence, for which the ship is liable; and the contributory negligence of the passengers, if conceded, constitutes no defense to such liability, under the rule that such negligence will not defeat the action when it is shown that defendant might, by the exercise of proper and reasonable care, have avoided the consequences thereof. Judgment, In re Kimball Steamship Co., 123 Fed. 838, reversed in Weisshaar *v.* Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84.

35. **Pleading.**—See ante, "Pleading," §§ 2829, 2835. See Croft *v.* Northwestern Steamship Co., 55 Pac. 42, 20 Wash. 175.

36. **Failure to furnish accommodations.**—Larsen *v.* Allan Line Steamship Co., 80 Pac. 181, 37 Wash. 555.

37. **Burden of proof of negligence generally.**—Gretschmann *v.* Fix, 189 Fed. 716.

38. The Downer, 171 Fed. 571.

39. **Burden of proof of contributory negligence or freedom therefrom.**—In an action for injury to a ferryboat passenger who stepped into an open coal chute, evidence held insufficient to show freedom from contributory negligence. Weill *v.* New York, 132 N. Y. S. 609, 147 App. Div. 634; resettling of order denied in 133 N. Y. S. 290, 148 App. Div. 919.

40. Gretschmann *v.* Fix, 189 Fed. 716.

still, under such circumstances, the mere happening of the accident is at least prima facie evidence of negligence on the part of the carrier, and it will be incumbent upon the latter to produce evidence which will excuse the prima facie failure of duty on its part; or, in other words, it has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by the exercise of the highest practical care and diligence. This rule does not change the general burden of proof, but simply provides that when a passenger on board a vessel over which he has no control, is injured without any fault of his own by the negligence of the carrier in using defective and insufficient means of transportation, the happening of the accident resulting in an injury, when proven, amounts to prima facie evidence of negligence on the part of the carrier, and makes it incumbent upon it to produce evidence to overcome the prima facie case thus established.[41] It has been so held where a passenger was injured by the explosion of a steam drum,[42] by the breaking of a hawser,[43] by the breaking of the hurricane deck,[44] by the giving away of the cover of an opening in the deck,[45] by the falling of an upper berth;[46] or by the falling of a gang plank.[47] It has also been held where a passenger was drowned by the sinking of the boat or breaking down of parts thereof,[48] and where a passenger was drowned in an attempt to transfer her to the shore.[49]

Licensees on Wharf—"Res Ipsa Loquitur."—Where plaintiff sued to recover for injuries caused by the negligence of defendant or his servants, and there was no contractual relation between the parties, the rule of "res ipsa

41. Presumption of negligence from proof of happening of accident.—Indiana Union Tract. Co. *v.* Scribner, 47 Ind. App. 621, 93 N. E. 1014.

The highest degree of care for the safety of a passenger is required of a ship, and where injury is sustained by the passenger the presumption of negligence is against the carrier. Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in 125 Fed. 732, 60 C. C. A. 500.

42. Explosion of steam drum.—The explosion of a steam drum on a steamer, by which passengers were injured, is prima facie evidence of negligence on the part of the carrier in a proceeding to recover for such injuries. In re California Nav., etc., Co., 110 Fed. 670.

43. Breaking of hawser.—Where plaintiff, a passenger on a steamship, was injured by the breaking of a hawser which was being used to dock the vessel, the fact of injury was sufficient to establish a prima facie case of negligence against the shipowner. Fowden *v.* Pacific Coast Steamship Co., 86 Pac. 178, 149 Cal. 151.

44. Breaking of hurricane deck.—The breaking of the hurricane deck of a boat, resulting in injury to a passenger who is rightfully upon such deck, is prima facie evidence of negligence in the carrier, but is not conclusive evidence, and may be overthrown or explained by evidence showing the exercise of proper care by the carrier. Evers *v.* Wiggins Ferry Co., 92 S. W. 118, 116 Mo. App. 130.

45. Giving away of cover of opening in deck.—When a passenger on a vessel is injured by the giving way of the cover of an opening in the deck, it is incumbent upon the owner of the vessel to show affirmatively that there was no fault or negligence on the part of the officers and crew, causing the injury. The City of Kingston, 77 Fed. 655.

46. Falling of upper berth.—The fact that an upper berth in a steamboat falls and injures a passenger occupying the berth below makes out a prima facie case of negligence on the part of the common carrier. Horn *v.* New Jersey Steamboat Co., 48 N. Y. S. 348, 23 App. Div. 302.

47. Falling of gang plank.—Evidence that a passenger was injured by being precipitated into water by the falling of a gang plank while trying to cross on the plank from a dock to a defendant's steamboat is sufficient to make a prima facie case. Croft *v.* Northwestern Steamship Co., 55 Pac. 42, 20 Wash. 175.

48. Sinking or breaking down of parts of boat.—When it is established that a passenger on a boat, while being carried as a passenger for hire, has been thrown into the water and drowned, without his fault, by the sinking of the boat or the breaking down of parts thereof, the law presumes negligence of the person operating the boat. Indiana Union Tract. Co. *v.* Scribner, 47 Ind. App. 621, 93 N. E. 1014.

49. Passenger drowned in attempted transfer to shore.—Where a girl takes passage on a steamboat, and is drowned in an attempt to transfer her to the shore, the burden of proof is on the carrier to show that the accident did not result from the fault of his officers or representatives. Le Blanc *v.* Sweet, 31 So. 766, 107 La. 355, 90 Am. St. Rep. 303.

loquitur" applied only where facts were shown which compelled the jury to draw an inference of negligence, or circumstances making legitimate inference.[50] Thus, plaintiff, an infant, standing with his mother on a pier awaiting the arrival of a transatlantic steamship, was struck in the face by a steel hawser, with which the steamship was being warped to the pier, caused by the breaking of an iron shackle with which the hawser was fastened to a mooring post, and there was no evidence of negligence on the part of defendant, except that arising from the sudden breaking of the hawser, and defendant showed that the pier was safe, had plaintiff and his mother kept within the shelter of the pier, as they were warned to do by the defendant's servants, and that the breaking of the shackle was not due to any negligence in handling the hawser or any defect in material, the doctrine of "res ipsa loquitur" did not apply.[51]

Burden of Proof of Facts Justifying Assault by Captain.—In an action by a passenger on a steamboat for an assault committed by the captain the burden of proving the facts set up by way of justification rests on defendant.[52]

§ 4422. Admissibility and Competency.—In an action against a carrier by water for personal injuries to a passenger the general rules as to the admissibility and competency of evidence prevail.[53] Thus, evidence of a habit or custom of the passengers[54] to disregard steamboat rules[55] is admissible. But mere opinion evidence[56] and evidence as to the custom of the vessel in making landings and discharging passengers[57] is inadmissible.

50. Licensees on wharf—Res ipsa loquitur.—Duhme *v.* Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615.

51. 94 N. Y. S. 1102, 107 App. Div. 237, reversed in Duhme *v.* Hamburg-American Packet Co., 77 N. E. 386, 184 N. Y. 404, 112 Am. St. Rep. 615.

52. Burden of proof of facts justifying assault by captain.—Levidow *v.* Starin, 60 Atl. 123, 77 Conn. 600.

53. See ante, "Admissibility of Evidence," §§ 2854, 2880.

54. Where the injury complained of was sustained by the fall upon the plaintiff of a small boat, which was suspended over the main deck on the larboard side of the defendant's steamboat, and which fell at a time when four or five persons were in it and another was trying to get into it, evidence that passengers had been in the habit of sitting in it so frequently before the accident that the officers of the steamboat must have known of such habit is admissible; though such evidence would not necessarily show that they had any reason to suppose that such occupation would be dangerous. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

55. Evidence of disregard by passengers of steamboat rules as to starboard boat, rails, or hurricane deck has no tendency to show either a license, permission, or custom affecting the larboard boat, or that there was danger of its being abusively or otherwise irregularly used by passengers, or in a manner dangerous to other passengers; such evidence is incompetent as to the use of the larboard boat, and the jury should be instructed to this effect, where such evidence has been received in an action against the steamboat company, by a passenger who has been injured by the fall of the larboard boat upon him. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

56. Where the injury complained of was sustained by the fall upon the plaintiff of a small boat, which was suspended over the main deck on the larboard side of the defendant's steamboat, and which fell at a time when four or five persons were in it and another was trying to get into it, the opinion of a witness at the trial, whether it was not manifestly to the discernment of passengers of common understanding an inappropriate place for passengers to be in, is inadmissible. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

57. Custom as to making landings and discharging passengers.—In an action against the owner of a steamboat for injuries to a passenger received while attempting to go ashore, the evidence of plaintiff tended to show that, at the instance of the purser, she attempted to land while the boat was lying motionless within a foot or less of the wharf, and was thrown into the lake by the boat starting before she had opportunity to alight, and the evidence of the defendant tended to show that plaintiff of her own volition attempted to step a distance of three or more feet from the rail of the boat while the boat was in motion. Held, that evidence as to the custom of defend-

Condition Shortly before Accident.—In an action for the death of a passenger from the sinking of a boat, the conditions shortly after the accident afforded some evidence of the condition at the time.[58] Evidence of the slippery condition of the cabin floor of a steamer, where a sick and helpless passenger was moved in her chair by an employee of the vessel, is competent in an action to recover for a resulting injury.[59]

Action for Assault by Ship's Surgeon in Vaccinating Passenger.—In an action against a steamship company for assault by a ship's surgeon in vaccinating a steerage passenger brought to a port in Massachusetts, evidence consisting of the printed quarantine regulations of the port, to the effect that only such steerage passengers as held certificates from such surgeon that they had been vaccinated would be allowed to land without detention or vaccination, and of testimony that such regulations were carried out, is properly admitted.[60]

§ 4423. Weight and Sufficiency.—In an action by a passenger against a carrier by water for personal injuries, testimony from which a jury might infer negligence, if unexplained, is sufficient to support a verdict for the plaintiff.[61] But where the testimony of the defendant shows that there was no negligence, and the jury explains the evidence introduced by the defendant from which, unexplained, the jury might have inferred negligence, a verdict for the plaintiff based on defendant's negligence is unsupported by the evidence.[62] In such actions the evidence has been held sufficient to show that the loss of the vessel was due to some fault in her or on the part of the master and crew;[63] that the carriers failed to exercise care in attaching a tug to a barge and in navigating them;[64] that the captain had knowledge of the intoxication of a passenger whom he lifted from the floor and left to stand un-

ant in making landings and discharging passengers was inadmissible. McKay *v.* Anderson Steamboat Co., 99 Pac. 1030, 51 Wash. 679.

58. Condition shortly before accident.—Indiana Union Tract. Co. *v.* Scribner, 47 Ind. App. 621, 93 N. E. 1014.

59. Chicago, etc., Steamship Co. *v.* Lynch, 201 Fed. 70, 119 C. C. A. 408.

60. Action for assault by ship's surgeon in vaccinating passenger.—O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

61. Weight and sufficiency.—See ante, "Sufficiency of Evidence," §§ 2881, 2904. See Louisville, etc., Mail Co. *v.* Gilliland, 24 Ky. L. Rep. 2081, 72 S. W. 1101.

In an action for damages for injuries alleged to have been caused by defendant's negligence while plaintiff was a passenger on a barge towed by a tug owned and controlled by defendant, evidence held sufficient to sustain a verdict in plaintiff's favor. Judgment 73 N. Y. S. 91, 65 App. Div. 361, affirmed in Hill *v.* Starin, 66 N. E. 1110, 173 N. Y. 632.

62. Louisville, etc., Mail Co. *v.* Gilliland, 24 Ky. L. Rep. 2081, 72 S. W. 1101.

Defendant's evidence showed that extra speed was necessary to overcome the eddy; that a stiff wind was blowing; that the accident occurred through the eddy driving the bow of the boat upstream and against the tree, and that, while a still higher speed might have avoided this, due care of passengers prevented a greater speed. Held, that a verdict for plaintiff, based on defendant's negligence, was unsupported. Louisville, etc., Mail Co. *v.* Gilliland, 72 S. W. 1101, 24 Ky. L. Rep. 2081.

63. Evidence considered, and held to show that the loss of a schooner, which foundered without due stress of weather, was due either to some fault in the vessel or on the part of her master and crew, which gave a legal claim for compensation against the owners to the surviving passengers and the representatives of those who were lost. The Jane Grey, 99 Fed. 582.

64. Negligence in attaching tug to barge and navigating them. — Plaintiff was a passenger on a barge towed by a tug, which were owned and operated by defendant. The tug was attached to the barge by a hawser passed through a chock in the bow of the barge, and fastened to a cleat in the bow deck floor. Plaintiff was on the bow deck, when the hawser tore away the chock and side rail, and either broke or slipped from the cleat, catching plaintiff's leg, and cutting it off. Plaintiff's evidence tended to show that the hawser was insecurely fastened, and too long; that the tow turned nearly at right angles, and when the hawser became taut the barge was tipped so that furniture slid along the deck, and people fell down. Defendant's evidence tended to show that the hawser was

supported;[65] that the accident was caused by the stewardess of the steamer;[66] that the caretaker of an injured child was not negligent;[67] that plaintiff was injured without fault on his part by being struck by a timber thrown over the side of the vessel by the crew.[68]

Assault by Captain.—Where, in an action by a passenger on a steamboat for an assault by the captain, defended on the ground that what was done by the captain was done for the purpose of awakening the passenger to demand the fare due for his six year old daughter traveling with him, the jury were authorized in finding that while, by the rule of defendant, half fare was required for a child of that age, the purser of the boat had declined the passenger's offer to buy a ticket for his daughter; that the deck watchman had told the passenger that it would be proper to take the child with him into the men's cabin; that the captain not only used unnecessary violence in awakening the passenger, but pulled him off his berth, shook and pinched him, and tore his clothes; and that this was done in the presence of a number of passengers, and accompanied with a threat of arrest for attempting to defraud, and a verdict for plaintiff for a substantial amount was authorized.[69]

§ 4424. Questions of Fact.—See ante, "Questions for Jury," §§ 2905, 2921.

Negligence of Carrier.—If there is any evidence from which the jury might infer negligence it is the duty of the court to submit the question whether the defendant was guilty of negligence, to the jury. Whether the carriers were negligent in failing to have certain nuts properly examined before the accident,[70] in failing to station guards at a space in the railing of the vessel where

properly attached, and did not break; that the chock was in a reasonably safe condition, and the vessels were carefully navigated. Held, that the evidence was sufficient to sustain a finding that the defendant failed to exercise the care in attaching the tug to the barge and in navigating them which, as a common carrier, he owed to his passengers. Judgment 73 N. Y. S. 91, 65 App. Div. 361, affirmed in Hill *v.* Starin, 66 N. E. 1110, 173 N. Y. 632.

65. Knowledge of intoxication of passenger.—In an action for injuries to a steamship passenger by the negligence of the captain in letting plaintiff stand unsupported while helpless from intoxication, after the captain had lifted him from the floor, so that plaintiff fell and broke his arm, evidence held to sustain a finding that the captain, with knowledge that plaintiff was intoxicated to a helpless degree, lifted him to his feet from the floor where he had been discovered asleep, and left him standing without any support, by reason of which plaintiff fell to the floor and broke his arm, without contributory negligence on his part, and that by reason thereof he suffered pain and loss to the amount of $575. Doherty *v.* California Nav., etc., Co. (Cal. App.), 91 Pac. 419.

66. Accident caused by stewardess.—Evidence in an action by a passenger against a steamship company for personal injuries, held to show that the accident was caused by negligence of the stewardess of the steamer, rendering the shipowner liable. Korzib *v.* Netherlands-American Steam Nav. Co., 169 Fed. 917, decree affirmed in 179 Fed. 1019, 102 C. C. A. 664.

67. Caretaker of child not negligent.—Where a child fell over a mat at an entrance to a saloon on a passenger steamer while in charge of her mother and a nurse, and the evidence was conflicting as to the lighting of the cabin and passageways, libelant's contention being an absence of artificial light, it was held that the caretakers of the child were not negligent. The North Star, 169 Fed. 711.

68. Passenger struck by timber thrown overboard by crew.—Evidence examined, and held to sustain the allegations of a libelant that while a passenger on respondent's ship he was injured, without negligence on his part, by being struck by a long timber which was thrown over the side of the vessel by the crew, under command of an officer, without having been given any warning of the danger. Pouppirt *v.* Elder Dempster Shipping, 122 Fed. 983, reversed in 125 Fed. 732, 60 C. C. A. 500.

69. Assault by captain.—Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123.

70. Negligence in failing to inspect nuts.—In an action for the personal injury of a passenger on defendant's steamboat, due to a failure of a part of the boat's machinery to operate, where it was shown that certain nuts were loose, and needed frequent attention, and the evidence as a whole presented a substantial question as to whether, if they had been

a railed bridge between it and the wharf boat rested,[71] in failing to provide a protecting board in front of a temporary bed,[72] and in moving in a sick and helpless passenger without her consent from a place of comparative safety to one less safe,[73] are questions for the jury. The questions whether the carrier took proper precautions in securing a larboard boat, or preventing passenger from standing under it or getting into it, are questions of fact for the jury.[74] So, also, whether the carrier was negligent in coming into collision with another boat[75] or in striking a tree in making a landing at a customary place,[76] are questions for the jury. And where the plaintiff was injured by the giving away of part of her berth,[77] or by falling down a stairway into the hold of a ves-

properly examined before the disaster, it might not have been avoided, the question of defendant's negligence was properly submitted to the jury. Wilmington Steamboat Co. *v.* Walker, 120 Fed. 97, 56 C. C. A. 49.

71. Failing to station guards at space in railing.—Defendant operated a passenger boat between the city of Cincinnati and a pleasure resort a few miles up the river. Passengers in going to and from the vessel at Cincinnati passed over a wharfboat, between which and the steamer there was a railed bridge three feet wide, and on the side of the steamer, where it rested, there was a space in the railing nine feet wide. Guards were usually stationed at such space on either side of the bridge to protect passengers going off the boat from stepping or falling off. Plaintiff's intestate, a boy 12 years old, with his mother, her sister, and two small children, returned on the boat late one evening with some 1,000 other passengers. There was much crowding at the bridge, and each of the women carried a child. In passing onto the bridge in some way plaintiff's intestate went to one side and fell between the boats and was drowned. There was evidence tending to show that there were no guards stationed at the sides of the bridge. Held, that the question of defendant's negligence was one for the jury. Coney Island Co. *v.* Dennan, 149 Fed. 687, 79 C. C. A. 375.

72. Failing to provide protecting board in front of temporary bed.—Plaintiff, while a passenger on defendant's steamship, complained of the narrowness of his berth, and the steward made a bed for him on a couch, widening it by placing a board under the mattress. This board prevented the insertion of the usual vertical protecting board in front, and during a storm plaintiff was thrown from the couch, owing to the pitching of the vessel, and was injured. Held, in an action to recover for such injury, that the questions whether or not defendant was negligent in failing to provide a protecting board, and whether the danger was so obvious that plaintiff was chargeable with contributory negligence, were properly submitted to the jury. International Mercantile Marine Co. *v.* Smith, 145 Fed. 891, 76 C. C. A. 423.

73. Moving helpless passenger to less safe place.—The question of the liability of a vessel owner for an injury to a sick and helpless passenger, who was moved by an employee, without her consent or volition from a place of comparative safety to one less safe, where she was thrown down and injured by the pitching of the vessel, held one for the jury. Chicago, etc., Steamship Co. *v.* Lynch, 201 Fed. 70, 119 C. C. A. 408.

74. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

75. In an action by a passenger on a boat for injuries sustained in a collision between it and another boat, evidence examined, and held that whether the latter boat was negligently managed, because of the failure of those in charge thereof to give the proper signal, if the former boat carried the proper lights, or because they failed to exercise proper care, if the former boat only carried a white light, so as to merely indicate the approach of a floating craft, was for the jury. Louisville, etc., Packet Co. *v.* Mulligan, 77 S. W. 704, 25 Ky. L. Rep. 1287.

Collision with barge tied at wharf.—Evidence in an action for injury to a passenger on a steamboat, by its running into a barge tied up at a wharf near that at which the steamboat was to land, whereby passengers on the steamboat were thrown to the floor, held sufficient to go to the jury on the question of negligence. Duggan *v.* New Jersey, etc., Ferry Co. (Del.), 7 Pen. 318, 76 Atl. 636.

76. A steamboat, in making a landing at a customary place, struck a tree, knocking it over and injuring plaintiff. The river was "bank full," and there was an eddy in front of the landing, which necessitated an approach bow on. The only evidence of negligence was that the steamboat was being driven with more than usual speed. Held, that the issue of negligence was properly submitted to the jury. Louisville, etc., Mail Co. *v.* Gilliland, 72 S. W. 1101, 24 Ky. L. Rep. 2081.

77. Giving away of part of berth.—Where plaintiff, a passenger on an ocean

sel,[78] the question of the carrier's negligence is for the jury.

Question of Contributory Negligence.—If a passenger by water was wanting in ordinary care, and without negligence on his part, would not have been injured, even if the defendant carrier was also negligent, he certainly can not recover. But the question of his negligence, the evidence being conflicting, is a question for the jury.[79] Thus, whether a passenger was injured by falling down a stairway,[80] or by the giving way of a part of her berth while she was attempting to get into it, by climbing up from the lower berth, in the absence of a ladder;[81] was guilty of contributory negligence are questions for the jury. Whether a passenger was guilty of contributory negligence in passing over a hatchway,[82] in stepping onto a slippery deck,[83] or in not going the direct way to the waiting room[84] are for the jury to decide. And whether a passenger is guilty of contributory negligence in being in the place he was when injured, as, for instance, where he went on the bow deck, after having been warned not to do so,[85] is also a question for the jury.

Meaning of Order or Advice of Officer of Steamer.—Whether the statement of the mate of a steamer to a passenger, as it approached his landing, that

steamship, was injured by the giving way of a part of her berth while she was attempting to get into it, by climbing up from the lower berth, in the absence of a ladder, the question of the shipowner's negligence was for the jury. Jarowski *v.* Hamburg-American Packet Co., 182 Fed. 320.

78. Falling down stairway.—In an action for injuries to a passenger on a steamship by falling down a stairway into the hold of a vessel, evidence held to require submission of the question of the carrier's negligence and plaintiff's contributory negligence to the jury. Baltimore, etc., R. Co. *v.* Moon, 84 Atl. 536, 118 Md. 380.

79. Question of contributory negligence.—Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Jarowski *v.* Hamburg-American Packet Co., 182 Fed. 320; Baltimore, etc., R. Co. *v.* Moon, 84 Atl. 536, 118 Md. 380.

80. Baltimore, etc., R. Co. *v.* Moon, 118 Md. 380, 84 Atl. 536.

81. Jarowski *v.* Hamburg-American Packet Co., 182 Fed. 320.

82. Passing over hatchway.—Though plaintiff had passed over a hatchway on a steamboat several times in company with, or with knowledge of, the mate, and found it all right, he was not guilty of contributory negligence, as matter of law, in assuming that it was safe, but that question was for the jury. Memphis, etc., Packet Co. *v.* Buckner, 57 S. W. 482, 22 Ky. L. Rep. 401, 108 Ky. 701.

83. Stepping onto slippery deck.—In an action against a steamship company for injuries sustained by a passenger, owing to her having fallen on a slippery deck, the fact that she went from the door of the saloon on the deck alone, and in so doing put her left foot on the doorsill, and then put her right foot forward and stepped on the deck, did not show her prima facie guilty of contributory negligence as a matter of law, the evidence being such that the jury might have found that she did not know when she stepped on the deck that it was slippery. Gillum *v.* New York, etc., Steamship Co. (Tex. Civ. App.), 76 S. W. 232.

84. Going indirect way to waiting room.—It was not error to refuse direction of a verdict for defendant on the ground that the direct way to the waiting room being lighted, and plaintiff having voluntarily gone the other way in the dark, without looking, she was guilty of contributory negligence, since, as the testimony tended to show that neither way was lighted, that as many went one way as the other, and that if she had looked she could not have seen the incline, the question of her negligence was for the jury. Sullivan *v.* Delaware, etc., Canal Co., 47 Atl. 1084, 72 Vt. 353.

85. Going on bow deck after being warned not to do so.—The defendant's evidence tended to show that the barge was not crowded, and the passengers, especially the plaintiff, were warned not to go on the bow deck; that this deck was twice cleared of passengers, including the plaintiff, and the doors in a partition separating this deck from the passenger deck were closed and hooked; that plaintiff was near the hawser, on the bow deck, watching it tighten and slack, and saw it loop when the tug turned; and that he was warned by a companion just before the accident. Plaintiff's testimony tended to contradict this evidence, and to show that when warned by his companion he tried to escape, but too late. Held, that plaintiff was not, as a matter of law, guilty of contributory negligence in being where he was, or in not exercising better judgment, under the circumstances, to avoid the injury. Judgment 73 N. Y. S. 91, 65 App. Div. 361, affirmed in Hill *v.* Starin, 66 N. E. 1110, 173 N. Y. 632.

he better go down on the lower deck, and get on the stage plank, to save time, meant that he should go on the stage plank before it was properly placed in the correct position for a safe landing, is a question for the jury.[86]

Question of Last Clear Chance.—In an action for death of a steamboat passenger through falling off a boat and being drowned, the question whether, notwithstanding deceased's negligence, defendant could, by the exercise of reasonable care, have prevented his death, is for the jury.[87]

§ 4425. Instructions.—A charge in an action by a passenger against a carrier by water for personal injuries must be confined to the scope of the allegations of the pleading,[88] must not be contradictory and too general,[89] must not invade the province of the jury [90] by taking from them the determination of the question of the carrier's negligence, where negligence is to be inferred from probative facts,[91] and must not ignore the defense of contributory negligence [92] or be misleading in respect thereto.[93] The rule that, where an essential qualifi-

86. Meaning of order or advise of officer of steamer.—Arkansas River Packet Co. *v.* Hobbs, 58 S. W. 278, 105 Tenn. 29.

87. Question of last clear chance.—Pate *v.* Tar Heel Steamboat Co., 148 N. C. 571, 62 S. E. 614.

88. Instructions.—See ante, "Instructions," §§ 2922, 2967.

In an action against a carrier for injuries to a passenger through the breaking of the deck of defendant's boat, the petition alleged that defendant was negligent in not building the decks strong enough to hold the passengers carried thereon, etc., and in permitting the material of the decks and on which they were supported to become rotten and too weak to support the passengers carried thereon, etc. Held, that an instruction that if the accident consisted in the falling down of the deck, and that if plaintiff's injuries resulted therefrom, the burden of proof was shifted on defendant to show that such falling down was through no fault, negligence, etc., of defendant, and, unless so shown, the jury should find for plaintiff, provided they did not further find that plaintiff was guilty of negligence in going on or remaining on the deck, was within the scope of the allegations of negligence. Evers *v.* Wiggins Ferry Co., 105 S. W. 306, 127 Mo. App. 236.

89. Trabing *v.* California Nav., etc., Co., 133 Cal. xx, 65 Pac. 478.

90. Hampton *v.* Occidental, etc., Steamship Co., 139 Cal. 706, 73 Pac. 579.

In an action for the death of plaintiff's intestate, who had fallen between a barge and a wharfboat when alighting from the barge, many witnesses testified that just at the moment that deceased was making her step from the barge to the wharfboat a vessel belonging to defendant made a landing at the wharfboat, and struck it with such force as to cause the separation of the wharfboat and barge, and that the landing was an unusual, unsafe, and dangerous one. Held, that it was proper to refuse a motion for a peremptory instruction in favor of defendant. Louisville, etc., Mail Co. *v.* Barnes, 79 S. W. 261, 117 Ky. 860, 25 Ky. L. Rep. 2036, 64 L. R. A. 574, 111 Am. St. Rep. 273.

91. An instruction in an action for death of passengers on a steamer, resulting from the collision therewith of defendant's steamer, that, if certain enumerated facts were found, defendant's steamer was fully complying with the rules and regulations governing her proper action in entering the harbor, is erroneous, where, if all the enumerated facts were true, the jury might have found that, when it was discovered that the other steamer was out of her course, or for some reason unable to mind her helm, defendant's steamer might have shifted her course, so as to avoid the collision, and that her failure to do so was negligence. Hampton *v.* Occidental, etc., Steamship Co., 73 Pac. 579, 139 Cal. 706.

92. Ignoring contributory negligence.—Evers *v.* Wiggins Ferry Co., 105 S. W. 306, 127 Mo. App. 236.

A common carrier by water provided a safe and convenient place for passenger to land from the saloon deck of the boat, and intended the forward part of the main deck and a slip adjustable to the state of the tide exclusively for the discharge and lading of freight and baggage. A passenger attempted to land from the main deck, and was injured while he was on the ship. At the trial of an action against the carrier to recover for such injuries, there was evidence warranting a finding that the plaintiff was notified that passengers were to land from the saloon deck only, and that subsequently he was warned by an officer of the boat not to leave it from the main deck and through the slip. Held, that a refusal to instruct the jury that he could not recover, if he received such notice and warning, unless the injury was willfully inflicted, was erroneous. Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

93. In an action against a carrier for injuries to a passenger through the fall-

cation of part of a charge is inadvertently omitted, such omission may be supplied by other parts of the charge, and that if when taking the whole charge together the true rule is laid and the jury could not have been misled, there is no error, applies in such cases.[94]

§ 4426. Special Verdict.—In an action against a carrier by water for injuries to a passenger, answers to interrogatories and the general verdict must be in irreconcilable conflict before the former will control the latter. Courts indulge every reasonable presumption in favor of the general verdict, and nothing is presumed in favor of the special finding by interrogatories. The antagonism between the general verdict and interrogatories must be apparent upon the face of the record beyond the possibility of its removal by any evidence legitimately admissible under the issues. However, if the answers to the interrogatories exclude every conclusion that will authorize a recovery by the party in whose favor the general verdict is rendered, then judgment should not be rendered upon the general verdict but upon the answers to the interrogatories.[95] In an action for the death of a passenger on a boat alleged to have been owned by defendant, which the defendant denied, where the jury's answers to interrogatories state that there is no direct evidence that the board of directors of defendant authorized the purchase or operation of the boat, but that such board authorized the purchase of the boat by its general superintendent of transportation, rebuilt it, and transferred its employees from its cars to the boat, and continued them on the pay roll without change of contract; that employees of the defendant were in charge of the boat; that all the money earned by the boat both before and on the day of the accident and that earned by defendant's cars was placed in the same bag and deposited together in the bank to the credit of defendant; that the directors of defendant knew that its employees were operating the boat in the spring preceding the accident, which occurred in August; and that at the time of the accident, the general superintendent of transportation knew that the boat was being operated for defendant —it will be presumed, in support of a general verdict for plaintiff, that the directors and officers of defendant had such knowledge and information about

ing of the hurricane deck of defendant's boat, an instruction that, even if the jury found that some of the passengers were warned not to go on the deck, plaintiff could not be charged with negligence in going thereon unless he was aware of the warnings, or unless the condition of the deck at the time he went thereon was unsafe to a reasonably careful observer, or not meant for the use of passengers, and that, in considering whether plaintiff should have known that the deck was unsafe or not meant for passengers, the jury might consider all the physical facts regarding the approach to the deck, was not misleading as telling the jury that, after going on the deck, plaintiff might shut his eyes as to its apparent physical condition. Evers *v.* Wiggins Ferry Co., 105 S. W. 306, 127 Mo. App. 236.

94. On the trial of an action, wherein it appeared that the fall of a boat which was hung over the deck was caused by the breaking of a bolt in its fastenings, which the plaintiff contended was negligently provided, of insufficient strength, at a time when several persons were in it, the judge, after calling attention to testimony that passengers had been seen in the small boat on previous occasions, instructed them that, if the defendants knew of this, or might with proper vigilance have known of it, and if the fastenings were not strong enough for a boat liable to be so used, and the defendants knew of such liability and made the fastenings no stronger, the defendants would be responsible. Held, that this instruction was defective, in that it allowed the jury to hold the defendants responsible, if the fastenings were in fact not strong enough, although the defendants might have had no notice of their weakness, and might not by the utmost care and skill have been able to ascertain it; and that this defect was not supplied by a general statement in an earlier part of the instructions that to entitle the plaintiff to recover he must satisfy the jury that the injury which he sustained was occasioned by the negligence of the defendants. Simmons *v.* New Bedford, etc., Steamboat Co., 100 Mass. 34.

95. Special verdict.—Indiana Union Tract. Co. *v.* Scribner, 47 Ind. App. 621, 93 N. E. 1014. See ante, "Verdict and Finding," § 2968.

the operation of the boat by its employees as to at least amount to a ratification of their acts.[96]

§ 4427. Liens.—A lien or privilege upon a vessel for the loss of life of a passenger is not created by La. Civ. Code, art. 3237, subd. 12, providing a privilege for loss or damage caused to person or property by negligent management of the vessel, as this was not intended to apply to actions for damages resulting in death.[97]

§ 4428. Damages.—See ante, "For Personal Injuries," §§ 3400, 3407.

Injury to a Child.—In an action for injuries to a child while a passenger on a steamer, $600 allowed as compensation for suffering and the remains of a scar.[98]

Damages for False Arrest and Imprisonment.—Where a passenger on a steamship was arrested by a watchman, without justification, dragged down the saloon stairway by the collar, pushed inside the freight room, and kept there in custody of another watchman for an hour, such passenger being greatly humiliated, but no serious harm having been done him further than the indignity and inconvenience imposed for the time being; he was entitled to damages in the sum of $1,000.[99]

Verdict for Nominal Damages Inconsistent.—A verdict awarding a passenger mere nominal damages for expulsion from a steam boat can not be sustained; where it authorized any recovery the jury must have found that his removal was not justified, or that the conduct of the plaintiff warranted his removal but that unnecessary force was used, where he was also subsequently imprisoned for half an hour. Such verdict is inconsistent and illogical.[1]

Remittitur of Damages.—An award of $1,000 to a passenger as damages for imprisonment and mistreatment by officers of a vessel has been held to be excessive, and reduced to $500, where his own conduct was not without blame.[2]

§ 4429. Ejection of Passengers.—See ante, "Ejection of Passengers," chapter 25; "For Ejection," §§ 3408, 3423.

In General.—A vessel engaged in carrying passengers has no right to eject a passenger whose contract is enforced, on the ground that his ticket is void.[3]

Ejection of Passenger Suffering from Contagious Disease.—A steamship engaged in carrying passengers has the right both under the United States statutes and at common law to eject a passenger suffering from a dangerous

96. Indiana Union Tract. Co. *v.* Scribner, 47 Ind. App. 621, 93 N. E. 1014.

97. **Liens.** — Decree, Jakobsen *v.* Springer, 87 Fed. 948, 31 C. C. A. 315, affirmed in The Albert Dumois, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

98. **Injury to a child.**—The North Star, 169 Fed. 711.

99. **Damages for false arrest and imprisonment.**—Ragland *v.* Norfolk, etc., Steamboat Co., 163 Fed. 376.

1. **Verdict for nominal damages inconsistent.**—Levy *v.* Providence, etc., Steamship Co., 123 Fed. 347.

2. **Remittitur of damages.**—Decree, Ragland *v.* Norfolk, etc., Steamboat Co., 163 Fed. 376, modified in 169 Fed. 286, 94 C. C. A. 562.

3. **Ejection of passengers.** — La Gascogne, 135 Fed. 577.

Libelant, while in New Orleans, was furnished, under a contract, with a steamship ticket from New York to Havre on the respondent vessel, which, at his request by telegram, was extended by the claimant. It appeared that afterwards, at the request of the person who had engaged the passage, the ticket was canceled; but libelant was not notified, and, on his presenting it at the New York office of claimant, it was accepted, and he was assigned a berth, and went on board with his effects. A few minutes before the vessel sailed, libelant was notified that the ticket was not good; and, being unable to then pay the fare demanded, he was ejected from the vessel, with a part of his baggage. Held, that under such facts he was entitled to remain, and his ejection was wrongful, and that he was entitled to recover $500 for the indignity put upon him, together with his expenses during the time he was delayed, and the cost of a new ticket. La Gascogne, 135 Fed. 577.

contagious disease, as for instance, trachomax.[4]

Pleading and Proof.—Where a steamboat company in an action for forcibly ejecting a passenger from its steamship, in answer pleads justification, in that the plaintiff when ejected was suffering from a dangerous contagious disease, it has the burden of proving justification as alleged.[5]

Evidence.—In an action against a vessel for wrongful ejection of a passenger alleged to be suffering from a contagious disease evidence of her husband and other witnesses that their intimate relations with her were not followed by any trouble with the eyes was admissible as bearing on the question whether plaintiff had the disease in question. And evidence that plaintiff was left in Liverpool, at a long distance from her friends, was admissible on the question of damages. But evidence that plaintiff went to Liverpool early in 1904 and was examined by defendant's doctors, and that she sailed from Liverpool in August of that year on a vessel of another line, was immaterial.[6]

Instructions.—The charge in such action must not be too general or contradictory. In conformity with this such a charge in an action where plaintiff was arrested by the captain of defendant's steamboat, and chained to a post on the lower deck, and ejected before he reached his destination, that plaintiff could recover only the actual damages suffered by him, unless defendant authorized the acts complained of, or participated therein or ratified them; and that the jury should not allow anything by way of punishing the defendant, unless it authorized the captain's acts or ratified them; and that, unless defendant participated in or authorized the captain's acts or ratified them, the measure of damages would be the amount which would compensate the plaintiff for all detriment proximately caused by the wrongful acts, was not erroneous as contradictory and too general.[7]

Damages.—Where a passenger on a vessel is deprived of his ticket, ejection therefrom, and compelled to purchase another, he is entitled to recover the cost of passage, with interest thereon. He is also entitled to damages for the indignity he suffered in being obliged to leave the vessel when he was entitled to be carried on her.[8]

§§ 4430-4442. Passengers' Effects.—See ante, "Passengers' Effects," chapter 29.

§ 4430. Liability as Innkeeper or Insurer.—See post, "Delivery to and Acceptance by Carrier," § 4431.

§ 4431. Delivery to and Acceptance by Carrier.—Delivery into Exclusive Custody of Vessel's Officers.—The rule seems to be well settled that, in general, a carrier is not liable for the loss of a passenger's baggage, where the loss is not occasioned by some particular breach of duty or negligence on the part of the carrier's servants, unless the baggage has been delivered to and taken into the exclusive custody of the carrier's servants. A steamship com-

4. **Ejection of passenger suffering from contagious disease.**—Mountford *v.* Cunard Steamship Co., 202 Mass. 345, 88 N. E. 782.

5. **Pleading and proof.**—Plaintiff's declaration alleged an assault by defendant's agents and employees in forcibly ejecting her from the steamship, and in a second count charged that, having purchased and paid for a ticket, and having boarded the steamship, defendant put her off the steamship and deprived her of passage. Defendant pleaded a general denial and a special defense that plaintiff was ejected because she was suffering from trachoma. Held, that the justice's attention not having been called to any difference between the two counts, he properly ruled that the burden was on defendant to prove justification as pleaded, and could not rely on evidence that its ship doctor reported that plaintiff had trachoma and ought not to be permitted to sail, as a justification. Mountford *v.* Cunard Steamship Co., 88 N. E. 782, 202 Mass. 345.

6. **Evidence.**—Mountford *v.* Cunard Steamship Co., 202 Mass. 345, 88 N. E. 782.

7. **Instructions.**—Trabing *v.* California Nav., etc., Co., 65 Pac. 478, 133 Cal. xx.

8. **Damages.**—La Gascogne, 135 Fed. 577.

pany is not permitted to choose whom it will serve, but must afford accommodations to all who pay fare. A passenger ship is necessarily accessible to all classes of travelers, and is so far a public place that it is unreasonable to impose upon the owners the burden of liability for thefts of the private baggage of passengers, unless the baggage has been delivered to and left in the exclusive control of the carrier's officers or servants.[9] But it is held by respectable authorities that, where the carrier is a steamship company, the liability of an innkeeper is assumed by its contract with passengers who pay for rooms and meals as well as for transportation. But the latest decisions of the American courts, and the preponderance in weight of authorities and reason, is against this exception to the general rule. The latter rule prevails in New York.[10]

What Constitutes Delivery.—Where plaintiff went aboard a packet boat taking with him his carpet bag, paid his fare as a passenger, and deposited his carpet bag with the luggage of other passengers on the deck of the boat which was generally used for that purpose, and on arriving at his destination, the carpet bag was missing, the delivery by plaintiff was as to the carpet bag and the articles of ordinary baggage it contained sufficient.[11] But where the plaintiff, intending to take passage on the steamboat of defendants, deposited his trunk on board in the usual place for baggage, but without putting it in charge of any person, or notifying any one employed on the boat of such deposit, or of his intention to take passage, and while temporarily absent from the boat it started, and he was left, and the trunk could not afterwards be found, there was not a constructive delivery and acceptance of the trunk as the baggage of a passenger, by which the defendants could be held chargeable for its loss.[12]

Baggage Received in Advance of Time of Expected Passage.—A steamship company which received a valise from one who was to sail on a future date, but refused to check it until a ticket should be presented, at which time the valise could not be found, is liable as a warehouseman, but not as a carrier.[13] But such company is liable as a common carrier for the loss of baggage, destroyed by fire, which, pursuant to the advice of its agent, has been sent by the prospective passenger in advance of the time of expected passage, and which has been received by such company at its docks in advance of such time, and is there kept, and, for its own convenience, is not immediately placed on the steamship on which passage was to be taken, and is destroyed while on such docks.[14]

Baggage Forwarded under Agreement to Forward by Slow Freight.—See post, "Baggage Detained by Customs' Officers," § 4438.

§ 4432. Duty to Provide Watchman.—A vessel carrying passengers by water must maintain a sufficient watch to protect its passenger's effects from theft. One man upon two decks in a large steamboat so cut up by staterooms that it is necessary to keep walking about in order to see them at all is insufficient protection.[15] And that the watchman was not vigilant may be inferred

9. **Delivery to carrier.**—The Humboldt, 97 Fed. 656.

10. *New York.*—Where shirt studs were taken from the cabin of a passenger on a steamship, the carrier's liability was that of an insurer, in the absence of negligence on the part of the passenger. Hart *v.* North German Lloyd Steamship Co., 92 N. Y. S. 338, 46 Misc. Rep. 426, affirmed in 95 N. Y. S. 733, 108 App. Div. 279.

Where money for traveling expenses, carried by a passenger on a steamboat, is stolen from his stateroom at night, without negligence on his part, the carrier is liable therefor, without proof of negligence; his liability being analogous to that of an innkeeper. Judgment, 29 N. Y. S. 56, 9 Misc. Rep. 25, affirmed in Adams *v.* New Jersey Steamboat Co., 45 N. E. 369, 151 N. Y. 163, 34 L. R. A. 682, 56 Am. St. Rep. 616.

11. **What constitutes delivery.**—Doyle *v.* Kiser, 6 Ind. 242.

12. Wright *v.* Caldwell, 3 Mich. 51.

13. **Baggage received in advance of time of expected passage.**—Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290.

14. North German Lloyd Steamship Co. *v.* Bullen, 111 Ill. App. 426.

15. **Duty to provide watchman.**—Where

from the fact that an oiler could leave his quarters below, traverse parts of a brilliantly lighted steamboat where he had no right to be, break into a stateroom, rob a passenger, and get away without being seen.[16]

§ 4433. Duty to Provide Stateroom Door with Bolts and Locks.—A vessel engaged in carrying passengers is negligent in failing to provide the doors of the stateroom with bolts or inside protection other than a lock which can be operated from outside, and is not excused by the fact that such inside securities might embarrass the passengers in case of fire or sudden danger.[17]

§ 4434. Particular Losses for Which Vessel Liable.—The owners of a steamship are responsible for the personal baggage of a passenger, unless the loss thereof was caused by the act of God or of public enemies.[18] Thus, a vessel is liable for the theft of baggage by a steward,[19] and for its loss through the misconduct of a servant in throwing it overboard.[20]

§ 4435. Passengers Entitled to Recover.—Deck passengers, whose baggage is not in trunks, and who keeps it in their own possession, cannot hold the ship liable for its loss or damage.[21]

§ 4436. Effects for Which Recovery Allowed.—A passenger upon a steamship line running between ports of different nations is not restricted in his recovery to mere wearing apparel.[22] He may recover for the loss of a manuscript.[23]

§ 4437. Contributory Negligence of Person Complaining.—A vessel engaged in the carriage of passengers is not liable for loss of a passenger's effects occasioned by his negligence or the failure of a passenger to shut the front hall and lock his stateroom does not necessarily constitute negligence, or, for

a passenger steamboat on the Great Lakes was equipped with 343 staterooms on two decks in two rows, with a passageway between them, the boat was negligent in failing to provide a sufficient watch; one man only being provided for that purpose. Decree, 151 Fed. 929, affirmed in The Western States, 159 Fed. 354, 86 C. C. A. 354.

16. The Western States, 159 Fed. 354, 86 C. C. A. 354.

17. **Duty to provide state room door with bolts and locks.**—Decree, 151 Fed. 929, affirmed in The Western States, 159 Fed. 354, 86 C. C. A. 354.

18. **Particular losses for which vessel liable.**—Judgment, 92 N. Y. S. 338, 46 Misc. Rep. 426, affirmed in Hart *v.* North German Lloyd Steamship Co., 95 N. Y. S. 733, 108 App. Div. 279.

The defense that damage to baggage by water entering through a broken port was the result of an inevitable accident is not sustained by evidence that, a short time before the injury was discovered, the ship, during a rough sea, passed through some floating wreckage, there being no evidence directly tending to prove that the port was broken by the wreckage, nor any attempt to show why the ship did not steer away from it or reduce its speed while passing through, nor any satisfactory proof that the ports were properly closed when the vessel sailed or were properly inspected afterwards. The Majestic, 17 S. Ct. 597, 166 U. S. 375, 41 L. Ed. 1039, reversing order, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746.

19. **Theft by steward.**—A shipowner is liable to a passenger for the value of jewelry stolen during the voyage by a steward employed to perform duties which the carrier owed to the passenger under the contract of carriage. Decree, 132 Fed. 52, affirmed in The Minnetonka, 146 Fed. 509, 77 C. C. A. 217.

20. **Misconduct of servant in throwing baggage overboard.**—That a steamship company permitted a passenger to retain control of his valise, and store same on deck, did not exempt it from liability for the misconduct of its servant in ordering the same to be thrown overboard. De Felice *v.* Compagnie Francaise, etc., Cie, 82 N. Y. S. 552, 83 App. Div. 73.

21. **Passengers entitled to recover.**—Defrier *v.* The Nicaragua, 81 Fed. 745.

22. **Wrong appeal.**—Levensohn *v.* Cunard Steamship Co., 162 Ill. App. 421.

23. **Manuscript of a manual on Greek grammar,** which a steamship passenger had written and of which he had no copy, contained in a trunk, was a proper part of his baggage, as affecting the steamship company's liability for loss of the trunk. Wood *v.* Cunard Steamship Co., 192 Fed. 293, 112 C. C. A. 551, 41 L. R. A., N. S., 371.

instance, where it was necessary to leave the door open for ventilation,[24] where the passenger closed the door and went for a key to the room,[25] or where the steward entered the room between the time the passenger left the room and the theft, and failed to secure the porthole or lock the door.[26]

§ 4438. Baggage Detained by Customs Officers.—Where baggage transported by a carrier by water is taken into the possession of the customs officers of a port, and destroyed by fire while detained by them, the carrier is not liable for its loss.[27] In such case the property is not in the possession or under the control of the carrier at the time of its loss, and the parties must be presumed to have contracted with the common knowledge of the necessity for customs, detention and inspection, and the burden is on the passenger to make provisions for the passage of his baggage beyond the borders of the foreign territory if nondutiable. The carrier is wholly powerless to prevent its seizure and detention and can not be held liable for its destruction, while in the possession of a foreign government, by a fire which it did not occasion, which it could not by any possible action of diligence, have prevented.[28]

§ 4439. Evidence.—There are many instances in actions against carriers by water in which the court's applying the general rules as to weight and sufficiency of evidence, have passed upon the sufficiency of the evidence to sustain a point in controversy; for instance, the evidence has been held sufficient to show delivery of the baggage to an authorized agent of the carrier,[29] negligent stowage of trunks,[30] that the complainant's baggage was stolen on the

24. Contributory negligence of person complaining.—Where a passenger had not finally retired for the night at the time her stateroom was entered and her jewelry stolen, but she was expecting the purser, so that she could place the jewels in his charge, and it was necessary that the door should be left open for ventilation, her failure to shut and bolt the same was not contributory negligence. The Minnetonka, 132 Fed. 52, decree affirmed in 146 Fed. 509, 77 C. C. A. 217.

25. A passenger on a steamship, having been assigned to a stateroom, placed therein a traveling bag containing $200 in $2 bills, locked the bag, closed the door of the stateroom, and went for a key to the room, none having been given him, returned to the room, and found that the money was stolen during his absence. Held, that the passenger was not negligent. Lincoln *v.* New York, etc., Steamship Co., 62 N. Y. S. 1085, 30 Misc. Rep. 752.

26. Any negligence of a steamship passenger in leaving the porthole of his stateroom open and the door unlocked when he left the room did not defeat his right to recover of the steamship company for articles taken from the room, where the steward of the steamship had in the meantime been in the room; it being his duty, if necessary to protect the passenger's goods, to have closed the porthole and locked the door. Judgment, 92 N. Y. S. 338, 46 Misc. Rep. 426, affirmed in Hart *v.* North German Lloyd Steamship Co., 95 N. Y. S. 733, 108 App. Div. 279.

27. Baggage detained by customs' officers.—Parker *v.* North German Lloyd Steamship Co., 76 N. Y. S. 806, 74 App. Div. 16, following Howell *v.* Grand Trunk R. Co., 92 Hun 423, 36 N. Y. 544.

Plaintiff traveled on defendant's steamer from New York to Germany, and on arrival directed that his trunks be forwarded to an interior town in England. Defendant's agent gave a receipt stating that the trunks were received from such steamer "for transfer by slow freight" to plaintiff, via London, to the address given by him. The agent forwarded the trunks in the usual way, and on their arrival in England they were detained at the custom house, where they were destroyed by fire. Held that defendant was not responsible for the destruction of the trunks. Parker *v.* North German Lloyd Steamship Co., 76 N. Y. S. 806, 74 App. Div. 16.

28. Parker *v.* North German Lloyd Steamship Co., 76 N. Y. S. 806, 74 App. Div. 16, following Howell *v.* Grand Trunk R. Co., 92 Hun 423, 36 N. Y. S. 544.

29. Delivery to authorized agent.—Where an immigrant suing for loss of baggage claims that the baggage was taken from her hotel in a foreign port by a representative of the steamship company, who gave no check or receipt, that the baggage was in fact shown to be placed on board the steamship is sufficient prima facie to prove delivery to an authorized agent. Haaga *v.* Austro-Americana Line, 173 Ill. App. 35.

30. Negligent stowage of trunks.—Libelants were passengers on a transat-

steamship during the voyage,[31] by an employee of the ship,[32] and the value of a manuscript contained in the passenger's trunk.[33] On the other the evidence in an action against a steamship company for jewelry taken from plaintiff's stateroom, has been held not to show plaintiff guilty of negligence.[34]

Delivery of Baggage in Damaged Condition.—Proof that a passenger's baggage was delivered to a vessel in good condition, and was damaged by seawater at the end of the voyage, is sufficient to establish the negligence of the carrier.[35]

§ 4440. Liens.—As regards liens upon a vessel for breach of a contract of affreightment, there is no distinction in principle between a contract for the transportation of a passenger with his baggage and one for the transportation of merchandise, and, by analogy with the rule in the latter case, no lien arises for loss of baggage unless at the time of such loss either the passenger had been received on board, or his baggage had been put into the custody or control of the vessel.[36]

§ 4441. Damages.—Where Indian curios, having no market value in the usually accepted sense, taken on board a transatlantic steamship by a passenger

lantic steamer, and their trunks, constituting their baggage, with those of other passengers, were broken to pieces, and the contents destroyed during the voyage. The vessel encountered unusually rough weather on the passage, and rolled heavily. A witness for libelants, who entered the compartment where the baggage was stowed immediately on the opening of the hatch at the end of the voyage, testified that he examined carefully, but could find no evidence that the trunks had been lashed or otherwise secured against movement in rough weather, and the compartment was not filled. Held that, in the absence of any evidence on the subject from claimants, such testimony was sufficient to support the libelants' contention of negligent stowage. Decree, 88 Fed. 331, affirmed in The Kensington, 94 Fed. 885, 36 C. C. A. 533, which is reversed in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

31. Theft of baggage.—Smith *v.* North German Lloyd Steamship Co., 142 Fed. 1032, affirmed in 151 Fed. 222, 80 C. C. A. 574.

32. Libelant and her traveling companion purchased ocean steamship tickets, and, after eating their first meal on board, libelant placed her jewels in a hand bag, and at once went to the purser's room to place the bag in his care. She was unable to obtain admittance, and finally notified the steward of her desire, who promised to inform her as soon as the purser returned. Libelant waited in her stateroom until 12 o'clock at night, when her room was entered by a man in steward's uniform, who seized the bag and fled. Libelant immediately notified the officers of the ship, but the bag was not again found. Held, that the facts established a cause of action for theft by the ship's servants, for which it was liable. The Minnetonka, 132 Fed. 52, decree affirmed in 146 Fed. 509, 77 C. C. A. 217.

33. Value of manuscript.—On libel against a steamship company for loss of a passenger's trunk, evidence held to show that manuscript contained in the trunk was worth $500. Wood *v.* Cunard Steamship Co., 192 Fed. 293, 112 C. C. A. 551, 41 L. R. A., N. S., 371.

34. Hart *v.* North German Lloyd Steamship Co., 92 N. Y. S. 338, 46 Misc. Rep. 426, affirmed in 95 N. Y. S. 733, 108 App. Div. 279.

35. Delivery of baggage in damaged condition.—Weinberger *v.* Compagnie Generale Transatlantique, 146 Fed. 516.

36. Liens.—The Priscilla, 114 Fed. 836, 52 C. C. A. 470.

By the custom of a steamship company, it received at its pier baggage sent there by passengers intending to take passage on its vessels, and kept the same until claimed by the passengers. By the rules of the company, the passenger was required to present a ticket, and have his baggage checked, before it was received on board a vessel. Libelant sent baggage to the pier, where it was received; and he subsequently purchased a ticket for one of the company's vessels, which he presented to the baggage master, but his baggage could not be found. Prior to such time the company had no notice to whom the baggage belonged, or when or by what vessel it was to be shipped. Held, that whatever the liability of the company, as carrier or warehouseman, libelant had no lien for the loss of the baggage on the particular vessel for transportation upon which he afterward contracted, but which at the time of the loss had not entered on performance of the contract, which would support an action in rem in a court of admiralty. The Priscilla, 114 Fed. 836, 52 C. C. A. 470.

for transportation from New York to Havre and paid for as extra baggage, were lost on the voyage through the sinking of the vessel, their value in New York, as shown by the opinions of experts, was properly taken as the measure of damages for the loss in a suit against the owners of the vessel.[37]

§ 4442. Limitation of Liability.—See ante, "Conditions and Limitations in Tickets," §§ 2218-2230; "Contracts, Fares, Passage and Tickets," §§ 4385-4390.

§ 4443. Penalties and Forfeitures for Violations of Regulations.—A court of admiralty may, in the exercise of a judicial discretion, refuse to impose on the owner of a steamship the penalty prescribed by Rev. St., § 4465 [U. S. Comp. St. 1901, p. 3046], for carrying more passengers than the number allowed by the vessel's inspection certificate, where, because of extraordinary conditions existing, such imposition would be inequitable. A steamship which left San Francisco for Seattle a few days after the destruction of the former city by earthquake and fire is not subject to the penalty prescribed by Rev. St. § 4465 [U. S. Comp. St. 1901, p. 3046], for carrying more steerage passengers than the number allowed by her inspection certificate, nor liable to such passengers in damages for the inconvenience and privation resulting to them from the overcrowding and from a shortage of water, where the excess of passengers was due to the confusion caused by the destruction of the city and the company's office and occurred notwithstanding its efforts to prevent it, and the shortage was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco, and to bad weather which prolonged the voyage.[38]

§§ 4444-4447. Offenses Incident to Carriage of Passengers—§ 4444. What Constitutes and Elements.—Under Rev. Stat., § 5344 (U. S. Comp. St. 1901, p. 3629), which provides that every captain on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, etc., shall be guilty of manslaughter, intent or malice is not an element of such offense, and proof that accused was the captain of the vessel; that he was guilty of misconduct, negligence or inattention to his duties thereon; and that by reason thereof human life was destroyed, is sufficient to sustain a conviction.[39]

Failure to Maintain Fire Drill and Provide Extinguishing Apparatus.—Under Rev. Stat., § 4471 (U. S. Comp. St. 1901, p. 3049), which provides for the maintenance of a steam fire pump and two hand pumps with pipes, one on each side of the vessel, to convey water to the upper decks to which suitable hose shall be attached and kept in good order at all times and ready for immediate use, and the United States Inspectors' rule 5, § 15, which provides for a fire drill at least once a week, and § 4482 (U. S. Comp. St. 1901, p. 3054), requires good life preservers in sufficient numbers, kept in accessible places for immediate use, it is the statutory duty of the captain to maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire is provided and maintained in proper order, and to exercise ordinary care to see that the life preservers are in fit condition for use.[40]

Failure to Post Station Bill Assigning Crew to Quarters.—Where a station bill posted on a vessel assigning the crew to quarters in case of fire referred to the crew by number instead of names, but the members of the crew

37. **Damages.**—La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in Deslions *v.* La Compagnie Generale Transatlantique, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

38. **Penalties and forfeitures for violations of regulations.**—The Charles Nelson, 149 Fed. 846.

39. **What constitutes and elements.**—Van Schaick *v.* United States, 159 Fed. 847, 87 C. C. A. 27, 14 Am. & Eng. Ann. Cas. 456.

40. **Failure to maintain fire drill and provide extinguishing apparatus.**—Van Schaick *v.* United States, 159 Fed. 847, 87 C. C. A. 27, 14 Am. & Eng. Ann. Cas. 456.

were not numbered, the posting of the bill did not constitute a compliance with the law requiring the posting of a station bill assigning the crew to quarters in case of fire.[41]

§ 4445. Defenses.—In a prosecution of the captain of a vessel for manslaughter, due to his negligence, misconduct, and inattention to duty in the performance of certain duties imposed on him by law, it is no defense that the government inspectors had failed in their duty to properly inspect the vessel and its safety appliances, and had wrongfully issued a certificate of inspection.[42]

Failure to Maintain Station Drills.—Where an excursion steamer in New York Harbor had been inspected early in May, 1904, and was ready for navigation about May 15th, she having been out but nine times prior to June 15th, when she was lost by fire, it is no excuse for the captain's failure to maintain fire drills as required by Inspectors' rule 5, § 15, that he had had no time or opportunity therefor, or that his crew was composed of raw material, and was constantly changing.[43]

§ 4446. Indictment.—An indictment against the master of a vessel transporting immigrants to a port of discharge within the United States, charging that there were no sufficient tables and seats provided for the use of such passengers, in violation of Act Cong. Aug. 2, 1882, c. 374 [U. S. Comp. St. 1901, p. 2931], though objectionable for failure to allege in what respects the insufficiency consisted, was not fatally defective, but the charge should be made more definite and certain by a bill of particulars or by a new indictment.[44]

§ 4447. Evidence.—In a prosecution of the captain of a vessel for misconduct and inattention to duty resulting in loss of life from fire starting in the forward hold of the vessel, it must be presumed that the life preservers originally furnished were sufficient, but evidence that they had been on the vessel from nine to thirteen years and only most supercilious tests had been made during this period, that many went to pieces as soon as taken from the racks, that others which were adjusted proved inadequate, as persons wearing life preservers were seen going down below the surface of the water and when brought up were dead, is sufficient to justify a finding that the captain was negligent in failing to provide, preserve, and inspect necessary life preservers.[45]

Negligence and Inattention to Duty.—Where an excursion steamboat was burned while plying quiet inland waters on a pleasant day with no vis major or unusual disturbance of the elements, and within half an hour after the fire broke out, 90 per cent of the passengers had been drowned or burned to death, such catastrophe was not the result of inevitable accident, but was itself evidence of negligence and inattention to duty on the part of the master and crew.[46]

41. **Failure to post station bill assigning crew to quarters.**—Van Schaick *v.* United States, 159 Fed. 847, 87 C. C. A. 27, 14 Am. & Eng. Ann. Cas. 456.

42. **Defenses.**—Van Schaick *v.* United States, 159 Fed. 847, 87 C. C. A. 27, 14 Am. & Eng. Ann. Cas. 456.

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46. **Negligence and inattention to duty.**—Van Schaick *v.* United States, 159 Fed. 847, 87 C. C. A. 27, 14 Am. & Eng. Ann. Cas. 456.

CHAPTER XL.

Limitations of Liability.

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§§ 4448-4493. Limitation of Exceptions in Contract—§ 4448. Implied Exceptions.—Unless a carrier assumes the risk of all contingencies, he is not liable because he fails to perform what is rendered impossible by the perils of the sea. Such events as are known as the accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition in every such engagement.[1] The act of God means inevitable accident, without the intervention of men and public enemies.[2]

§§ 4449-4480. Express Exceptions in Bill of Lading or Shipping Contract—§§ 4449-4450. Power and Validity Generally—§ 4449. In General.—In the absence of statutory provision to the contrary, a carrier of goods may, by special contract, contained in the bill of lading, stipulate for a more limited liability than that which the law would otherwise impose upon him.[3]

Private Carrier.—A contract by a lighterage company to carry the product of a manufacturing company in and about New York Harbor, furnishing the full capacity of its vessels, made it a private carrier; and a provision of its contract that it should not be liable for goods lost or damaged, but requiring the owner to insure against such loss, is valid.[4]

§ 4450. What Law Governs.—Exemptions for negligence, contracted for in a foreign port on a foreign vessel, though valid where made, will not ex-

1. Implied exceptions.—Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220. See, to the same effect, The Tornado, 108 U. S. 342, 27 L. Ed. 747, 2 S. Ct. 746; Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391; The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629.

The rule seems to be well settled that when the voyage is broken up by a sea peril, that neither the shipper nor the charterer is in general liable to the shipowner beyond the time when the peril occurred; but that rule is more particularly applicable in cases where the transportation of the cargo is not complete. Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220.

Burden of proof.—The burden is on the carrier to show that the injury was by the act of God, for which the company was not liable. Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Transportation Co. *v.* Downer (U. S.), 11 Wall. 129, 20 L. Ed. 160; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

2. Act of God or inevitable accident.—The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

Damage to luggage from sea water, which came through a broken port hole, is not the result of inevitable accident or act of God if the accident was one which could have been prevented by human effort, sagacity and care. The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

Disaster occasioned by the incompetency, unskillfulness, or negligence of the master or pilot in charge of the deck, is not inevitable accident. The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; The Morning Light (U. S.), 2 Wall. 550, 17 L. Ed. 862; Union Steamship Co. *v.* New York, etc., Steamship Co. (U. S.), 24 How. 307, 16 L. Ed. 699.

Difficulties or improbabilities of accomplishing the undertaking will not avail the carrier. The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629.

War.—Perils to the ship and cargo from a war, the existence of which was known to both parties when the contract is entered into, the owner making no provision against any contingency, is no reason for breaking up the voyage and not proceeding to the port of delivery. The Harriman (U. S.), 9 Wall. 161, 19 L. Ed. 629.

3. Power and validity generally.—The Henry B. Hyde, 82 Fed. 681, decree affirmed in 90 Fed. 114, 32 C. C. A. 534; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

And such special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against. The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748, quoting Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

4. Private carrier.—The Maine, 170 Fed. 915, 96 C. C. A. 131, reversing decree, 153 Fed. 635.

cuse torts and consequent damage occurring within our territorial jurisdiction.[5]

Stipulations Limiting Liability for Negligence.—A contract limiting the carrier's liability for negligence, though valid by the lex loci, will not be enforced when it is in violation of the public policy of the forum;[6] even though the contract expressly provides that it shall be governed by the laws of the ship's flag or by the laws of a place where such contract is valid.[7] This rule governs both under and independent of the Harter Act.[8]

§ 4451. Construction Generally.—Exceptions in a bill of lading or charter party, inserted by the ship owners for their own benefit are unquestionably to be construed most strongly against them.[9] Their meaning ought not to be extended to give the ship owner a protection, which, if intended, should have been expressed in clear terms.[10]

Rule of Ejusdem Generis.—A clause in a bill of lading exempting the carrier from liability for loss or damage "occasioned by causes beyond his control," following the enumeration of a large number of specific causes, including perils of the sea, fire, accidents of navigation, and others of like nature, which would be covered by such clause if given a broad construction, must be restricted in meaning to causes of the same general nature as those particularized. As so construed, such excuse does not relieve the carrier from liability for damage occasioned while the vessel was in port and being unladen, by the explosion of certain detonators forming a part of the cargo, which made a hole in the side of the ship, through which the sea water entered and injured the goods, where

5. What law governs.—The Kensington, 88 Fed. 331, decree affirmed in 94 Fed. 885, 36 C. C. A. 533, which is reversed in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

A provision in a bill of lading, containing an exception of damage from negligent stowage, that the contract should be governed by the law of the flag (English), is not enforceable in our courts, being against the public policy of this country. Decree 76 Fed. 582, affirmed in Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326, affirmed in 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

6. Contracts limiting carrier's liability for negligence.—The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; compare Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12.

The validity of a stipulation exempting a steamship company from liability for negligence of its servants in the performance of its voyage is to be governed by the American law in a contract of affreightment made in an American port by an American shipper with an English steamship company doing business here; hence, since, by our law, such a stipulation is not enforceable, the contract is void. Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102.

7. Contract stipulating that it shall be governed by laws of place where valid.—The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102. See Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12, where the court refused to expressly decide on this question.

A provision in the contract of a carrier with a passenger restricting the carrier's liability for negligence, to the passenger, is contrary to the public policy enforceable in our courts, and hence unenforceable; even though the passenger's contract was made, and became binding in a foreign country, and expressly stipulated that the law of the foreign country should control the contract. The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102, discussing Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30.

8. Effect of Harter Act.—The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30. See post, "Proceedings to Limit Liability," §§ 4548-4576.

9. Construction generally.—Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12, affirming 66 Fed. 776, 14 C. C. A. 88; The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537; The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597; The Queen, 78 Fed. 155, affirmed in 94 Fed. 180, 36 C. C. A. 135, reversed in 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

10. The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537.

the detonators were shipped and handled in the usual way, and the explosion was an unusual, and even unprecedented, occurrence.[11]

Preliminary Memorandum.—The bill of lading can alone be considered as the contract between the parties, and can not be modified by a memorandum which is preliminary merely; the same rule of construction would apply to the memorandum as to the bill of lading.[12]

Exceptions Omitted from Contract.—No exceptions of a private nature, which is not contained in the contract itself can be engrafted upon it by implication or an excuse for its nonperformance. The carriers are responsible for the miscarriage of their master and agent.[13]

Loss by Negligence.—Exemptions in bills of lading are not construed to cover the negligence or default of the carrier, unless it is expressly stipulated for.[14]

Unseaworthiness.—Clauses in a bill of lading exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication, so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage.[15]

§§ 4452-4455. Operation and Effect Generally—§ 4452. General Rule.—Where stipulations in the nature of exceptions limiting the extent of the obligation of the carrier, are inserted in the bill of lading of water carrier, the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument,[16] and the carrier is not liable for loss or damage caused by the excepted perils.[17]

§ 4453. Partial Invalidity.—Though a stipulation for exemption from liability be in part in contravention of law, yet such portion as is otherwise valid may be enforced.[18]

§ 4454. Right of Assignees.—Where goods are shipped by charterers under bills of lading containing the clause, "All conditions as per charter party," the receivers of the cargo and indorsees of the bills of lading take the goods subject to a charter exception of latent defects in the hull.[19]

§ 4455. Loss from Negligence of Carrier or Servants.—Exemptions in a bill of lading which are brought into operation by the negligence of the shipowner or his servants are not enforceable in the courts of this country.[20] By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils to which the neg-

11. Rule of ejusdem generis.—Decree 64 Fed. 878, reversed in The G. R. Booth, 91 Fed. 164, 33 C. C. A. 430.

12. Preliminary memorandum.—The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537.

13. Exceptions omitted from contract.—Howland *v.* Greenway (U. S.), 22 How. 491, 16 L. Ed. 391.

14. Loss by negligence.—Decree, 168 Fed. 386, affirmed in The Toronto, 174 Fed. 632, 98 C. C. A. 386.

15. Unseaworthiness.—The Carib Prince, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 Fed. 254, 15 C. C. A. 385.

16. General rule.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017.

17. Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017.

18. Partial invalidity.—The Prussia, 88 Fed. 531, decree affirmed in 93 Fed. 837, 35 C. C. A. 625.

19. Right of assignees.—The Sandfield, 79 Fed. 371, decree affirmed in 92 Fed. 663, 34 C. C. A. 612.

20. Loss from negligence of carrier or servants.—The Manitou, 116 Fed. 60, affirmed in 127 Fed. 554, 63 C. C. A. 109.

ligence of himself or his servants has contributed.[21] Thus, stipulations against loss by perils of the sea, dangers of the sea or navigation, etc.; against loss by heating or heat;[22] against the risk of due refrigeration;[23] or a stipulation that the shipment should be on deck at the owner's risk,[24] do not exempt from liability for a loss from such cause to which the negligence of the ship owner or his servants contributed.

§§ 4456-4479. Particular Exceptions—§§ 4456-4463. Perils of Sea, Navigation, Lakes, Rivers, etc.—§ 4456. In General.—"Perils of the sea" in a ship's bill of lading denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A casus fortuitus was defined in the civil law to be, quod damno falati contingit, cuivis diligentissimo possit contingere. It is a loss happening in spite of all human effort and sagacity. The words "perils of the sea," may, indeed, have grown to have a broader signification than "the act of God."[25] Generally speaking, the words have the same meaning in a bill of lading as in a policy of insurance, although the effect of negligence of the master or crew contributing to the loss by a peril of the sea may be different on the two contracts.[26]

The term "dangers of lake navigation" includes all the ordinary perils which attend navigation on the lakes, among which are dangers arising from shallowness of water at the entrance to harbors formed from them.[27]

§ 4457. Damage by Sea Water—Leakage.—Damage to cargo by sea water is not necessarily damage by a peril or danger of the seas.[28] Damage to cargo by sea water entering the hold around a loose rivet, which has been fractured by perils of the sea, is a loss by perils of the sea within the excep-

21. Compania De Navigacion La Flecha *v.* Brauer, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree 66 Fed. 776, 14 C. C. A. 88.

After a barge had been loaded with a cargo of wheat in January, and while lying in the Chicago river, awaiting the opening of lake navigation in the spring, a drain pipe which passed through the hold above the wheat, and the lower part of which was below the surface of the river, so that it remained full of water, froze and burst, and water from the river ran in upon the cargo. The shipkeeper in charge for the owners knew that water was entering the vessel, but, on the supposition that it came in from a different place, made no examination for a month, although he could easily have done so; and during all that time the water continued to run in upon the wheat, doing it serious damage. Held, that the result should reasonably have been anticipated, and that, moreover, the keeper was guilty of gross negligence, which rendered the owner of the vessel liable for the injury to the cargo, irrespective of the obligation assumed under the bill of lading to deliver the cargo safely at the port of destination, dangers of navigation, fire, and collision alone excepted. Northwestern Transp. Co. *v.* Leiter, 107 Fed. 953, 47 C. C. A. 97.

22. Loss from heat or heating.—See post, "Loss from Heat or Heating," § 4472.

23. Risk of refrigeration.—See post, "Risk of Due Refrigeration," § 4469.

24. Carriage in open barge at owner's risk.—See post, "Jettison," § 4461.

25. Perils of sea definition.—The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

Losses arising from the dangers of navigation are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which can not be prevented by human skill and prudence. When efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law result from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the expected peril may be regarded as continuing its operation. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

26. The G. R. Booth, 19 S. Ct. 9, 171 U. S. 450, 43 L. Ed. 234, certifying case 64 Fed. 878.

27. Transportation Co. *v.* Downer (U. S.), 11 Wall. 129, 20 L. Ed. 160.

28. Damage by sea water.—The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748, following The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9.

tions of a charter party and bill of lading.[29] But damage to cargo caused by seawater which enters through the deck by reason of its defective condition, which renders the vessel unseaworthy for the particular voyage and cargo;[30] or damage to cargo from sea water, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage; is not a loss by perils of the sea,[31] or through dangers of the sea.

§ 4458. Collisions, Stranding, Obstructions of Navigation.—Collision[32] or stranding[33] is doubtless a peril of the sea, navigation, or river. Thus the dangers of unknown obstructions have been held to be a peril of navigation, as, for instance, a loss from striking an unmarked, unknown and hidden obstruction below the surface of the water,[34] a loss occasioned by running into a sunken tree, the presence of which was unknown;[35] and a loss from running upon a sand reef recently found in a river.[36]

§ 4459. Explosions.—Explosions are not included among the perils of the sea.[37] As, for instance, the explosion of a steam boiler on a steam vessel,[38] or of box of detonators. Where a box of detonators stowed in the hold of a vessel, as a part of the cargo, exploded, tearing a hole in the side of the ship below the water line, through which the sea water immediately entered, and, penetrating into the next compartment, damaged a consignment of sugar; although the explosion and the inflow of the water were concurrent causes of the damage, yet the explosion, and not the inflow of the sea water, was the proximate and responsible cause of damage, and the damage was not occasioned by a peril of the sea within the exceptions in the bill of lading.[39] The vessel having reached her port of destination, and being engaged in unloading, at the time of the explosion, the damage would not come within a provision of the bill of lading exempting the carrier from liability for loss or damage occasioned by an "accident of navigation."[40]

§ 4460. Fire.—The words "perils of the river" do not include fire.[41]

§ 4461. Jettison.—A jettison, the necessity for which was occasioned solely by a peril of the sea, is a loss by a peril of the sea, and within the exception contained in the bill of lading.[42] But, if the unseaworthiness of the vessel, at

29. The Sandfield, 79 Fed. 371, decree affirmed in 92 Fed. 663, 34 C. C. A. 612.

30. The Nellie Floyd, 116 Fed. 80, affirmed in 122 Fed. 617, 60 C. C. A. 175.

31. Decree 138 Fed. 743, affirmed in The Brilliant, 159 Fed. 1022, 86 C. C. A. 671.

32. **Collisions, stranding, obstructions of navigation.**—Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469, citing General Mut. Ins. Co. *v.* Sherwood (U. S.), 14 How. 351, 14 L. Ed. 452, and Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 31 L. Ed. 63, 8 S. Ct. 68; The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754.

33. **Stranding.**—Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469, citing General Mut. Ins. Co. *v.* Sherwood (U. S.), 14 How. 351, 14 L. Ed. 452, and Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 31 L. Ed. 63, 8 S. Ct. 68.

34. Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1.

35. Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 120 U. S. 166, 30 L. Ed. 621, 7 S. Ct. 550.

36. Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 120 U. S. 166, 30 L. Ed. 621, 7 S. Ct. 550.

37. **Explosions.**—The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9.

38. Propeller Mohawk (U. S.), 8 Wall. 153, 19 L. Ed. 406; The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9.

39. The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9; The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

40. The G. R. Booth, 19 S. Ct. 9, 171 U. S. 450, 43 L. Ed. 234, certifying case, 64 Fed. 878.

41. **Fire.**—Garrison *v.* Memphis Ins. Co. (U. S.), 19 How. 312, 15 L. Ed. 656. See post, "Fire," § 4466.

42. **Jettison.**—Dupont de Nemours & Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584, distinguished in Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742, 15 S. Ct. 657; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58. See, to the

the time of sailing on the voyage, caused, or contributed to produce, the necessity for the jettison, the loss is not within the exception of perils of the seas.[43]

Fault or Breach of Contract by Master or Owner.—But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance.[44] Thus, a wrongful jettison of sound cattle by order of the master, from unfounded apprehensions, during rough weather, is not a "loss or damage occasioned by causes beyond his [the carrier's] control, by the perils of the sea, or other waters," or "by collisions, stranding, or other accidents of navigation," in the meaning of the bill of lading.[45] And an exception, in a bill of lading of cattle, as follows: "On deck, at owner's risk; steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising,"—does not cover a jettison of uninjured cattle, in rough weather, by order of the master, from unfounded apprehension, in the absence of any pressing perils of the ship, and without any attempt to separate them from cattle previously injured.[46]

In case of jettison of deck load, neither the master, carrier, nor ship is responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss.[47]

§ 4462. Storms.—Where a shipping contract excepted acts of God, other words of exemption from liability for injury from storm are not needed.[48] The loss of logs which broke loose from a raft by reason of a high wind, after they had been towed out to a steamer for loading in the open sea;[49] the death of horses appearing to have resulted from the violence of a hurricane;[50] and

same effect, General Mut. Ins. Co. *v.* Sherwood (U. S.), 14 How. 351, 14 L. Ed. 452; The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754; The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9. See, also, The Star of Hope (U. S.), 9 Wall. 203, 19 L. Ed. 638.

43. Dupont de Nemours & Co. *v.* Vance (U. S.), 19 How. 162, 15 L. Ed. 584, distinguished in Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742, 15 S. Ct. 657.

44. **Fault or breach of contract by master or owner.**—Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; General Mut. Ins. Co. *v.* Sherwood (U. S.), 14 How. 351, 14 L. Ed. 452; The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754; The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9.

45. Compania De Navigacion La Flecha *v.* Brauer, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree 66 Fed. 776, 14 C. C. A. 88.

46. Compania De Navigacion La Flecha *v.* Brauer, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree 66 Fed. 776, 14 C. C. A. 88.

47. Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58.

48. **Storms.**—Unique Shipping Co. *v.* Guffey Petroleum Co., 169 Fed. 905, decree affirmed in 177 Fed. 1005, 100 C. C. A. 200.

49. **Loss of logs.**—Where, in loading a cargo of mahogany logs, the ship was obliged to lie three miles off shore in the open sea, the logs being delivered in rafts, which were made fast to the ship, and bills of lading then given for the same, the vessel is not liable for logs which broke away from the rafts and were lost before they were loaded, when reasonable diligence was exercised in the loading, and the loss arose either from unusual weather conditions, making a case of perils of the sea within the exceptions in the bills of lading, or because they were insufficiently secured in the rafts through the negligence of the shipper. Decree 132 Fed. 160, affirmed in Munson Steamship Line *v.* Steiger & Co., 136 Fed. 772, 69 C. C. A. 492.

50. **Death of horse due to violence of hurricane.**—A special written contract between a steamship company and the shipper of a horse stipulated that the company should furnish room on the steamship for the horse, and supply it with water on the passage, and that the company should be in no manner liable for any accident that should happen to the horse on board the ship by reason of the perils of the sea, sickness, disease, or any other unavoidable cause whatever, and, further, that the shipper would, at his own expense, provide stalls and food during the voyage, and proper grooms to take sole charge of the horse. During

damage to cargo from water escaping from a ballast tank which had become buckled in a storm;[51] were losses due to a peril of the sea, within an exemption in the bill of lading, and the ship is not liable therefor.

§ 4463. Negligence of Carrier or Servants.—The negligence of the carrier, or his servants, is not a peril of the sea.[52] By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified peril, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.[53] "Dangers of navigation" or "perils of the sea," as used in bills of lading or concerning shipping, mean only those dangers which are inevitable, and do not excuse the vessel from liability for loss caused by negligence.[54]

§ 4464. Exceptions as to Warranty of Seaworthiness.—Clauses exempting the shipowner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness whether patent or latent, existing at the commencement of the voyage.[55] A provision of a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage.[56] And a stipulation

the voyage, and between ports, the ship encountered a violent hurricane, and by reason of the rolling and pitching of the ship the horse was thrown from his stall and killed. No negligence on the part of the servants of the company was shown; the death of the horse appearing to have resulted from the violence of the storm, or from the failure to provide grooms and a proper stall. Held, that the company is not liable. New England, etc., Steamship Co. *v.* Paige, 33 S. E. 969, 108 Ga. 296.

51. Ballast tank buckled.—The Charlton Hall, 207 Fed. 343, 125 C. C. A. 116.

52. Negligence of carrier or servants.—Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985. See, also, The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017; Northwestern Transp. Co. *v.* Leiter, 107 Fed. 953, 47 C. C. A. 97.

53. Compania De Navigacion La Flecha *v.* Brauer, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree 66 Fed. 776, 14 C. C. A. 88.

An exception of "perils of the sea" in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care, unless prevented by the excepted perils. The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9, commenting upon Propeller Mohawk (U. S.), 8 Wall. 153, 19 L. Ed. 406, and The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754.

54. Pettyjohn *v.* Oregon Coal, etc., Co., 58 Ore. 392, 113 Pac. 438.

55. Exceptions as to warranty of seaworthiness.—The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181, 18 S. Ct. 753; The Caledonia, 157 U. S. 124, 39 L. Ed. 64, 15 S. Ct. 537.

56. The Aggi, 107 Fed. 300, 46 C. C. A. 276; The Sandfield, 92 Fed. 663, 34 C. C. A. 612, affirming decree 79 Fed. 371.

Exceptions in a bill of lading of damage from "latent defects in hull," etc., do not include unseaworthiness existing at the inception of the voyage, and at the time the bill of lading was signed, and resulting from a latent defect in a rivet in a water tank. The Caledonia, 15 S. Ct. 537, 157 U. S. 124, 39 L. Ed. 644, applied in The Carib Prince, 15 C. C. A. 385, 68 Fed. 254, reversed in 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181.

An exception in a charter party from liability for loss or damage from delays, steam boilers and machinery or defects therein operates prospectively only and does not exempt the ship from liability for loss caused by unseaworthiness from a defective shaft, the defect being a latent one and existing before the commencement of the voyage. The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537. See The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181, 18 S. Ct. 753.

in a bill of lading that the carrier may convey goods in lighters to and from the ship at the risk of the owner of the goods does not apply to risks arising out of the unfitness of a lighter.[57]

Stipulation against Unseaworthiness at Inception of Voyage—Proper Inspection.—A provision in a ship's bill of lading that the owners should not be accountable for unseaworthiness of the vessel at the commencement of the voyage if all reasonable means had been taken to provide against such unseaworthiness will exonerate the owners from liability for such injury, where proper inspection and repairs had been made before the entering on the voyage.[58] Aliter, where such inspection is not made.[59]

§ 4465. Exceptions of Loss or Damage Resulting from Negligence of Carrier.—In General.—By the law before the passage of the Harter Act, Feb. 13, 1893, ch. 105, 27 Stat. 445, common carriers, by land or sea, could not, by any form of contract with the owner of property carried, exempt themselves from responsibility for loss or damage arising from negligence of their own servants; and any stipulation for such exemption was contrary to public policy and void.[60]

Carriage at Owner's Risk.—A navigation company is responsible for loss, by negligence of its servants, of money carried under a stipulation that it is to be at all times exclusively at the risk of the "shipper." [61] Where a contract for the shipment of flour provided that, in consideration of a reduced freight

57. Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

58. **Stipulation against unseaworthiness at inception of voyage—Proper inspection.**—A steamer encountered heavy weather in crossing the Atlantic, during which the seams of the ballast tank, which was constructed of iron plates riveted together, were sprung, and two rivets were lost, permitting a leakage into the hold above, by which a portion of the cargo was injured. The ship had been surveyed and her tanks tested prior to the voyage, and she had been given a certificate of classification in the highest class. Proper inspection had been made before entering on the voyage, and the tanks tested by pressure and found tight. The leak, in the opinion of experts, was caused by the strain of the ship in the heavy weather during the voyage, and there was no evidence contradicting such opinion or to show that the rivets lost were in any way defective in material or workmanship. Held that, under a bill of lading providing that the owners should not be accountable for the unseaworthiness of the vessel at the commencement of the voyage if all reasonable means had been taken to provide against such unseaworthiness, the shipowners would be exonerated from liability for injury to the cargo. The Ontario, 106 Fed. 324, affirmed in 115 Fed. 769, 53 C. C. A. 199.

59. Sugar in the hold of an iron steamship was damaged by water coming in through a small hole made by corrosion of the acid of sugar drainage and sea water, which reached the plate through cracks in the lining of Portland cement. The evidence was insufficient to show that the cracks were caused by any accident after sailing. Respondent relied on an exception in the bill of lading of damage from unseaworthiness, provided "all reasonable means have been taken" to make the ship seaworthy. Held, that, in the inspection prior to the voyage, a failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which the leak occurred, in order to examine the cement, was a lack of "due diligence" and "reasonable means" to make the ship seaworthy, and the carrier was not exempted under the bill of lading. The Alvena, 79 Fed. 973, 25 C. C. A. 261, affirming 74 Fed. 252.

60. **Exceptions of loss or damage resulting from negligence of carrier.**—Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469, citing The Lottawanna (U. S.), 21 Wall. 558, 22 L. Ed. 654; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Belgenland, 114 U. S. 355, 29 L. Ed. 152, 5 S. Ct. 860; The Harrisburg, 119 U. S. 199, 30 L. Ed. 358, 7 S. Ct. 140; New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831; Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062. See The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102.

61. **Carriage at owner's risk.**—New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12.

rate, the flour was to be carried in open barges at libelant's risk, such provision did not relieve respondent from liability for loss and injury to a part of the cargo, resulting from respondent's negligent failure, for 16 hours after discovering that the barge on which the flour was being loaded was in a leaking condition, to take steps to save the cargo from injury.[62]

Stipulation Respecting Liability for Stowage.—A ship is liable for damage to cargo, resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading.[63]

What Law Governs.—See ante, "What Law Governs," § 4450.

Limiting Amount of Liability to Specified Sum.—See post, "Limitation of Amount of Damages," § 4476.

§ 4466. Fire.—A shipowner may limit his common-law liability for fire by special stipulations in the bill of lading,[64] and he can in this way extend his statutory exemption from fires to such as occur after the discharge of the cargo.[65] A provision in a bill of lading that, if the articles named therein shall be conveyed in part by water, they shall "be subject to all customary conditions of same," does not exempt the carrier from loss by fire, on the ground that in contracts for transportation of goods there is a well-established usage for exemptions covering loss by fire, unless it be shown that the custom is reasonable, uniform, well settled, not in opposition to fixed rules of law, nor in contradiction of the express terms of the contract.[66]

§ 4467. Stowage on Deck.—Where, in an action by a shipper against a carrier for loss of oil clothing shipped under a bill of lading providing that inflammable goods might be transported on deck and should be at the shipper's risk, the evidence showed a custom to treat oil clothing as inflammable, and when carried by water to transport it on deck, the carrier was not liable for the loss of the goods in consequence of the same being washed overboard.[67]

§ 4468. Loss Through Leakage.—Stipulations in a bill of lading against liability for loss or damage to cargo through leakage do not exempt the shipowner from liability for damage caused by seawater which enters through the deck by reason of its defective condition, which renders the vessel unseaworthy for the particular voyage and cargo.[68]

§ 4469. Risk of Due Refrigeration.—A carrier by water, who accepts a cargo of frozen meat for transportation across the ocean, impliedly contracts that his vessel is provided with suitable and efficient apparatus to enable him to deliver the cargo in proper condition but it is competent for the parties, by express contract, to stipulate for the exemption of the carrier from liability

62. California Nav., etc., Co. *v.* Stockton Mill. Co., 184 Fed. 369, 107 C. C. A. 46, affirming judgment 165 Fed. 356.

63. **Stipulation respecting liability for stowage.**—The Mississippi, 120 Fed. 1020, 56 C. C. A. 525, affirming decree, 113 Fed. 985.

64. **Fire.**—Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062, citing York Co. *v.* Central Railroad (U. S.), 3 Wall. 107, 18 L. Ed. 170; New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Railroad Co. *v.* Manufacturing Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176.

Agreement exacted by collector of customs.—Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

65. Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

66. Robinson *v.* New York, etc., Steamship Co., 74 N. Y. S. 384, 36 Misc. Rep. 705, affirmed in 78 N. Y. S. 359, 75 App. Div. 431, 69 N. E. 1130, 177 N. Y. 565.

67. **Stowage on deck.**—Tower Co. *v.* Southern Pac. Co., 195 Mass. 157, 80 N. E. 809.

Jettison.—See ante, "Jettison," § 4461.

68. **Loss through leakage.**—The Nellie Floyd, 116 Fed. 80, affirmed in 122 Fed. 617, 60 C. C. A. 175.

for loss or damage to the cargo in consequence of latent defects in such apparatus which are not due to any fault or negligence on his part, or on the part of those for whom he is responsible.[69] But a provision in a bill of lading that the risk of due refrigeration of meats shall be borne by the shipper, though damage be caused by neglect of the carrier's servant, does not excuse the carrier from the duty of reasonable care to provide a proper refrigerating plant.[70]

§ 4470. Risk of Mortality or Accident.—The assumption of the risk of mortality or accident throughout the voyage does not constitute an exemption of the shipowner from his obligation to furnish a seaworthy vessel at its commencement.[71]

The wrongful jettison of the sound cattle by the act of the carrier's servants can not reasonably be considered as an "accident to, or mortality of the animals."[72]

§ 4471. Loss from "Sweating, Natural Decay or Sea Water."—In an action to recover for damage to a cargo of rice alleged to have been received by the ship in good condition but to have been delivered at the end of the voyage in a damaged condition due to sea water and consequent heating, where the owners of the vessel clearly show that she was seaworthy and in all respects properly equipped for the carriage of the cargo at the beginning of the voyage, and also at its termination, that the cargo was properly stowed, and that there was no negligence during the voyage which would account for the entry of sea water, they have fully established a defense under a bill of lading which exempted the vessel from liability for damage from sweating, natural decay, or from sea water caused without the ship's fault or negligence.[73]

§ 4472. Loss from Heat or Heating.—The words "heat" and "heating," as used in a ship's bill of lading in stating the causes of damage to cargo for which she should not be liable, are synonymous.[74] Where a shipment of shellac from Calcutta to New York, made under a bill of lading excepting liability for loss or damage from heat, was injured by being subjected to an unusually high degree of heat, which caused it to fuse together, such fact alone is not sufficient to establish the negligence of the vessel; it being shown that it might occur without negligence, especially during the passage through the Red Sea,

69. **Risk of due refrigeration.**—The Prussia, 93 Fed. 837, 35 C. C. A. 625, affirming decree, 88 Fed. 531.

A steamship company contracted for the carriage of a consignment of fresh meat to a European port, the bill of lading containing a provision expressly exempting the carrier from liability for loss or damage arising from any defect or insufficiency in the refrigerating apparatus of the vessel. The meat became damaged on the voyage in consequence of the failure of the refrigerating machinery to work properly. The apparatus, as well as the vessel, was new, had been constructed by competent makers, and had been thoroughly tested, and found to work perfectly. Its failure to work properly on this voyage was caused by the presence in a suction pipe of a leather washer, which had been inadvertently left in the interior of the apparatus when it was put together by the makers, and had gradually worked into the pipe. Its presence could not be detected until the machinery was taken apart by an expert at the end of the voyage. Held, that due diligence was exercised by the owner of the vessel to provide suitable and perfect refrigerating machinery, and that the damage arose from a latent defect, for which it was not responsible under the terms of the bill of lading. The Prussia, 93 Fed. 837, 35 C. C. A. 625, affirming decree, 88 Fed. 531.

70. The Prussia, 88 Fed. 531, affirming decree, 93 Fed. 837, 35 C. C. A. 625.

71. **Risk of mortality or accident.**—The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537.

72. Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12.

73. **Loss from "sweating, natural decay, or sea water."**—The Folmina, 143 Fed. 636, affirmed in 153 Fed. 364, 82 C. C. A. 440, but reversed on rehearing, 173 Fed. 615, 97 C. C. A. 557.

74. **Loss from heat or heating.**—The Good Hope, 197 Fed. 149, 116 C. C. A. 573, affirming decree, 190 Fed. 597.

and that the shellac was stowed in a particularly well-ventilated part of the vessel.[75]

§ 4473. Theft.—An exemption in a bill of lading of liability for loss of cargo by theft does not relieve the vessel, where there was negligence on her part which contributed to or facilitated the theft.[76]

§ 4474. Delay in Delivery.—Provisions of a ship's bills of lading that the carrier should not be required to deliver at any particular time or meet any particular market, and limiting its liability for damage to cargo, are applicable only to the original voyage, and the ship loses the benefit of them when it deliberately abandoned such voyage.[77]

§ 4475. Strikes or Stoppage of Labor.—Where a bill of lading exempted a carrier from delay occasioned by strikes of stoppage of labor "from whatever cause," and on the arrival of the ship delivery was delayed by a general longshoreman's strike, which prevented prompt delivery, which had been in progress for a month before arrival, and continued after she was discharged, with which strike the carrier had nothing to do, it was entitled to the benefit of the exemption.[78]

§ 4476. Limitation of Amount of Damages.—The measure of damages for delay in delivering a cargo of merchandise, for which the vessel is liable, is the difference between the price the goods actually brought when they arrived, and the price they would have brought at the time they should have been delivered; and this measure of damages is not changed by a stipulation in the bill of lading that the shipowner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability.[79]

Liability for Negligence.—It is competent for a steamship company as a carrier of goods to limit its liability in case of loss, even as against its own negligence, by a provision in the bills of lading that it is "not accountable for any sum exceeding $100 per package for goods of whatever description, * * * unless the value of such be herein expressed and freight as may be agreed paid thereon," where such valuation is the basis on which freight is charged and was fully known to the shipper.[80] But a provision in a bill of lading limiting a carrier's liability to the value of the goods at the place of shipment does not relieve it from a greater liability for a loss occurring through the negligence of the shipper in using an unseaworthy vessel.[81]

§ 4477. Benefit of Insurance Clause.—Where, in a suit for limitation of liability arising out of a collision which resulted in the loss of the second vessel and her cargo, such vessel, although adjudged equally in fault, claimed and was awarded exemption from liability to her cargo owners under the provision of the Harter Act, her owners have no right to be subrogated to the claims of the cargo owners against the insurer of the cargo, under the "benefit of insurance" clause of the bills of lading, because the court awards the entire fund for distribution to the cargo owners in preference to the vessel owners on account of the vessel's contributing fault, on the theory that such action necessarily imposed on the vessel the liability for the loss of cargo. In such case

75. The St. Quentin, 162 Fed. 883, 89 C. C. A. 573.

76. Theft.—The Ghazee, 172 Fed. 368, 97 C. C. A. 66.

77. Delay in delivery.—Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

78. Strikes or stoppage of labor.—The Toronto, 174 Fed. 632, 98 C. C. A. 386.

79. Limitation of amount of damages.—The Styria, 101 Fed. 728, 41 C. C. A. 639, modified in 22 S. Ct. 731, 186 U. S. 1, 46 L. Ed. 1027.

80. Liability for negligence.—Hohl *v.* Norddeutscher Lloyd, 175 Fed. 544, reversing decree, 169 Fed. 990.

81. Judgment, 45 N. Y. S. 286, 17 App. Div. 408, reversed in Lowenstein *v.* Lombard, etc., Co., 58 N. E. 44, 164 N. Y. 324.

the payment of claims entitled to legal preference, as permitted by admiralty rule 55, cannot be said to take anything from the holders of inferior claims, who have no interest in the fund until preferred creditors have been satisfied.[82]

§ 4478. Exception of Restraints of Princes, Rulers, or People.—"Bills of lading usually contain an exception of loss occasioned by restraint of princes, rulers, or people." A declaration of war between the United States and Spain after the ship cleared with a cargo of contraband, but before sailing, constitutes a "restraint of princes" within that clause.[83] But the mistaken action of a deputy collector in refusing a clearance to a vessel which should have been granted does not constitute a "restraint of princes, rulers, or people" within that clause of a bill of lading; and is not a sufficient excuse for the nonperformance of a contract for transportation of the cargo.[84]

§ 4479. Requirements as to Notice of Loss and Time to Sue.—A stipulation in a bill of lading that all claims for loss or damage to merchandise shipped shall be barred within a specified number of days after the date of the bill of lading if no claim is presented therefor,[85] and a stipulation against liability for loss or damage unless suit shall be brought within a specified time[86] are valid, if reasonable. The time specified must be deemed reasonable or otherwise according to the facts of the particular case.[87] Thus if a ship is driven out to sea and is not heard from for thirty days, obviously the

82. Benefit of insurance clause.—In re Lakeland Transp. Co., 103 Fed. 328, modifying 111 Fed. 601, 49 C. C. A. 481.

83. Exception of restraints of princes, rulers, or people.—The Austrian steamship Styria loaded at an Italian port as a part of her cargo a quantity of sulphur for delivery at New York. The master issued bills of lading therefor, and on April 24, 1898, cleared; but, before sailing, war was declared between the United States and Spain. Held, that such fact constituted a "restraint of princes," within an exception in his bills of lading, which justified the master in refusing to proceed to a port of one of the belligerent powers with a cargo of sulphur, generally recognized and treated as contraband of war, and that he had the right to land such cargo, with all proper precautions for safekeeping, at the expense of the shippers, without waiting for further action of the hostile powers, thus leaving his vessel free to proceed with the remainder of her cargo; but, having learned, before he left the port, through official proclamation made by the Italian government, that the Spanish government had agreed not to treat sulphur as contraband of war until further notice, it became the duty of the master to reload the cargo so discharged, and the vessel was liable to the shippers for the damages sustained by reason of failure to do so. The Styria, 101 Fed. 728, 41 C. C. A. 639, modified in 22 S. Ct. 731, 186 U. S. 1, 46 L. Ed. 1027.

84. Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

85. Notice of loss.—The Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278.

A provision in a bill of lading requiring all claims for damages to be presented within 30 days from the date thereof makes the period of limitation unreasonably short, and is therefore void. Decree, The Queen, 78 Fed. 155, affirmed in 94 Fed. 180, 36 C. C. A. 135, reversed in 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

A stipulation for notice of any claim of loss within 30 days from date of shipment, in a bill of lading for goods carried by ship from San Francisco to San Pedro, is not unreasonable as applied to a loss which was known to the consignors more than 3 weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice. Decree, Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, reversed in 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

86. When suit to be brought.—A stipulation in a bill of lading against liability for loss or damage unless suit shall be brought within three months is valid. Ginn *v.* Ogdensburg Trans. Co., 85 Fed. 985, 29 C. C. A. 521.

87. Provisions of bills of lading requiring claims for loss or damage to cargo to be presented to the carrier within a stated time, and barring any suit for such loss or damage unless commenced within a further stated time, will be enforced by the courts only so far as they are reasonable under the circumstances of the particular case. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

provision would not apply since its enforcement might destroy the right of recovery.[88]

Notice before Removal of Goods.—A provision in a bill of lading that the shipowner shall not be liable "for any damage to any goods, * * * notice of which is not given before the removal of the goods," means "before removal" from the ship's custody and control.[89] The phrase "notice of which is not given before the removal of the goods," properly construed, does not require such notice to be given before the goods are taken from the ship, but before their removal from the dock where they are deposited by the ship, and where, after they are released from the ship's tackle, they may be inspected and examined, both by the consignees and the officers of the ship. So construed, such provision is reasonable and valid.[90] A shipper under such a bill seeking to recover for damage to cargo must show a compliance with its terms.[91]

Bars Both Proceedings in Rem and in Personam.—A stipulation, in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within a specified time, applies to a libel against the ship itself, as well as to claims in personam against the owners and bars both proceedings.[92]

Excuses for Failure to Comply with Condition—Shipowner Having Knowledge of Damage.—Failure to comply with a provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," is not excused by the fact that the ship had knowledge of the damage, the purpose of the requirement being to advise the owners that they are charged with liability therefor.[93]

Waiver.—Provisions of bills of lading requiring claims for loss or damage to cargo to be presented to the carrier within a stated time, and barring any suit for such loss or damage unless commenced within a further stated time, may be waived by the carrier by his conduct,[94] as where the carrier entertains the claim and continues negotiations for its settlement.[95] But the failure of the

88. The Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278.

89. Notice before removal of goods.—The Persiana, 185 Fed. 396, 107 C. C. A. 416, reversing decree, 156 Fed. 1019.

90. The St. Hubert, 107 Fed. 727, 46 C. C. A. 603.

A provision in a bill of lading that "neither the steamship owners nor their agents nor any of their servants are to be liable * * * for any claim notice of which is not given before the removal of the goods" is to be construed as requiring such notice to be given before the removal of the goods from the dock, and imposes a valid condition precedent to the right to recover for damage to cargo either against the owners personally, or by a suit in rem, where, under the circumstances of the case, such condition is just and reasonable—as where the damage was known when the cargo was discharged. Decree, 116 Fed. 123, affirmed in The Westminster, 127 Fed. 680, 62 C. C. A. 406.

91. The Persiana, 185 Fed. 396, 107 C. C. A. 416, reversing 156 Fed. 1019.

92. Bars both proceedings in rem and in personam.—The Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419, reversing 94 Fed. 180, 36 C. C. A. 135, which affirms 78 Fed. 155; The Westminster, 127 Fed. 680, 62 C. C. A. 406, affirming 116 Fed. 123.

93. Excuses for failure to comply with condition—Shipowner having knowledge of damage.—The St. Hubert, 107 Fed. 727, 46 C. C. A. 603.

94. Waiver.—Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

95. Libelant shipped cargo on respondent's vessel from Seattle to St. Michaels, Alaska, under a clear verbal agreement that it should be delivered on the first trip of the vessel in the spring, or as soon as the ice was out of the harbor. When the vessel arrived the harbor was still closed by ice, and the vessel, after tendering delivery at Nome, returned to Seattle with the cargo on board, and delivered it on the next voyage. The bills of lading provided that all claims for damages should be presented to the carrier within 10 days from notice thereof, and that no action should be brought after 60 days. When the vessel decided to return from Nome with the property on board, libelant's agent served notice that a claim would be made for such damages as might result, and, when the goods were finally delivered at St. Michaels, served as specific a claim for damages as could then be made, and a more specific

owners to insist on the condition in other cases does not constitute a waiver in favor of libelant, where it is not shown that he knew the fact and was misled by it.[96]

§ 4480. Presumptions and Burden of Proof.—Where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible under the exceptions,[97] but where

claim was later presented in Seattle, which respondent took under consideration, and negotiations for settlement were continued for a year before suit was brought. Held, that libelant had made reasonable compliance with the terms of the bills of lading as to notice, and that the delay in bringing suit was waived by the carrier by entertaining the claim and continuing negotiations for its settlement. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

96. The Westminster, 127 Fed. 680, 62 C. C. A. 406, affirming decree, 116 Fed. 123.

97. Presumptions and burden of proof.—The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748, following Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

Damage by sea water.—A carrier must prove that damage to a cargo from water was occasioned by the perils of the sea within an exception in the bill of lading against dangers and accidents of the seas. The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

"As illustrated in the case of The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. Ct. 9, proof merely of damage to cargo by sea water does not necessarily tend to establish that such damage was caused by a peril or danger of the seas." The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

"The efficient cause of the damage must be sought in those conditions or events which caused or permitted the entrance of sea water. It can not in reason be said that sea water was the efficient, the proximate cause of the cargo damage, because no other cause for that damage has been disclosed. As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed, it can not be said that the damage has been shown to have resulted from causes within the scope of a sea peril; * * * that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against set perils. For the distinction between the two, see The Henry B. Hyde, 32 C. C. A. 534, 90 Fed. 114; The Lennox, 90 Fed. 308; The Patria, 68 C. C. A. 397, 132 Fed. 971." The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

"The inability of the court below to determine the cause of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by the sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823." The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

"And see further, the following cases, applying the principle just stated, and holding that because the damage to cargo was shown to have been occasioned by sea water, without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof: The Sloga, 10 Ben. 315, Fed. Cas. No. 12,955; The Compta, 4 Sawy. 375, Fed. Cas. No. 3,069; Bearse *v.* Ropes, 1 Spr. 331, Fed. Cas. No. 1,192; The Zone, 2 Spr. 19, Fed. Cas. No. 18,220; The Svend, 1 Fed. 54; The Centennial, 7 Fed. 601; The Lydian Monarch, 23 Fed. 298; The Queen, 78 Fed. 155, affirmed in 36 C. C. A. 135, 94 Fed. 180;

loss or damage has been occasioned by one of the excepted causes, the burden of proof is shifted upon the shipper, to show negligence.[98]

Seaworthiness of Vessel.—Although perils of the sea were excepted by the charter party, the burden of the proof is on the carrier to show that the vessel was in good condition and suitable for the voyage at its inception.[99]

Loss from Shipping Order or Condition of Goods.—Where goods are delivered in a damaged condition plainly caused by breakage, rust, or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be prima facie within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier.[1]

§§ 4481-4493. Provisions in Passenger Tickets—§ 4481. Liability for Personal Injuries to Passenger.—Validity.—A provision of a steamship ticket exempting the carrier from responsibility for its own or its agents' negligence, or failure of duty towards its passengers, provided it has used due diligence to make the vessel seaworthy, is void, as against public policy.[2]

Operation—Exception of Restraints of Rulers, etc.—Quarantine.—The provision in a contract for ocean transportation that the carrier will not be liable for delay from "restraints of princes, rulers, and peoples" does not exempt the carrier from liability for negligence in failing to furnish sufficient and suitable food and lodging, which it undertook to furnish, during a quarantine required by the government.[3]

§§ 4482-4493. Liability for Passenger's Effects—§§ 4482-4487. Validity, Form and Requisites—§ 4482. Stipulation That Landing Not Part of Voyage.—A provision in a contract between a ship and its passengers that the landing shall not be deemed a part of the voyage is contrary to public policy and void, and does not relieve the carrier from liability for loss of baggage or delay in delivery.[4]

§§ 4483-4487. Stipulation Limiting Liability to Stated Sum—§ 4483. Validity Generally.—A condition in a steamship ticket limiting the liability of the carrier for loss of baggage to a stated sum, will not be enforced where the sum named bears such relation to the quantity of the baggage and the sum paid for its carriage as to render the limitation manifestly unreasonable.[5] The

The Phœnicia, 90 Fed. 116, affirmed in 40 C. C. A. 221, 99 Fed. 1005; Insurance Co. *v.* Easton, etc., Transp. Co., 97 Fed. 653; The Presque Isle, 140 Fed. 202." The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

98. Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Rich *v.* Lambert (U. S.), 12 How. 347, 13 L. Ed. 1017; Transportation Co. *v.* Downer (U. S.), 11 Wall. 129, 20 L. Ed. 160.

Where injury to cargo resulted from a cause excepted in the bill of lading, the carrier can not be held responsible, unless his negligence is affirmatively shown. The St. Quentin, 162 Fed. 883, 89 C. C. A. 573.

99. **Seaworthiness of vessel.**—The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

1. **Loss from shipping order or condition of goods.**—The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748.

2. **Validity of provision in passenger tickets.**—The Oregon, 133 Fed. 609, 68 C. C. A. 603.

3. **Restraint of rulers—Quarantine.**—Larsen *v.* Allan Line Steamship Co., 80 Pac. 181, 37 Wash. 555.

4. **Stipulation that landing not part of voyage.**—The Valencia, 110 Fed. 221, affirmed in 117 Fed. 68, 54 C. C. A. 454.

5. **Validity generally.**—La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

A provision in a passenger ticket that neither the ship, the shipowner, nor the agent is responsible, beyond the amount of $100, for loss of or injury to passengers arising from latent defects in the steamer, or default or negligence of the shipowner's servants, is unreasonable and invalid. Moses *v.* Hamburg-American Packet Co., 88 Fed. 329.

passenger must have the right to increase the amount by payment of a reasonable charge,[6] and can not be compelled to subject it to the provisions of the Harter Act.[7]

Ticket Valid in Country Where Issued.—Restrictions of the liability of a steamship company for its own negligence or failure of duty toward a passenger, being against the public policy enforced by the courts of the United States, will not be upheld, though the ticket was issued and accepted in a foreign country and contained a condition making it subject to the law thereof, which sustains such stipulations.[8]

§§ 4484-4487. Form and Requisites—§ 4484. Meeting of Minds of Parties Generally.—In order that a provision in a passenger's contract ticket limiting the liability of a carrier by water to a reasonable stated sum may be valid, it is essential that the minds of the parties meet in respect thereto.[9]

§ 4485. Knowledge and Acceptance.—A limitation in a ticket sold by a steamship company of the recovery of damage to passenger's baggage to a reasonable stated sum is valid,[10] where it is clearly expressed in legible type of a fair size, and only carelessness or indifference on the passenger's part prevents him from protecting himself in a proper manner if he did not wish to encounter the risk of loss.[11] The general rule is that a clause of a passenger's ticket issued by a water carrier, limiting its liability to a stated sum, must be read by the passenger or its contents made known to him in order for it to bind him.[12] But the court of New York [13] held that there is a just and logical distinction

6. Right to increase amount by payment of a reasonable sum.—An arbitrary limitation of 250 francs for the baggage of any steamship passenger, unaccompanied by any right to increase the amount by adequate and reasonable proportional payment, is void as against public policy. Decree, 94 Fed. 885, 36 C. C. A. 533, reversed in The Kensington, 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

7. Subjecting to provisions of Harter Act.—A stipulation in a steamship passenger's ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy. Decree, 94 Fed. 885, 36 C. C. A. 533, reversed in The Kensington, 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

8. Ticket valid in country where issued.—The Kensington, 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190, affirming 94 Fed. 885, 36 C. C. A. 533.

9. Meetings of minds of parties generally.—Wood *v.* Cunard Steamship Co., 192 Fed. 293, 112 C. C. A. 551, 41 L. R. A., N. S., 371.

10. Knowledge and acceptance.—The Morro Castle, 168 Fed. 555.

11. Signed agreement.—Bachman *v.* Clyde Steamship Co., 152 Fed. 403, 81 C. C. A. 529.

12. A provision printed in a steamship ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage to $100, not read by nor called to the attention of the passengers, is unreasonable and void. Weinberger *v.* Compagnie Generale Transatlantique, 146 Fed. 516.

The fact that the ticket containing such provisions was handed to the passenger, who filled in some blank spaces under a caption, "Passengers will please fill in the following information required for United States authorities," disclosing certain particulars relating to herself and traveling companion, did not render such provisions binding on her, it appearing that she never read nor adopted them. The Minnetonka, 132 Fed. 52, decree affirmed in 146 Fed. 509, 77 C. C. A. 217.

A clause of a steamship ticket headed "Notice," limiting the liability of the vessel or owners to $100 for loss of the passenger's personal effects, is not a part of the contract, and does not relieve the owner from full liability, where it was not read by or made known to the passenger. Smith *v.* North German Lloyd Steamship Co., 142 Fed. 1032, affirmed in 151 Fed. 222, 80 C. C. A. 574.

13. *New York.*—Sterling Amusement Co. *v.* La Compagnie Generale Transatlantique, 113 N. Y. S. 1032, 61 Misc. Rep. 603; Tewes *v.* North German Lloyd Steamship Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A., N. S., 199; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Wheeler *v.* Oceanic Steam Nav. Co., 72 Hun 5, 25 N. Y. S. 578, 55 N. Y. St. Rep. 715, affirmed in 149 N. Y. 576, 43 N. E. 990.

between an ordinary railroad ticket, which may often be regarded as a mere token, and a passage ticket for an ocean voyage, the sale and purchase of which is usually conducted with such caution and deliberation as to invest the transaction with the elements of a contract, the terms of which the purchaser has ample opportunity to ascertain and understand, and that, therefore, a passenger is bound by a limitation of damages for loss of baggage in his ticket, though the terms were not directly brought to his attention.[14]

Notice Brought to Knowledge of Passenger.—Even in the case of a mere notice it is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk.[15]

Inconspicuously Printed Conditions.—Conditions printed inconspicuously upon a steamship ticket, providing that the shipowner shall not be liable for any loss of the passenger's baggage through theft, or any act, neglect, or default of the shipowner's servants or others, which were not known to the passenger nor called to his attention are invalid and constitute no defense to an action by the passenger to recover for the loss of jewelry stolen by one of the ship's employees.[16]

Clause Printed on Margin of Ticket.—A clause printed on the margin of a steamship ticket, headed "Notice," limiting the liability of the vessel or owners to $100 for loss of the passenger's personal effects, is not a part of the contract, and does not relieve the owners from full liability, where it was not read by or made known to the passenger.[17]

Memoranda on Back of Ticket.—A notice or memorandum printed on the back of a steamship ticket purporting to limit the liability of the carrier for loss of baggage, not referred to in the body of the ticket nor called to the attention of the purchaser, is simply a notice, and forms no part of the contract.[18] Where a passenger by water waives a breach of the contract of passage instead of rescinding it, he is bound by a limitation of the value of his baggage contained therein.[19]

14. Darnana *v.* La Compagnie Generale Transatlantique, 114 N. Y. S. 118.

A passage ticket for an ocean voyage is a contract, and not a mere token, and hence the mere fact that the purchaser did not notice a clause therein limiting the steamship's liability for loss or damage to baggage to $50, unless the full value was disclosed and freight paid, did not exempt the passenger from enforcement thereof. Judgment, 93 N. Y. S. 1149, 104 App. Div. 619, reversed in Tewes *v.* North German Lloyd Steamship Co., 78 N. E. 864, 186 N. Y. 151, 8 L. R. A., N. S., 199; S. C., 78 N. E. 1113, 186 N. Y. 525; Brinck *v.* North German Lloyd Steamship Co., 78 N. E. 1100, 186 N. Y. 525.

Plaintiff purchased a steamship ticket, which contained a clause providing that the company's liability for loss or damage of baggage should be limited to $100, unless the passenger had the full value insured. No such insurance was taken out. Plaintiff's agent, who purchased the tickets, testified that he could not speak or read the language in which the tickets were printed. Held, that the plaintiff is bound by the limitation of liability. Sterling Amusement Co. *v.* La Compagnie Generale Transatlantique, 113 N. Y. S. 1032, 61 Misc. Rep. 603, judgment affirmed on rehearing 113 N. Y. S. 1151.

15. Notice brought to knowledge of passenger.—The Morro Castle, 168 Fed. 555, 558; Bachman *v.* Clyde Steamship Co., 152 Fed. 403, 81 C. C. A. 529.

16. Inconspicuously printed conditions.—The Minnetonka, 146 Fed. 509, 77 C. C. A. 217, affirmed decree, 132 Fed. 52.

17. Clause printed on margin or ticket.—Smith *v.* North German Lloyd Steamship Co., 151 Fed. 222, 80 C. C. A. 574, affirmed decree, 142 Fed. 1032.

18. Memoranda on back of ticket.—La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

19. Plaintiff engaged passage on defendant's boat; the contract limiting defendant's liability for loss of baggage. On the day of sailing defendant refused plaintiff passage on its boat, but engaged for him passage on another, which plaintiff accepted; but his baggage went on the first boat. Held that, plaintiff having

Baggage Checked on Return Portion of Ticket.—Where plaintiff bought a round-trip steamship ticket which limited the carrier's liability for loss of baggage to $100, and, months after the purchase, had a trunk checked on the return portion of the ticket, and the trunk was lost through the carrier's negligence, the carrier was entitled to insist on the limitation of liability,[20] because under the circumstances of the case there was a contract between the parties limiting the carrier's liability.

Weight of Evidence of Knowledge.—On libel by a steamship passenger for loss of a trunk, the testimony of the libelant that he had no distinct recollection of having examined a notice on the back of the ticket to which attention was called by the words "see back" on the face of the ticket, but felt sure it done so, which statement he immediately qualified by saying that he did not know that there was any limitation of liability contained in the notice, is insufficient to show the agreement limiting the steamship company's liability. The only fair interpretation of this testimony is that, although without distinct recollection, he had examined the notice in a general way, but did not know that there was any limitation in it. It is not satisfactory proof of any such meeting of the minds of the parties as would constitute an agreement materially to modify the obligation to the carrier.[21]

§ 4486. Type or Printing.—See ante, "Knowledge and Acceptance," § 4485.

§ 4487. Conditions Printed on Margin on Back of Ticket.—See ante, "Knowledge and Acceptance," § 4485.

§ 4488. Interpretation.—In determining whether a passenger had a cause of action for damage to baggage, the contract must be construed as a whole.[22]

§§ 4489-4492. Operation and Effect—§ 4489. Stipulation That Landing Not Part of Voyage.—Even if a provision in a contract between a ship and its passengers that the landing shall not be deemed a part of the voyage, is enforceable within reasonable limits, it can not exonerate the ship from loss of baggage or delay which was due to some extent at least to the fact that the vessel was unnecessarily overloaded.[23]

§§ 4490-4492. Stipulation Limiting Liability to Stated Sum—§ 4490. Losses Covered.—Loss Result of Ordinary Negligence.—A provision in an ocean steamship ticket that in no event should the steamship be liable for

waived defendants' breach of contract by accepting passage on the other boat, instead of rescinding the contract, as he could have done, he is bound by the limitation as to the loss of his baggage in the original contract. Eggermont *v.* Cunard Steamship Co., 119 N. Y. S. 1110.

20. **Baggage checked on return portion of ticket.** — Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Lindsey *v.* Maine Steamship Co., 88 N. Y. S. 371.

21. **Weight of evidence of knowledge.** —Wood *v.* Cunard Steamship Co., 192 Fed. 293, 112 C. C. A. 551, 41 L. R. A., N. S., 371.

22. **Interpretation.**—Sterling Amusement Co. *v.* La Compagnie Generale Transatlantique, 113 N. Y. S. 1032, 61 Misc. Rep. 603.

23. **Stipulation that landing not part of voyage.**—Libelants contracted for the carriage of themselves and their baggage and effects by a steamship from San Francisco to Nome in the spring of 1900. There was no landing place at Nome, and all landing had to be done by means of lighters. The tickets provided that the voyage should end at the place of anchorage, and that the landing was no part of the contract. After they were put on shore libelants were compelled to wait in some cases 10 days, and until the ship had been to other ports and returned, before receiving their baggage, effects, and freight, by reason of which they suffered exposure, expense, and loss on account of the delay, which was due, to some extent at least, to the fact that the ship was unnecessarily overloaded. Held, that the stipulation in the contracts did not exonerate the ship from liability in damages under the circumstances shown, even if enforceable within reasonable limits, owing to the condition of the port and the prevailing custom. Decree, The Valencia, 110 Fed. 221, affirmed in 117 Fed. 68, 54 C. C. A. 454.

loss of baggage for an amount exceeding $50, unless the value of the baggage in excess of that sum be declared at or before the issuance of the contract or at or before the delivery of the luggage to the ship, and freight at current rates for every kind of property paid thereon is effective to limit the carrier's liability in case of loss of baggage to the amount specified, though the loss was the result of the carrier's ordinary negligence.[24]

§ 4491. Baggage to Which Applicable.—Hand Baggage.—A condition in a steamship ticket limiting the liability of the carrier for loss of baggage to a stated sum unless the same, in excess of that sum, be declared before the issue of the contract or delivery of the effects to the ship and payment of freight at current rates thereon; does not apply to hand baggage delivered to the company's baggage master on his statement that it would be sent to the passenger's room.[25]

Application to Extra Baggage.—A condition in a steamship ticket limiting the liability of the carrier for loss of baggage to a stated sum, does not apply to extra baggage taken and paid for as such under a subsequent agreement.[26]

§ 4492. Tickets as Evidence.—In an action against a steamship company for damage to baggage, the printed passage ticket containing the terms of the contract is admissible under the general denial.[27]

§ 4493. Compliance with Stipulation for Notice of Loss.—Where a steamship was docked on completion of her voyage at 2 p. m., a notice of loss of effects by theft, mailed by a passenger at the same place at 5:30 p. m. on the second day thereafter, was a substantial compliance with a condition of the ticket requiring notice of claim to be given within 48 hours, especially where the facts of the loss were fully known to the officers of the vessel before the termination of the voyage.[28]

§§ 4494-4576. Limitation of Vessel Owner's Liability by Acts of Congress—§§ 4494-4530. Limited Liability Act—§§ 4494-4497. General Consideration—§ 4494. History and Object.—The law on this subject is now embodied in §§ 2943, 2944, U. S. Comp. Stat., 1901, pp. 2943, 2944. These sections are a substantial reenactment of the act of March 3, 1851, 9 Stat. at L., p. 635, chap. 43, U. S. Comp. Stat., 1901, p. 2943.[29]

Object of Law.—The object of the law was to encourage ship building and

24. **Loss result of ordinary negligence.**—Judgment, 93 N. Y. S. 1149, 104 App. Div. 619, reversed in Tewes *v.* North German Lloyd Steamship Co., 78 N. E. 864, 186 N. Y. 151, 8 L. R. A., N. S., 199; S. C., 78 N. E. 1113, 186 N. Y. 525; Brinck *v.* North German Lloyd Steamship Co., 78 N. E. 1100, 186 N. Y. 525.

25. **Hand baggage.**—A steamship company issued a passage ticket limiting its liability for loss of personal effect of passengers to $100, unless the value of the same, in excess of that sum, be declared before the issue of the contract or delivery of the effects to the ship and payment of freight at current rates thereon. Hand baggage was delivered to the company's baggage master at his direction, and on his statement that it would be sent to the passenger's room, but it was never delivered. Held, that the loss, if unexplained, established a prima facie case of negligence for which the company was liable, notwithstanding the failure of the passenger at the time of delivery to declare the value thereof or pay excess freight thereon; such requirement not applying to hand baggage. Judgment, 90 N. Y. S. 834, 100 App. Div. 36, affirmed in Holmes *v.* North German Lloyd Steamship Co., 77 N. E. 21, 184 N. Y. 280, 5 L. R. A., N. S., 650.

26. **Application to extra baggage.**—La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

27. **Tickets as evidence.** — Sterling Amusement Co. *v.* La Compagnie Generale Transatlantique, 113 N. Y. S. 1032, 61 Misc. Rep. 603.

28. **Compliance with stipulation for notice of loss.**—The Minnetonka, 146 Fed. 509, 77 C. C. A. 217, affirming decree, 132 Fed. 52.

29. **History and object.**—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

to induce capitalists to invest money in this branch of industry.[30] Section 6 of the act (now § 4287 of the Revised Statutes) shows that it was the purpose of the preceding sections to release the owner from some liability for negligence and fraud of the master and other agents of the owner, for which those persons are themselves liable and were to remain so.[31]

§ 4495. Constitutionality.—Congress had power to pass the Limited Liability Act of 1851 and it is therefore constitutional.[32]

§ 4496. Part of Maritime Law.—The act of congress which limits the liability of shipowners was passed in amendment of or as a part of the maritime law of the country.[33] But, whilst the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law.[34]

§ 4497. Effect of Subsequent Acts.—The statute relating to limitation of liability of shipowners is not repealed by the Act of February 28, 1871, entitled

30. Object of law.—Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27, following Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

"The purpose of the act of 1851, in according to shipowners the right to limit their liability in whole or in part, and the meaning of that act, as well as the purpose and meaning of the sections of the Revised Statutes embodying the provisions of the Act of 1851, have been often before the Supreme Court of the United States and have been conclusively adjudicated. Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612." La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

"In Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674, Mr. Justice Nelson, delivering the opinion of the court, thus stated the purpose of the limitation of liability which the act granted: 'The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe.'" La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

31. Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97; Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

32. Constitutionality.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28; The Lottawanna (U. S.), 21 Wall. 558, 22 L. Ed. 654; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806.

The fourth section of the Act of June 17, 1886, extending the Act of March, 1851, to all vessels is constitutional. In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840.

33. Part of maritime law.—In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Lottawanna (U. S.), 21 Wall. 558, 22 L. Ed. 654; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28; Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27, following Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

34. The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612. See, to the same effect, The Lottawanna (U. S.), 21 Wall. 558, 22 L. Ed. 654.

"An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," 16 Stat. 440,[35] by the Act of June 26, 1884, 1 Supp. Rev. St. 440,[36] by the Hepburn Act,[37] nor by the Employer's Liability Act of April 22, 1908.[38]

§ 4498. Construction.—The supreme court of the United States at first said that the Limited Liability Act should be strictly construed, since its effect is to take away or abridge the right of recovering damages at the common law [39] but later it said: "The practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment." [40]

Acts in Pari Materia.—Section 18 of Act June 26, 1889 (23 Stat. 57, c. 121 [U. S. Comp. St., 1901, p. 2945]), which provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending," and Rev. St., § 4283 [U. S. Comp. St., 1901, p. 2943], are in pari materia, and to be construed together. The provision of the older act by which the limitation of liability therein provided for is confined to things "done, occasioned or incurred without the privity of knowledge of such owner or owners," also qualifies the latter act, which was not intended to apply to liabilities of the owners of vessels for the consequences of their personal faults or upon obligations personally contracted by them.[41]

35. Effect of subsequent acts.—Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

36. Section 18 of the Act of June 26, 1884 (23 Stat., at L. 53-57, ch. 121, U. S. Comp. Stat., 1901, 2804, 2945, operates as an amendment of the existing law, and not at a repeal of the qualifications found in that law. "This is the view adopted by three circuit courts of appeal, in the cases of The Republic, 9 C. C. A. 386, 61 Fed. 109, in the second circuit, The Annie Faxon, 21 C. C. A. 366, 75 Fed. 312, in the ninth circuit, and in Great Lakes Towing Co. *v.* Mill Transp. Co., 22 L. R. A., N. S., 769, 83 C. C. A. 607, 155 Fed. 11, in the sixth circuit, as well as by a number of district courts, among them being the case of The Amos D. Carver, 35 Fed. 665, and In re Meyer, 74 Fed. 881." Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

Rev. St., § 4493, making exceptions, in favor of passengers, from the rule of limitation of liability of a shipowner under Rev. St., §§ 4283, 4289, is not repealed by Act June 26, 1884 (1 Supp. Rev. St. 440). The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366, modifying decree, 66 Fed. 575.

37. Hepburn Act.—Hepburn Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St., 1901, p. 3154), does not repeal Rev. St., U. S. §§ 4482-4289 (U. S. Comp. St., 1901, pp. 2943, 2945), relating to limitation of liability. The Hoffmans, 171 Fed. 455.

38. Employer's Liability Act April 22, 1908, does not by implication repeal the statutory provisions permitting shipowners to limit their liability, as applied to actions for injuries to employees on a vessel operated by a railroad company as part of its interstate line, nor affect the right of the company to maintain proceedings for such limitation in a court of admiralty. The Passaic, 204 Fed. 266, 122 C. C. A. 466, affirming decree, 190 Fed. 644.

39. The Main *v.* Williams, 152 U. S. 122, 38 L. Ed. 381, 14 S. Ct. 486.

40. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, following Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

41. Acts in pari materia.—Great Lakes Towing Co. *v.* Mill Transp. Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A., N. S., 769.

§§ 4499-4505. Losses Covered—§ 4499. Loss or Damage to Jewelry, Precious Metals, Moneys, etc.—The second section, 4281, Rev. Stat., of the Act of March 3, 1851, exempts the owner and master from liability for loss or damage to jewelry, precious metals, or money, etc., put on board the ship, unless its character and value be disclosed in writing.[42] But this statute does not apply to a case where a passenger took such of her jewelry as she was accustomed to wear aboard, and was robbed thereof before she succeeded in depositing it with the purser, without any fault on her part.[43]

§ 4500. Loss or Damage by Fire.—The first section of the Limited Liability Act, § 4282, Rev. Stat., exempts the shipowner from loss or damage by fire to goods on board the ship, unless caused by his own design or neglect.[44] The case of loss and damage by fire on board of a ship is also within the provisions of the third and fourth sections of the act of 1851, although provided for by § 1, of the act.[45] Personal participation of owner in negligence essential to liability in order to make the owner of a vessel, in case of loss by fire, liable for negligence, it must, under the first section of the Limited Liability Act, § 4282, Rev. Stat., appear that the owner had directly participated in the negligence. The exception does not extend to the officers and crews of the vessel, as representing the owners.[46]

Special Contracts and Usage.—Originally the act contained a proviso that the parties may make such contract between themselves on the subject as they please.[47] This proviso referred to express contracts.[48] Hence a local custom that shipowners shall be liable in such cases for the negligence of their agents, is not a good custom; being directly opposed to the statute.[49] And so a special contract claimed to be founded on usage will not take the case out of the Act of 1851.[50]

Loss by Fire While Goods in Warehouse.—Rev. St., U. S., § 4282, exempting vessel owners from liability for loss of or damage to goods by fire happening to or on board of the vessel, is limited in its application to fires on shipboard, and has no application to loss of goods by fire while in a warehouse.[51]

Effect of Stipulation in Bill of Lading for Carriage by Rail and Water.—See ante, "Construction, Operation and Effect," §§ 455-513; "Operation and Effect Generally," §§ 4452-4455.

42. **Loss or damage to jewelry, precious metals, moneys, etc.**—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

43. **Personal jewelry.**—Rev. St., § 4281 [U. S. Comp. St., 1901, p. 2942], providing that, if any shipper of jewelry, etc., contained in any parcel or package or trunk shall take the same as freight or baggage on any vessel without giving written notice of its character and value, and having the same entered on the bill of lading, the shipowner shall not be liable as carrier, is intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a woman passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employee of the ship before she had the opportunity to do so. Decree, 132 Fed. 52, affirmed in The Minnetonka, 146 Fed. 509, 77 C. C. A. 217.

44. **Loss or damage by fire.**—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25; Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674; Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

45. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

46. Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

47. **Special contracts and usage.**—Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

48. Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

49. Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

50. Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

51. **Loss by fire while goods in warehouse.**—Black *v.* Ashley, 44 N. W. 1120, 80 Mich. 90.

§§ 4501-4505. Loss or Damage for Which Liability Limited to Value of Vessel and Pending Freight—§ 4501. Maritime and Nonmaritime Torts Generally.—Under the original law of limited responsibility of shipowners the owners are not to be liable beyond their interest in the ship and freight for the acts of the master or crew, done without their privity or knowledge. It extended to liability for every kind of maritime tort, loss, damage and injury.[52] Section 4283, Rev. Stat., the third section, limits the shipowners liability in three classes of damage or wrong-happening without their privity, and by the fault or neglect of the master or other persons on board,[53] viz: First in cases of embezzlement[54] or loss or damage to goods on board;[55] second, damage by collision to other vessels and their cargoes;[56] third, any other damage or forfeiture done or incurred; to an amount not exceeding the value of the vessel and freight then pending.[57]

Nonmaritime Torts.—The limitation of a shipowner's liability for maritime torts not the result of his own fault, provided by Rev. St., §§ 4283-4285 (U. S. Comp. St., 1901, pp. 2943, 2944), was extended to nonmaritime torts by the provisions of Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St., 1901, p. 2945), limiting the individual liability of a shipowner for "any or all debts and liabilities," except wages and liabilities incurred prior to such enactment, to his share in the vessel, and the aggregate liabilities of all the owners of a vessel on account of the same to the value of the vessel and freight pending.[58]

§ 4502. Obligations Ex Contractu.—The Limited Liability Act, as originally enacted, did not include the owner's individual liability for obligations ex contractu incurred without his knowledge or privity.[59] But §§ 4283 and 4284, Rev. Stat., as amended by the 18th section of the act of June 26, 1884 (23 Stat. at L. 57, chap. 121, U. S. Comp. Stat., 1901, p. 2945), include "any or all debts and liabilities" of the owner, incurred on account of the ship, without his privity or fault.[60]

52. **Maritime and nonmaritime torts generally.**—"In Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612, the words 'the liability of the owner * * * shall in no case exceed,' etc., were construed as extending to any liability 'for any act, matter, or loss, damage or forfeiture, done or incurred;' and as therefor providing that the 'owner shall not be liable beyond his interest in the ship and freight for the acts of the master or crew, done without his privity or knowledge.'" Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

53. Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

54. **Embezzlement.**—Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

55. **Loss or damage to goods on board.**—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

56. See post, "Collision," § 4503.

57. Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

58. **Nonmaritime torts.**—Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

"The case of Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25, which was a petition for the benefits of the Limited Liability Act and to stay suits at common law against the owner for liability by fire carried to buildings on land, communicated from the ship, has been cited as holding that the limited liability statute did not apply to such a claim, and that a court of admiralty could not draw to itself jurisdiction over any such claim. But that liability was incurred on September 20, 1880, a date antecedent to the Act of 1884, which act expressly excluded liabilities which arose before its passage. That the decision by this court was not made until November, 1886, and that the opinion makes no reference to the Act of 1884, is of no importance, since the act had no application." Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

59. **Obligations ex contractu.**—Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

60. Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27; The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

"The legislation is in pari materia with the Act of 1851 (9 Stat., at L. 635, chap.

Personal Contracts of Part Owner.—A vessel owner is not entitled to limit his liability upon his own personal contracts,[61] but only for contracts made by the master or other agent on the credit of the ship.[62] Thus the statute does not apply so as to exempt a part owner from full liability for supplies purchased by his authority, or with his knowledge and consent,[63] or for services rendered in pursuance of a contract for towing and wrecking services[64] entered into by a part owner of the vessel.

§ 4503. Collision.—The third division of § 4283, Rev. Stat., limits the shipowner's liability for damage by collision to other vessels and their cargoes, where the collision occurred without their privity, to an amount not exceeding value of the vessel and freight then pending.[65]

43, § 3), as carried into the Revised Statutes as § 4283, et seq. (U. S. Comp. Stat., 1901, p. 2943), and must be read in connection with that law; and so read, should be given such an effect not incongruous with that law, so far as consistent with the terms of the later legislation. The former law embraced liabilities for maritime torts, but excluded both debts and liabilities for nonmaritime torts. The section under consideration includes debts, save wages of seamen and liabilities of an owner incurred prior to the passage of the law. The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part. True, a liability may arise out of a contract as well as from a tort. But a liability ex contractu is included ex vi termini, and the addition of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.'" Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

61. Personal contracts of part owner.—The Loyal, 204 Fed. 930, 123 C. C. A. 252, affirming decree 198 Fed. 591.

Act Cong. June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St., 1901, p. 2945), limiting the individual liability of a shipowner to the proportion of debts that his share of the vessel bears to the whole, does not apply to a case where persons are not sought to be charged as shipowners, but only upon a personal contract. Richardson Fueling Co. *v.* Seymour, 85 N. E. 496, 235 Ill. 319.

1 Supp. U. S. Rev. St., 1874-91, p. 443, § 18, limiting the individual liability of shipowners to the proportion of the ship owned by them, restricts the liability imposed on them by law as the result of such ownership, and does not limit their liability on contracts made by them. Kerry *v.* Pacific Marine Co., 54 Pac. 89, 121 Cal. 564, 66 Am. St. Rep. 65, modified 54 Pac. 262.

62. The Loyal, 198 Fed. 591.

63. Act June 26, 1884, c. 121, § 18, 23 Stat. 57 [U. S. Comp. St., 1901, p. 2945], which provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole," is to be construed in connection with the Limited Liability Act of 1851 (Rev. St., § 4283 [U. S. Comp. St., 1901, p. 2943]), and does not apply to personal contracts, so as to exempt a part owner from full liability for supplies purchased by his authority, or with his knowledge and consent. Rudolf *v.* Brown, 137 Fed. 106.

64. Towing and salvage contract.—A towing company entered into a contract with the managing agent of petitioner, which was the owner of certain vessels on the Great Lakes, by which it agreed to perform all towing and wrecking service required by such vessels during the season at certain stated prices. One of petitioner's vessels having stranded, the towing company was called on pursuant to said contract, and sent a tug with wrecking apparatus to the assistance of such vessel, where it spent several days in pumping and attempting to get her afloat, but unsuccessfully, and she was lost. Held, that section 18 of Act June 26, 1884 (23 Stat. 57, c. 121 [U. S. Comp. St., 1901, p. 2945]), did not entitle petitioner to a limitation of liability for the services so rendered by the towing company under its contract to the value of the salvage recovered from the wreck. Great Lakes Towing Co. *v.* Mill Transp. Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A., N. S., 769.

65. Collision.—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664; The Baltimore (U. S.), 8 Wall. 377, 19 L. Ed. 463; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Atlas, 93 U. S. 302, 23 L. Ed. 863; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674; The Wanata, 95 U. S. 600, 24 L. Ed. 461; The Cayuga (U. S.), 14 Wall. 270, 20 L. Ed. 828.

In cases of collision, where both vessels were in fault, the statute of limited liability applies for the claim for one-half the difference between the respective losses of the two vessels, the obligation to pay that difference being the legal liability arising from the collision. The damage done to both vessels should be added together in one sum, and equally divided, and a decree should be pronounced in favor of the vessel which suffered most against the one which suffered least, for half the difference between the amounts of their respective losses.[66] The owners sustaining the greater loss can not under the Limited Liability Act claim entire exoneration from liability, and have a decree for half of their damage, without deducting the damage to the other vessel.[67] In such case the statute of limited liability is not to be applied until the balance of damage has been struck; and then the party against whom the decree passes may, if otherwise entitled, have the benefit of the statute in respect of the balance, which he is decreed to pay.[68]

How Damage Estimated—Items Included.—Subject to that provision in the act of congress, the damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention.[69]

Amount of Bond and Interest.—Where one-half the difference between the amounts of the respective losses of two vessels, both being at fault for collision, is more than the amount of the bond given by the vessel decreed limitation of liability, with interest at six per cent per annum from date of the decree, it is proper for the court to decree as damages to the other vessel the amount of the bond with such interest.[70]

Interest on Amount Salvaged from Offending Ship.—Where a collision occurred by which the offending ship and her cargo were sunk at sea, but strippings from the ship were rescued before she went down, from which the owner afterwards realized several thousand dollars, held, that in awarding damages against the owner, limited to the amount of their interest in the ship,

66. The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41; The Manitoba, 122 U. S. 97, 30 L. Ed. 1095, 7 S. Ct. 1158; The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491.

In The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491, which was a collision occasioned by the mutual fault of a steamer and a schooner, followed by a total loss of the latter, the survivor was permitted to deduct from one half of the damages recovered for the loss of the vessel one half of the value of the cargo of the latter, notwithstanding the total loss of the schooner, and the fact that under the Harter Act she would not have been liable to the owner of the cargo for negligence in navigation. It was held in that case that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability had been fixed upon the principle of an equal division of damages. The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751, 20 S. Ct. 595. It was correct to deduct half the value of the cargo from half the value of the sunken schooner, and to limit a recovery to the, "difference between the values."

This is in effect extending the doctrine of The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516, wherein the question of liability for the loss of the cargo was not in issue, to one where the vessel suffering the greater injury is also the carrier of the cargo. The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491.

67. The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41. See The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491.

68. The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41. See The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Manitoba, 122 U. S. 97, 30 L. Ed. 1095, 7 S. Ct. 1158.

69. How damage estimated—Items included.—The Baltimore (U. S.), 8 Wall. 377, 19 L. Ed. 463; The Cayuga (U. S.), 14 Wall. 270, 20 L. Ed. 828.

70. Amount of bond and interest.—The Manitoba, 122 U. S. 97, 30 L. Ed. 1095, 7 S. Ct. 1158.

the court is not bound to allow interest on the proceeds of the wreck or strippings; but may in its discretion, allow interest or not.[71]

Costs and Interest in Nature of Damages Occasioned by Appeal.—The act of congress limiting the liability of shipowners in a case of collision does not release them from the payment of costs in the district court, beyond the amount of the stipulation filed therefor, if they appear and make defense, nor, in case they appeal to the circuit court, from the payment of the costs taxable there, or of interest in the nature of damages occasioned by the appeal.[72]

§ 4504. Personal Injuries and Death by Wrongful Act.—The Limited Liability Act applies to cases of personal injury and death by wrongful act as well as to those of loss of, or injury to, property.[73]

Conflict of Laws.—Where the law of a state to which a vessel belonged, in other words, the law of the domicil or flag, gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action given by the law of the domicil or flag will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability.[74]

Collision Cases.—The personal representatives of a passenger and of members of a crew who were drowned as the result of the collision of their vessel with another vessel on the high seas may recover in full in proceedings for the limitation of liability of such other vessel a liability created by the statutes of the state of the vessel's domicile, in favor of the personal representatives of a person whose death is caused by violence or negligence.[75] The main objection is that the statute allows a recovery beyond the maintenance and support which is the limit of a seaman's rights against his own vessel when injured by the

71. **Interest on amount salvaged from appending ship.**—The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174.

72. **Costs and interest in nature of damages occasioned by appeal.**—The Wanata, 96 U. S. 600, 24 L. Ed. 461, citing Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

73. **Personal injuries and death by wrongful act.**—Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27, following Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751, 20 S. Ct. 595, following Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612, and distinguishing The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41, and The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97. So held as to § 4783, Rev. Stat.

74. **Conflict of laws.**—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664; The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133.

75. **Collision clause.**—Judgment, The Hamilton, 146 Fed. 724, 77 C. C. A. 150, affirmed in 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133.

Law of Delaware.—The liability created by Act Del. Jan. 26, 1886, as amended by Act March 9, 1901, in favor of personal representatives of a person whose death is caused by violence or negligence, will be enforced in a proceeding in admiralty for the limitation of liability arising out of a tortious collision on the high seas of vessels belonging to Delaware corporations. Judgment, The Hamilton, 146 Fed. 724, 77 C. C. A. 150, affirmed in 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133.

Law of France.—Under the general law that the territorial sovereignty of a state extends to a vessel of such state when it is upon the high seas, the law of France, which authorizes a recovery for loss of life against a vessel in fault therefor, governs in proceedings by the owner of a French vessel in the courts of the United States for limitation of liability for claims arising out of the sinking of such vessel in collision on a voyage across the Atlantic, and claims for loss of life resulting from the collision may be proved against the fund paid in if the vessel is held in fault. Decree 117 Fed. 261, reversed in La Bourgogne, 139 Fed. 433, 71 C. C. A. 489.

The law of France, which authorizes a recovery for loss of life against a vessel in fault, will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be at fault for a collision in a fog on the high seas, although the French courts, in applying to the facts found the international rule as to the speed of vessels in a fog, might not have held such vessel to be at fault. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

negligence of the master or a fellow servant on his ship. But the question here regards the liability of another vessel. The contract between the seaman and the owners of the vessel does not affect the case.[76] Neither does the Harter Act, even if its terms could be extended to personal injuries and loss of life.[77] Neither does the negligence of the seaman's vessel.[78] This is the rule, although both vessels in collision are in fault.[79] The recovery may be had under the Limited Liability Act, although the local law gave no lien or privilege therefor upon the vessel itself.[80]

Part Owner's Proportion.—Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St., 1901, p. 2945), which provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual shares of the vessel bears to the whole," is applicable to cases of personal injury; and the proportion of a part owner's liability for damages in case of a personal injury, if the injury occur without the privity or knowledge of any of the owners, is the proportion which his interest in the vessel bears to all the interests therein, and not more.[81]

§ 4505. Salvage Claim.—Under the Act of June 26, 1884 (23 Stat. at L. 57, ch. 121, U. S. Comp. Stat., 1901, p. 2945), a salvage claim is one to which the Limited Liability Act applies, even if such claim was not included within the meaning of § 4283, Rev. Stat.[82]

§§ 4506-4514. Condition Precedent to Right to Limit Liability—§ 4506. Seaworthiness and Sufficiency of Equipment.—The owners of a vessel are not entitled under § 4283, U. S. Comp. St., 1904, p. 2943, to a limitation of liability, if they fail to provide a seaworthy vessel at the inception of the voyage.[83]

Sufficiency and Competency of Crew.—It is the duty of the owners of a ship carrying goods and passengers, not only to provide a seaworthy vessel, but also provide their vessel with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as the striking of the ship on a reef of rocks, and the consequent imperative necessity for instant action to save the lives of the passengers and crew.[84] Under Rev. St., § 4463 [U. S. Comp. St., 1901, p. 3045], which requires every steam vessel carrying passengers to have in her service a full complement of licensed officers and full crew sufficient at all times to manage the vessel, as well as by the general maritime law, the crew must not only be sufficient in numbers, but competent for

76. The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133, distinguishing The Osceola, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, and affirming Erie R. Co. *v.* Erie, etc., Transp. Co., 204 U. S. 220, 51 L. Ed. 450, 27 S. Ct. 246.

77. The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133. See post, "Personal Injuries and Death by Wrongful Act," § 4504.

78. The Atlas, 93 U. S. 302, 23 L. Ed. 863; The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133.

79. Both vessels in fault.—Where two vessels belonging to different owners came into collision as the result of fault on the part of both, and both owners brought proceedings in admiralty to limit their liability, a claim for damages was maintainable against both vessels by the personal representatives of the passengers and crew of both vessels who died as the result of the collision. The Hamilton, 146 Fed. 724, 77 C. C. A. 150.

80. The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751, 20 S. Ct. 595; Jakobsen *v.* Springer, 87 Fed. 948, 31 C. C. A. 315.

81. Part owner's preparation.—Cook *v.* Smith, 187 Fed. 538, 109 C. C. A. 304, affirming decree 164 Fed. 628.

82. Salvage claim.—The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

83. Seaworthiness and sufficiency of equipment.—In re Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

84. Sufficiency and competency of crew.—In re Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

all the duties they may be called on to perform in any exigency that is likely to happen, and unless such a crew is supplied the owners are not entitled, under § 4493 [U. S. Comp. St., 1901, p. 3058], to a limitation of liability under § 4283 [U. S. Comp. St., 1901, p. 2943] for damages to persons and baggage growing out of the loss of the vessel.[85] The owners are liable for furnishing an inadequate crew which they shipped large enough in numbers but sick with fever.[86] Where the owners appointed an imcompetent superintendent to manage ships in Alaskan waters, they were not entitled to a limitation of liability for loss arising from sending out a barge in windy and stormy weather.[87] A ship is insufficiently manned where, although there is a sufficient number of sailors, they are unable to understand and execute the orders because of their inability to understand the language in which the orders of the officers in command have to be given.[88]

Lifeboats, Rafts and Disengaging Apparatus.—The question whether vessels not fully equipped with the lifeboats, life rafts, and disengaging apparatus required by the laws of the United States should be accorded the limitation of liability has not been passed upon by the supreme court,[89] but the district court for the southern district of New York has held that the owner of a steamship is not debarred from maintaining proceedings for limitation of liability on account of claims arising from her loss at sea on the ground that she was at the time violating Rev. St., § 4488 [U. S. Comp. St., 1901, p. 3055], requiring all steamers to be provided with such number of lifeboats, etc., as will best secure the safety of all persons on board in case of disaster, where, although she did not have sufficient boats to carry all persons on board, she had complied with all of the requirements of the board of inspectors, and received their certificate to that effect, and carried such number of boats as the inspectors determined would best secure the safety of all persons on board, because a greater number would interfere with her management, and create an additional danger.[90]

Sufficiency of Supply of Life Preservers.—The failure of a sailing vessel to carry a sufficient supply of life preservers for her passengers, which is not required by act of congress nor by custom, can not be charged as a fault against the owners, who intrusted her equipment entirely to a competent master, which will deprive such owners of the right to the limitation of liability provided by Rev. St., § 4283.[91]

Defective Equipment Due to Neglect of Authorized Agent to Provide Same.—See post, "Want of Privity or Knowledge of Owner of Negligence or Defect," § 4507.

85. In re Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

86. The Gentleman, Fed. Cas. No. 5,324, Olc. 110.

87. Parsons *v.* Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302.

88. In re Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

The passenger steamer City of Rio de Janeiro on her return voyage from Hongkong and intermediate ports struck on a sunken rock outside San Francisco in a fog and darkness, and sank in 20 minutes thereafter, carrying down a large number of her passengers and crew. She carried eleven lifeboats, all of which should have been launched in five minutes, but only three were launched at all, and two of those were swamped by improper handling. The crew were sufficient in number, but were Chinese, and only two were able to understand the language spoken by the officers, who were white men, and they had never been drilled in launching the lifeboats. Held, that the vessel was not manned by an efficient and competent crew, such as it was the duty of the owners to provide, that the insufficiency of the crew was the paramount cause of the damages to persons and baggage, and that such owners were not entitled to a limitation of liability for damages to persons and baggage arising from the sinking of the vessel. In re Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

89. **Lifeboats, rafts and disengaging apparatus.**—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

90. La Bourgogne, 117 Fed. 261, reversed 139 Fed. 433, 71 C. C. A. 489.

91. **Sufficiency of supply of life preservers.**—The Jane Grey, 99 Fed. 582.

§ 4507. Want of Privity or Knowledge of Owner of Negligence or Defect.—Mere negligence of itself does not necessarily establish the existence on the part of the owner of a vessel of "privity or knowledge," within the meaning of Rev. St., U. S., § 4283 (U. S. Comp. St., 1901, p. 2943), according to shipowners a limited exemption from liability.[92]

The knowledge or privity of the managing officer or agent of a corporation is the knowledge or privity of the corporation within the meaning of Rev. Stat., § 4283 (U. S. Comp. St., 1901, p. 2943), providing for the limitation of liability of shipowners for losses caused without their privity or knowledge.[93]

92. Want of privity or knowledge of owner of negligence or defect.—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, affirming 144 Fed. 781, 75 C. C. A. 647, following Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

In determining the Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617, it became necessary to decide whether, if there was negligence of the owner of a vessel in case of fire, within the meaning of the 1st section of the Act of 1851, such negligence was the necessary equivalent of privity and knowledge of the owner, as expressed in the 3d section of the act. It was held that the two provisions were not necessarily coterminous, that negligence under the 1st section of the act might exist so as to prevent the unqualified limitation given by that section, and yet the owner of the vessel be entitled to the more limited exemption given by the 3d section, which depended upon the absence of privity or knowledge. In other words, it was decided that although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

"Nothing to the contrary is properly to be deduced from the case of The Main *v.* Williams, 152 U. S. 122, 38 L. Ed. 381, 14 S. Ct. 486, * * * for that case did not purport in the slightest degree to overrule or qualify the previous decisions, and was concerned, not with the meaning of the words 'privity and knowledge,' but with the rule to be applied in determining what constituted pending freight within the meaning of the law for the limitation of liability." La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

"It may be that there are general expressions found in some cases in the lower federal courts, decided both before and after the Hill Case, which lend color to the assumption that privity and knowledge, as defined in the statute, is but the equivalent of mere negligence. Such of the cases relied upon, however, as were decided before the authoritative interpretation of the statute in the Hill Case, were necessarily overruled by that decision, and so far as those decided since may be inconsistent with the previous rulings of the court, they are clearly not entitled to weight." La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

93. Knowledge or privity of manager of corporation.—In re Jeremiah Smith & Sons, 113 C. C. A. 391, 193 Fed. 395; The Republic, 61 Fed. 109, 9 C. C. A. 386; Parsons *v.* Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302; Weisshaar *v.* Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84; Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886.

When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

A company running a line of oyster boats held not entitled to a limitation of liability for the consequences of an explosion caused by negligence in the filling of gasolene tanks where the work was done under the superintendence of the managing agent of the line at one of its terminal ports. In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391.

A corporation engaged in the transportation of cargo and passengers between Seattle and Alaskan points maintained a line of steamers to St. Michael, which was the Alaskan headquarters of its fleet, and there transshipped to other steamers and barges, which were run by the company between that port and Dawson and other points on the Yukon river. Its general manager was located at San Francisco, and he sent a superintendent to take charge of all the company's business at St. Michael. Such superintendent being compelled to return, by reason of illness, in July, left in charge his assistant, who was incompetent for the position by reason of his inexperience in such matters, which was known to the general manager, but who was permitted to remain in charge during the remainder of the season. About October 1st he contracted on behalf of the company to take a cargo to Nome, and loaded the same on a river barge, which was wholly unfit for such a voyage at that season, and which sank

"Privity or Knowledge" of Officers and Crew.—The words "privity or knowledge" in § 4283, Rev. Stat., does not extend to the officers and crews of vessels, as representing the owners, but the privity or knowledge must be that of the owners themselves.[94] Thus an owner who, after a general inspection, purchases a vessel from a shipbuilder of recognized standing and reputation, who equips her with machinery, means, and appliances which are suitable and sufficient, if properly used, may limit his liability for injuries occasioned by the negligent use of such appliances by his employees.[95]

Promulgation of Regulations as to Speed.—The duty on the part of a steamship company seeking limitation of liability for claims arising out of a collision in a fog, to have made regulations directing that its steamers be not run at an immoderate rate of speed in a fog, in order to negative privity or knowledge of fault, was sufficiently discharged by promulgating regulations which, in terms, reiterated the international rule, and called for compliance with its provisions.[96]

Duty of Inspection Delegated to Skilled Marine Engineer.—Where a corporation owning a steam vessel had delegated to a competent and skilled marine engineer the duty of inspecting the boiler on such vessel, and supervising the repair thereof, it was entitled, under Rev. St., §§ 4283-4289, to limit its liability for damage resulting from an explosion of the boiler through a defect not apparent to an unskilled person, although there had been negligence on the part of some of its employees in the inspection or repair of the boiler.[97]

in a storm before having started, through the additional negligence of the agent in not having it taken to a safe place. Held that, whether such agent in fact had authority to accept such cargo, he held ostensible authority, and the company was bound by his action, and, responsible for his negligence and incompetence, and was not entitled to a limitation of liability for the loss under Rev. St., §§ 4283-4285 [U. S. Comp. St., 1901, pp. 2943, 2944], which were not intended to relieve shipowners from personal liability for their own willful or negligent acts. Parsons *v.* Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302.

Defect in equipment which had existed for five years.—A corporation owner of a vessel held not entitled to a limitation of liability against a claim for the death of an employee resulting from defective equipment of the vessel, which defect had existed for five years. In re Ross, 204 Fed. 248, 122 C. C. A. 516, reversing decree, 196 Fed. 921.

Obvious defects—No inspection—Use under personal direction of president.—Where a judgment was recovered for the death of a person on a derrick scow by the breaking of a part of the derrick, the court finding that the part was obviously defective, but that no inspection was made, that the derrick was being used under the personal direction of defendant's president, defendant is not entitled to limitation of liability against such judgment on the ground that the injury was without its privity or knowledge, through the fault or negligence of the master of the scow. The Capt. Jack, 169 Fed. 455.

Acquiescence of president of company in overloading boat.—Where the president of a steamship company was present in a small boat sent ashore by one of the company's ships, and acquiesced in the action of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under Rev. St., §§ 4283-4285 [U. S. Comp. St., 1901, p. 2944]. Judgment, In re Kimball Steamship Co., 123 Fed. 838, reversed in Weisshaar *v.* Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84.

94. "Privity or knowledge" of officers and crew.—Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

The master of a tug, through whose negligent towage a tow was stranded, held not incompetent in such sense that his employment charged the owner with privity, which deprived it of the right to a limitation of liability. The Murrell, 200 Fed. 826, decree affirmed in Baltimore, etc., Barge Co. *v.* Eastern Coal Co., 195 Fed. 483, 115 C. C. A. 393.

95. Inspection on purchase from builder.—Decree, In re Excelsior Coal Co., 136 Fed. 271, affirmed in 142 Fed. 724, 74 C. C. A. 56.

96. Promulgation of regulations as to speed.—Judgment La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

97. Duty of inspection delegated to skilled marine engineer.—The Annie

Failure of Agent to Inspect or Provide Suitable Machinery.—A shipowner, who has provided a suitable person as his agent to inspect or provide for the proper equipment of the vessel, is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent in failing to provide such equipment or to maintain it in good condition of which the owner had no knowledge or notice. The owner of a fleet of barges employed in the lightering service is not deprived of the right to a limitation of liability for the death of an employee engaged in discharging a cargo of railroad rails from one of the barges, resulting from the use of defective tongs borrowed by the master from another boat, where it was shown that such tongs were used infrequently and were not a part of the ordinary equipment of the barges, but were supplied to some, and, when needed by others, were borrowed from them; that the owner had no knowledge of the defect, and employed competent masters on whose request tongs were supplied or replaced when out of repair.[98]

§§ 4508-4514. Surrender of Vessel and Pending Freight or Interest Therein—§ 4508. In General.—The real object of the federal Limiting Liability Act being to limit the liability of vessel owners to their interest in the adventure, it has been the custom in assessing the value of ship to include all that belongs to the ship and may be presumed to be the property of the owner, not merely the hull together with the boats, tackle, apparel and furniture, with all the appurtenances comprising whatever is on board for the object of the voyage belonging to the owners, whether such object be warfare, the conveyance of passengers, goods, or the fisheries.[99] In 1875, the federal court for the first circuit held that the word "ship" as used in the statute would not include, in the case of a whaler, the "whaling outfit, consisting of whaling gear, casks, provisions, and supplies for the crew and trading, known as the 'slops.'" The court found that these were "appurtenances" of a whaling vessel, and because congress had not used the word "appurtenances," which appeared in the American Limitation of Liability Act, it was itself evident intention not to include that which is "not part of the ship" in the language of merchants, but only appurtenant to it, as is necessary for a special voyage or adventure.[1] This was a narrow construction of the clause. Subsequently the supreme court held that the word "freight" used in the same clause was not to be given a narrow or technical definition, and although the precise question was not before the court, it laid down the general rule as above stated, in effect that the clause should be construed broadly to cover what the owners have at risk on the vessel for the object of the adventure.[2]

Right of Action Representative of the Ship.—The clear purpose of congress was to require the shipowner, in order to be able to claim the benefit of the Limited Liability Act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight.[3] Where a vessel has been wrongfully taken from the custody of her owners or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment as compensation for a failure to restore the property. Manifestly, if the option was af-

Faxon, 75 Fed. 312, 21 C. C. A. 366, modifying decree 66 Fed. 575.

98. **Failure of agent to inspect or provide suitable machinery.**—The Tommy, 151 Fed. 570, 81 C. C. A. 50, reversing 142 Fed. 1034.

99. **Surrender of vessel and pending freight or interest therein.**—The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. Ed. 381; The Buffalo, 154 Fed. 815, 83 C. C. A. 531, affirming 148 Fed. 331.

1. Swift *v.* Brownell, Holmes 467, Fed. Cas. No. 13,695.

2. The Buffalo, 154 Fed. 815, 83 C. C. A. 531, affirming 148 Fed. 331, following Oberton in The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. Ed. 381 and distinguishing Swift *v.* Brownell, Holmes 467, Fed. Cas. No. 13,695.

3. **Right of action representative of the ship.**—O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140.

forded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act,[4] but it does not operate an assignment of the insurance on the vessel.[5]

The word "interest," § 4285, Rev. Stat., was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and whatever the extent or character of his ownership may be, the amount or value of that interest is to be the measure of his liability.[6]

§ 4509. Particular Vessels and Parts Thereof Which Must Be Surrendered.—Steam Hoist or Derrick as Part of Vessel.—A traveling steam hoist or derrick, mounted upon a fuel scow specially designed to be used with such a hoist, and from which, although removable, it had been removed but once in 14 years, is a part of the vessel, within the meaning of the limitation of liability statute (Rev. St., § 4283 [U. S. Comp. St., 1901, p. 2943]).[7]

Both Vessels in Collision Property of Petitioner.—The purpose of proceedings for limitation of liability for a collision is to exempt the petitioner from all personal liability on account of the collision, on whatever ground it may rest; and where the petition is for the limitation of liability as owner of a vessel sunk, but it is found on the hearing, on appropriate allegations in the answer, that petitioner was also owner of the other vessel concerned, and that both were in fault for the collision, it is a condition precedent to the granting of the relief sought that both vessels and their pending freight be surrendered.[8]

Tug in Charge of Lighter.—In proceedings for limitation of liability, growing out of the explosion of a pump boiler on a lighter, a tug which was in charge of the lighter should also be surrendered by the common owner.[9]

Other Vessels Employed with Vessel Charged with a Negligent Injury.—The fact that the owner of a vessel charged with a negligent injury also owned other vessels employed in connection with such vessel does not require their surrender in a proceeding for limitation of liability, where they are not charged with any fault.[10]

§ 4510. Transfer of Interest to Trustee or Appraisement and Payment into Court of Value.—This liability of the shipowners may be discharged by surrendering and assigning to a trustee for the benefit of the parties injured, in pursuance of the fourth section of the act, their interest in the vessel and freight, or payment of their value into court; although those may have been diminished in value by the collision or other casualty during the voyage.[11] Rev. St., §§ 4283, 4285 [U. S. Comp. St., 1901, pp. 2943, 2944], clearly give the owner of any vessel the right to personal exemption from liability for any damage occasioned by such vessel without his privity or knowledge by transferring her and her pending freight to a trustee to be appointed by a court of admiralty, and although admiralty rule 54, prescribing the procedure under said sections, permits him at his option to retain the vessel by having her ap-

4. O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140.

5. The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; Hoffeld *v.* United States, 186 U. S. 273, 46 L. Ed. 1160, 22 S. Ct. 927. See post, "Insurance."

6. The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; Hoffeld *v.* United States, 186 U. S. 273, 46 L. Ed. 1160, 22 S. Ct. 927.

7. **Steam hoist or derrick as part of vessel.**—Decree 148 Fed. 331, affirmed in The Buffalo, 154 Fed. 815, 83 C. C. A. 531.

8. **Both vessels in collision property of petitioner.**—Judgment 134 Fed. 749, reversed in The San Rafael, 141 Fed. 270, 72 C. C. A. 388.

9. **Tug in charge of lighter.**—Thompson Towing, etc., Ass'n *v.* McGregor, 207 Fed. 209, 124 C. C. A. 479.

10. **Other vessels employed with vessel charged with a negligent injury.**—The Sunbeam, 195 Fed. 468.

11. **Transfer of interest to trustee or appraisement and payment into court of value.**—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

praised and paying her appraised value, and pending freight into court or giving a stipulation therefor, he still has the right before an appraisement made on his petition has been accepted, or any order has been made thereon, to dismiss that part of his petition, and, instead, to ask for the appointment of a trustee to whom he may transfer the vessel and her freight.[12]

Ex Parte Appraisement.—Although some prior notice of the holding of the appraisement might very well have been served upon a person named in the libel and petition as a respondent, even if he was out of the jurisdiction of the court, yet the appraisement ex parte was not void, because Rule 54 does not require prior notice of the appraisement to be given to any one, and only requires a monition to be issued after a stipulation has been given or a transfer has been made to a trustee.[13] The making of the appraisement ex parte, and the taking of the stipulation thereupon, are, at most, an irregularity which the district court can correct.[14] The stipulation stands in the place of the vessel and her freight, leaving to the court its usual power to act, on proper application, in respect to giving a new or further stipulation.[15]

§ 4511. Bond for Payment into Court.—Where the owners of a vessel, in proceedings for limitation of their liability for a collision, gave bond conditioned for the payment into court on its order of the appraised value of the vessel "and the interest on the same as provided by law," and thereafter contested their liability, the result being an award against the vessel exceeding its value, the stipulators are liable for interest on the bond from the date of its execution at the legal rate.[16]

§ 4512. Abandonment to Underwriters.—The right to proceed for a limitation of liability is not lost or waived by a surrender of the ship to underwriters.[17]

§ 4513. Total Loss of Vessel.—If the vessel and her freight be totally lost, the liability of her owner is thereby extinguished.[18]

§ 4514. Effect of Failure to Surrender Pending Freight.—Failure to surrender pending freight to the trustee does not necessitate a refusal to allow the limitation of liability for claims arising out of a collision at sea, where there is an honest controversy as to whether there was any pending freight to be surrendered, and there is no question as to the insolvency of the owner.[19]

Recovery of Amount Not Surrendered.—Under the Limited Liability Act, U. S. Stat., §§ 4282, 4285, a shipowner who retains the sum of the damages which have been awarded him for the loss of his ship and freight by collision

12. Ohio Transp. Co. *v.* Davidson Steamship Co., 148 Fed. 185, 78 C. C. A. 319.

13. Ex parte appraisement.—In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246.

14. The Benefactor, 103 U. S. 239, 247, 26 L. Ed. 351; In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246.

15. In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246; The Wanata, 95 U. S. 600, 24 L. Ed. 461; United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150.

16. Bonds for payment into court.—Decree, In re Lakeland Transp. Co., 103 Fed. 328, modified in The George W. Roby, 111 Fed. 601, 49 C. C. A. 481.

17. Abandonment to underwriters.—The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172.

18. Total loss of vessel.—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97; The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41.

19. Effect of failure to surrender pending freight.—Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

with another vessel which was in fault, has not surrendered "the amount or value" of his interest in the ship; he has not given up "the whole value of the vessel, he has not transferred his interest in such vessel and freight." It follows, therefore, that the shipowner to the extent of the damage paid him on account of the collision, is liable to the creditors of the ship, and that the cargo owners can recover by an action in personam against the shipowner the due average proportion of the expenses at the port of refuge incurred for the benefit of the ship and freight.[20]

§§ 4515-4524. What Constitutes Value of Ship and Freight—§ 4515. Point of Time at Which Value Taken.—The law limits the liability to the value of the ship and freight after the injury has occurred, but not before—aliter, under the English law.[21] The point of time at which the amount or value of the owner's interest in ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss or damage occurs.[22] If the ship is lost at sea, or the voyage be otherwise broken up before arriving at her port of destination, the voyage is then terminated for the purpose of fixing the owner's liability.[23]

§ 4516. Freight and Passenger Money Estimated.—No freight except what is earned is to be estimated in fixing the amount of the owner's liability;[24] and this liability extends to freight and passage money prepaid at the port of departure.[25] Where a vessel is lost on a voyage, and thereby contracts of transportation are unperformed, it may be that there will be no freight earned and none to be surrendered.[26] But freight and passage money which was received for the voyage under an absolute agreement that the sums so paid were, in any event, to belong to the owner of the vessel, which were tantamount to stipulations that, although such freight and passage moneys might be only partially earned, the right to the whole amount was contractually complete, must be surrendered as freight pending on the voyage under the rule that the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed against the shipowner.[27] Where a ship, at the time she was

20. Recovery of amount not surrendered.—O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140.

21. So held in collision cases.—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150.

22. The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

Collision.—The value of the vessel and freight for the purposes of limitation of liability is to be assessed at no later period than the termination of the voyage during which the collision happened. The George L. Garlick, 107 Fed. 542, 46 C. C. A. 456.

23. The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172.

24. Freight and passenger money estimated.—The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172.

25. Passage money and freight prepaid.—Under the Limited Liability Act, Rev. Stat., § 4283, the liability of a shipowner for the "freight then pending" extends to passage money, and to freight prepaid at the port of departure. The Main *v.* Williams, 152 U. S. 122, 38 L. Ed. 381, 14 S. Ct. 486.

26. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, following Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

In respect to the pending freight, which must be surrendered by a shipowner, in order to secure the statutory limitation of liability, the law is that freight pending is freight earned; and when the voyage is broken up by the wrecking of the ship before reaching her destination, there is ordinarily no freight earned, for, even though prepaid, in the absence of special contract, it may be recovered back by the shipper. Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497.

27. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, following The Main *v.* Williams, 152 U. S. 122, 38 L. Ed. 381,

stranded and the voyage terminated, was carrying passengers, who had prepaid their passage under contracts providing that in case of the loss of the vessel the passage money should not be refunded, such passage money must be considered the same as freight earned, and surrendered by the owner in proceedings for the limitation of liability; and no deduction can be made because certain of the tickets were given to the passengers by the shipowners, nor on account of a sum paid by such owner for the transportation of the passengers from the place of the stranding to their port of destination.[28]

§ 4517. What Constitutes Earnings of Voyage.—The earnings of the voyage which a shipowner is required by the statute to surrender in order to obtain a limitation of liability for losses occurring on such voyage are those only of the particular voyage which exposed the passengers or property to risk; and where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, discharging her passengers and cargo at each terminal port, each of the trips between such ports constitutes a separate voyage, within the meaning of the statute, and in proceedings for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre the owner is not required to surrender the earnings of the preceding trip from Havre to New York.[29] The

14 S. Ct. 486, and O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140; La Bourgogne, 139 Fed. 433, 71 C. C. A. 489, reversing, 117 Fed. 261.

Sums prepaid for freight and passage on the voyage, under an absolute agreement that such sums are, in any event, to belong to the owner of the vessel, must be surrendered as freight then pending on the voyage, within the meaning of Rev. St., U. S., §§ 4283, 4284 (U. S. Comp. St., 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of the sinking of the vessels as a result of a collision at sea. Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

By the terms "freight pending" and "freight for the voyage," as used in Rev. St., §§ 4283, 4284 [U. S. Comp. St., 1901, p. 2943], is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, and where passage or freight money is prepaid under contracts by which it becomes the absolute property of the shipowner whether the voyage is completed or not, it must be regarded as earned, although the vessel is lost, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss. Decree 117 Fed. 261, reversed in La Bourgogne, 139 Fed. 433, 71 C. C. A. 489.

28. Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497.

29. What constitutes earnings of voyage.—Decree 117 Fed. 261, reversed in La Bourgogne, 139 Fed. 433, 71 C. C. A. 489; S. C., 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, affirming 144 Fed. 781, 75 C. C. A. 647.

Where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, each trip between the two terminal ports constitutes a "voyage," within the meaning of the statute providing for limitation of liability of owners to their interest in the vessel "and her freight for the voyage" (Rev. St., § 4284 [U. S. Comp. St., 1901, p. 2943]); and the owner, in instituting proceedings thereunder for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre, is not required to deposit the freight earned on the preceding trip from Havre to New York. La Bourgogne, 117 Fed. 261, reversed in 139 Fed. 433, 71 C. C. A. 489.

"As §§ 4283, 4284, Rev. Stat. (U. S. Comp. Stat., 1901, p. 2943), are in pari materia, the two must be considered together, and therefore the freight then pending, referred to in § 4283, is freight then pending for 'the same voyage,' or 'for the voyage,' as these words are used in § 4284." La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664. See ante, "Construction," § 4498.

"In common parlance, each of these trips was a separate voyage. Undoubtedly the word 'voyage' may have different meanings under different circumstances, depending on the subject to which it relates or the context of the particular contract in which the word is employed. This is illustrated by the use of that word in the subsidy contract, where the word is used as signifying a sailing from Havre to New York and the return trip to Havre." The meaning of the word in §§ 4283, 4284, Rev. Stat., "must be ascertained by considering the context of the sections and the remedy which they were intended to afford; in other words, their obvious intent and purpose. The intimate

construction of the statute as applied to such case cannot be affected by the fact that in a contract for carrying mails, between the ship and the French government, a round trip was designated as a voyage.[30]

§ 4518. Ship Subsidy Money.—No part of the annual subsidy paid to a steamship company by the French government in consideration of the operation of a weekly steamship service between Havre and New York need be surrendered as freight pending for the voyage, within the meaning of Rev. St., U. S., §§ 4283, 4284 (U. S. Comp. St., 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of the loss of one of the vessels of such steamship company in a collision on a voyage from New York to Havre.[31] In proceedings by a French steamship company under Rev. St., § 4284 [U. S. Comp. St., 1901, p. 2943], for limitation of liability for claims arising out of the sinking of one of its ships while on a voyage from New York to Havre, the "freight for the voyage" which the petitioner is required by the statute to surrender can not be construed to include any part of an annual subsidy paid to the company by the French government, in consideration for which the company agreed to build and maintain a weekly steamship service between Havre and New York, the vessels to be built in France and to be of a character, size, speed, and equipment specified, and subject to the use of the government in case of war or other extraordinary political circumstances, and to transport gratuitously all mails and specie for the use of the state. In such case it is impossible to determine what part of subsidy is to be considered as compensation to any single vessel for transportation of the mails on a single trip.[32]

§ 4519. Freight Earned by Other Vessels on Through Shipment.—Under Rev. St., § 4283 [U. S. Comp. St., 1901, p. 2943], which provides that the liability of the owner of a vessel for loss or damage to cargo occurring without his privity or knowledge "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending," pending freight is limited to that due to or to be earned by the particular vessel through whose fault the loss occurred, and the fact that goods when lost or injured were being transported under through bills of lading upon different vessels of the same owner does not require a surrender of the freight earned by a different vessel in the course of such shipment.[33]

§ 4520. Damages for Loss of Vessel in Collision.—Damages recovered by the owner for the loss of his vessel by collision stand in the place of the vessel herself, and he is not entitled to the benefit of the statutes for limitation of liability, unless he surrenders the sum recovered for the benefit of the ship's creditors.[34]

§ 4521. Insurance.—Insurance is no part of the owner's interest in the ship or freight within the meaning of the law, and does not enter into the amount for which the owner is held liable.[35]

relation between the provisions of the two sections, which were both in the Act of 1851, was pointed out in considering that act in Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585." La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

30. La Bourgogne, 117 Fed. 261, reversing 139 Fed. 433, 71 C. C. A. 489.

31. **Ship subsidy money.**—Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

32. La Bourgogne, 139 Fed. 433, 71 C. C. A. 489, reversing decree, 117 Fed. 261.

33. **Freight earned by other vessels on through shipment.**—Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

34. **Damages for loss of vessel in collision.**—O'Brien *v.* Miller, 18 S. Ct. 140, 168 U. S. 287, 42 L. Ed. 469, affirming decree, 59 Fed. 621, and reversing decree, 67 Fed. 605, 14 C. C. A. 566.

35. **Insurance.**—The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150.

§ 4522. Deduction for Expenses of Voyage.—The interest of the owners in a "vessel and her freight then pending," within the meaning of Rev. St., § 4283, limiting their liability in certain cases, is intended to include their entire interest or investment in the adventure, and they are not entitled to make any deduction from the gross amount of freight and passage money pending on account of any expenses incurred for the voyage.[36]

§ 4523. Expenses of Salvage and Allowance for Risk of Undertaking.—Where a ship was stranded on a reef and so injured as to terminate her voyage, in order to secure the statutory limitation of liability the owner, when the vessel is not surrendered, must pay her value as she lay upon the rocks, and the amount of her freight then pending, if any. Her value for such purpose is not affected by the result of any subsequent salvage operations, whether undertaken by the owner or others; and where at great risk, hazard, and expense the owner succeeded in releasing her and having her towed to a port where she was valued, there must be deducted from such valuation, for the purpose of fixing the measure of his liability in limitation proceedings, not only the expense incurred in her rescue, but also an allowance on account of the risk and hazard of the salvage undertaking, which clearly affected her value as she lay before such operations were commenced.[37]

§ 4524. Substitution of Another Vessel.—The owner can not relieve himself from the obligation of the statute by merely substituting some other boat of his own as the vehicle of transportation. Where a lighter sank at a pier while being loaded, injuring a large part of her cargo, the fact that the uninjured cargo was then transferred by her owner to another vessel, and that such lighter did not deliver any part of it, does not relieve the owner in proceedings for limitation of his liability from the necessity of surrendering as "pending freight" the freight which she would have earned if she had carried the cargo.[38]

§ 4525. Waters, Vessels and Interests to Which Applicable.—Extent of Territorial Operation.—A law of limited liability of shipowners being a part of our maritime code, the extent of its territorial operation is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends—on the sea and the great lakes, and the navigable waters connecting therewith. It is not confined to the class of subjects which limit the power to regulate commerce.[39] The Shipowner's Limited Liability Act applies to

So held where the vessel at fault for collision, as result of which she took fire and sank, was insured against fire. The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172; Hoffeld *v.* United States, 186 U. S. 273, 46 L. Ed. 1160, 22 S. Ct. 927.

36. **Deduction for expenses of voyage.**—The Jane Grey, 99 Fed. 582.

37. **Expenses of salvage and allowance for risk of undertaking.**—Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497.

38. **Substitution of another vessel.**—Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

39. **Extent of territorial operation.**—The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; O'Brien *v.* Miller, 168 U. S. 287, 42 L. Ed. 469, 18 S. Ct. 140; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Lottawanna (U. S.), 21 Wall. 558, 22 L. Ed. 654; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617. See ante, "Part of Maritime Law."

The Limited Liability Act applies to the stranding of a ship which took place on Devil's Bridge, on the north side of and near Gay Head, at the west end of Martha's Vineyard, just where Vineyard Sound opens into the main sea. Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the navigable waters of the United States, and no state legislation can prevent the full operation of the maritime law on those waters. So held where the liability itself arose from

vessels only which are engaged in foreign commerce, and commerce between the states, not the purely internal commerce and navigation of a state,[40] and it applies to foreign as well as domestic vessels.[41] It was settled in The Scotland, 105 U. S. 24, 26 L. Ed. 1001, that a foreign ship is entitled to obtain in the courts of the United States the benefit of the law for the limitation of liability of shipowners.[42] It applies to vessels engaged in rivers or inland navigation[43] and to vessels used on the Great Lakes.[44] The fourth section of the act of Congress of June 19, 1886, extended the Limited Liability Act to all kinds of vessels, not only seagoing vessels, but those used on lakes or rivers, or in inland navigation, including canal boats, barges, and lighters,[45] and it has been held that it applies to a scow used as a derrick boat,[46] and a barge with a pile driver mounted thereon,[47] and the right does not depend upon the fact that the vessel was actually engaged upon a voyage at the time of the act or event against which the owner seeks to limit his liability, but the statute applies to a vessel at a dock being altered and refitted,[48] and to one which had been beached

the state law. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

The law of limited liability may be applied to navigable rivers above tidewater, such as the Savannah River, and to vessels engaged in commerce on such a river. In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840; The Genesee Chief *v.* Fitzhugh (U. S.), 12 How. 443, 13 L. Ed. 1058; Fretz *v.* Bull (U. S.), 12 How. 466, 13 L. Ed. 1068; Jackson *v.* The Magnolia (U. S.), 20 How. 296, 15 L. Ed. 909; Nelson *v.* Leland (U. S.), 22 How. 48, 16 L. Ed. 269; The Commerce (U. S.), 1 Black 575, 17 L. Ed. 107; The Hine (U. S.), 4 Wall. 555, 18 L. Ed. 451; The Belfast (U. S.), 7 Wall. 624, 19 L. Ed. 266; The Eagle (U. S.), 8 Wall. 15, 19 L. Ed. 365; The Daniel Ball (U. S.), 10 Wall. 557, 19 L. Ed. 999; The Montello (U. S.), 20 Wall. 430, 22 L. Ed. 391, and Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056, 3 S. Ct. 434.

Vessels navigating high seas between parts of a state.—The act applies. Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224. See, also, Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806.

40. Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

41. Foreign vessels.—Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

42. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

43. Ships employed in river or inland navigation.—Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97; The New York, 175 U. S. 187, 44 L. Ed. 126, 20 S. Ct. 67.

The words "**any vessel of any description whatsoever, used in rivers or inland navigation.**"—Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

Use of the phrase "inland navigation." See Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674.

44. Vessels used on Great Lakes.—Moore *v.* American Transp. Co. (U. S.), 24 How. 1, 16 L. Ed. 674; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97; The New York, 175 U. S. 187, 44 L. Ed. 126, 20 S. Ct. 67. See Walker *v.* Transportation Co. (U. S.), 3 Wall. 150, 18 L. Ed. 172.

Where a general ship, employed in navigating the lakes, receives goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland waters, her liability must be determined by the rules of law applicable to carriers of goods upon such inland waters. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

45. In re Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 S. Ct. 840. See, also, Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806.

46. Scow used as derrick boat.—The owner of a scow built for the carrying of stone is entitled to limitation of liability for negligent injury inflicted by her under Rev. St., § 4289, as amended by Act June 19, 1886, § 4, although she was at the time being used as a derrick boat in unloading other vessels. The Sunbeam, 195 Fed. 468.

47. A barge with pile driver mounted thereon.—A barge with a pile driver mounted thereon held a vessel within Rev. St., §§ 4283, 4289 (U. S. Comp. St., 1901, pp. 2943, 2945), giving the right to a limitation of liability. In re Ross, 196 Fed. 921.

48. Vessel at dock.—The right of the owner of a vessel to a limitation of liability under the provisions of Rev. St. §§ 4283-4285 [U. S. Comp. St., 1901, pp. 2943, 2944], does not depend upon the fact that the vessel is actually engaged upon a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his lia-

and was partially dismantled.[49]

Vessel Abandoned to Underwriter.—Section 4283, Rev. Stat., applies to a vessel which has been wrecked and abandoned to the underwriters; they are relieved under the statute from their liability for negligence while engaged in saving the wreck or the cargo.[50]

Charterer of Lighter.—A lighterage company which contracts to transfer cargo from one ship to another and for that purpose charters a lighter, the lighterman, who employs the stevedores, and superintends the work, being furnished by the owner, is not entitled to a limitation of liability, under Rev. St., § 4286 [U. S. Comp. St., 1901, p. 2944], for a loss of cargo by the capsizing of the lighter through negligent loading.[51]

§ 4526. Proceedings against Which Available.—The limitation of liability is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner; the limitation extends to the owner's property as well as to his person.[52]

§ 4527. Freighters Entitled to Participate.—"On the Same Voyage."—The phrase "on the same voyage" is added to confine the participation in the apportionment to the freighters of a single voyage, and not to permit the shipowner to bring into the compensation losses sustained on prior or other voyages.[53]

§ 4528. Effect of Stipulation in Bill of Lading.—A stipulation in a bill of lading that the matters and things set forth shall be received as prima facie evidence of the facts provided for and of the truth of the matter set forth does not prevent a carrier from seeking a limitation of liability under the United States statutes.[54] A bill of lading issued by a railroad company, providing that, if any part of the property shall be carried by water, such carrier shall be subject to the conditions in the bill of lading, including the condition that no carrier shall be liable for the perils of the sea, or by fire, or from accidents of navigation, does not operate to prevent the application of the limitation of the liability act when the property is destroyed by fire on a barge.[55]

§ 4529. Remedies Reserved.—The sixth section in § 4287, Rev. Stat., in terms, saves the remedy to which any party may be entitled against the master, officer, or mariner of such vessel, for negligence, fraud or other malversation.[56]

bility, but the statute applies equally to a vessel at a dock in her home port, where she is being altered and refitted, and where she has remained for several months. In re Michigan Steamship Co., 133 Fed. 577, decree reversed McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518.

49. Partially dismantled vessel. — A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a "vessel," within the meaning of Rev. St., § 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (U. S. Comp. St., 1901, p. 2945); and her owners may maintain proceedings for a limitation of liability for damage done by her, where she floated and went adrift in a storm without their knowledge. The C. H. Northam, 181 Fed. 983.

50. Vessel abandoned to underwriter.—Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

Section 4283 applies to the liability of the owner of a vessel on such voyage, for damage for death of an employee. Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

51. Charterer of lighter.—Smith *v.* Booth, 110 Fed. 680, affirmed in 122 Fed. 626, 58 C. C. A. 479.

52. Proceedings against which available.—The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150.

53. On the same voyage.—La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

54. Effect of stipulation in bill of lading.—The Hoffmans, 171 Fed. 455.

55. The Hoffmans, 171 Fed. 455.

56. Remedies reserved. — Walker *v.* Transportation Co. (U. S.), 3 Wall. 150,

While the right to common-law remedies is reserved, it is so reserved subject to the provisions of the statute which sanction proceedings for the limitation of liability, as a result of which resort to proceeding to limit liability is available after a judgment at common law.[57]

§ 4530. Waiver of Right.—The right of a part owner of a steamship to a limitation of his liability for a personal injury to the proportion of the damages which his interest in the vessel bears to all the interests, given by Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St., 1901, p. 2945), is a personal one, which may be waived, and is so waived where, after suit against a part owner for injury to a seaman, he files a petition for limitation of his liability "to the amount of the value of his interest" in the vessel, makes no request for further limitation in the trial court, and, after the amount of damages has been fixed, stipulates with the claimant for a reduction of such amount.[58] Such right is not waived by failure to assert such right in the collision suit, nor by an exception to the libel therein,[59] nor by giving a supersedeas bond on appeal from a decree for collision damages.[60]

§§ 4531-4547. Harter Act—§ 4531. Purpose.—The plain purpose of the Harter Act was to relieve carriers by water of some of the harsher rules of obligation in force before its passage.[61] Its object was to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act but from its general tenor and provisions.[62]

§ 4532. Construction.—The trend of judicial decision in the United States has been to construe the Harter Act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability.[63] In determining the effect of the Harter Act in restricting the operation of general and well-settled principles, the court will treat those principles as still existing, and limit the relief from their operation afforded by the statute to that called for by the language itself of the statute.[64]

Prospective Not Retrospective.—All bills of lading issued since the passage of the Harter Act are governed by its express provision;[65] but contracts made before the passage of the act are unaffected by its provisions.[66]

18 L. Ed. 172. See Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886, 12 S. Ct. 97.

57. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

58. Waiver of right.—Cook *v.* Smith, 187 Fed. 538, 109 C. C. A. 304, affirming decree, 146 Fed. 628.

59. A vessel owner held not to have waived the right to limitation of liability against claims for collision damages by the failure to assert such right in the collision suit, nor by an exception to the libel therein. Monongahela River Consol. Coal, etc., Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127.

60. The right of a vessel owner to a limitation of liability, as against a decree for collision damages recovered against him in a suit in personam, given by Rev. St. § 4283 (U. S. Comp. St., 1901, p. 2943), is not waived by the giving of a supersedeas bond on appeal from such decree. Monongahela River Consol. Coal, etc., Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127.

61. Plain purposes.—See The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

62. The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516.

63. Construction.—Decree, 107 Fed. 294, modified in The Germanic, 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

64. Flint *v.* Christall, 18 S. Ct. 831, 171 U. S. 187, 43 L. Ed. 130, reversing 82 Fed. 472.

65. Prospective not retrospective. — Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

66. Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398, 18 S. Ct. 12.

Which Section Governs Determined from Acts Causing Loss.—A case may occur which, in different aspects, falls within both §§ 1 and 3 of the Harter Act, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.[67]

Section 3 must be read with § 2 to effectuate the purpose of the act.[68]

§ 4533. Effect of Clauses in Bills of Lading Relieving from Liability.—A claimant who sets up the Harter Act and relies upon it, must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary.[69] The Harter Act in all cases coming within its provisions, overrides and nullifies any such stipulations in a bill of lading,[70] but the Harter Act has no application to such stipulations by private carriers.[71]

67. Which section governs determined from acts causing loss.—The Germanic, 196 U. S. 589, 49 L. Ed. 610, 25 S. Ct. 317.

68. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

69. Effect of clauses in bills of lading relieving from liability.—Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; The Germanic, 196 U. S. 589, 49 L. Ed. 610, 25 S. Ct. 317.

"Prior to the Harter Act it was established that a common carrier by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469, following Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627. But of course the responsibilities of the carrier were subject to modification by law, and with respect to vessels transporting merchandise from or between ports of the United States and foreign ports they were substantially modified by the Harter Act." The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

In The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831, the opinion, after stating that, as the law stood before the passage of the act, the shipowner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in officers and crew, and that in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who might so contract, proceeded to say that "congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty." The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560. See, also, The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

In determining the effect of this statute in restricting the operation of general and well-settled principles, the proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute. The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831.

In reference to the preceding paragraph the court said: "This language is laid hold of as indicating that the decision proceeded upon the ground that congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation." The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831, there was no agreement between shipowner and cargo owner respecting general average, nor respecting the consequences of a stranding or other peril that might result from the negligence of the master or crew of the vessel. The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

70. Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102.

71. Private carriers.—When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire, and a condition in such a contract, to which the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2947]), relating to exemptions from liability has

Instances Where Stipulation Void.—A stipulation that the law of the ship's flag shall govern in a bill of lading of a foreign ship on a voyage to the United States,[72] a stipulation seeking to relieve the carrier from the initial duty of furnishing a seaworthy vessel,[73] or restricting liability for the construction, repair and outfit of the vessel, a stipulation exonerating the carrier from all responsibility for goods exceeding a specified value,[74] for neglect in loading or stowing,[75] and the care and delivery of the cargo,[76] and for faults of com-

no application, exempting the shipowner from liability on account of the carelessness of the employees, is not contrary to public policy. Decree, 140 Fed. 123, reversed in The Fri, 154 Fed. 333, 83 C. C. A. 205.

72. Stipulation that law of flag shall govern.—A stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified and overridden by Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], which probibits contracts against liability for negligence in loading and stowing the cargo. Decree, Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326, affirmed in 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

73. Restricting obligation of seaworthiness.—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516.

Stipulations in a bill of lading can not relieve a carrier from the discharge of his initial duty under the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) to use due diligence to furnish a seaworthy vessel. Judgment, The Southwark, 108 Fed. 880, 48 C. C. A. 123, reversed in 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

Where owner used due diligence.—Under the Harter Act the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness. The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181, 18 S. Ct. 753.

74. Limiting value to specified sum.—Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289.

A stipulation exempting the carrier from liability for loss of goods "which are above the value of $100 per package," unless their value is expressed in the bill of lading, is intended to release the carrier from any liability for packages worth more than $100, and not merely for the excess over $100, and is therefore void under the Harter Act as well as the general maritime law. Decree, 69 Fed. 574, 16 C. C. A. 332, reversed in Calderon *v.* Atlas Steamship Co., 18 S. Ct. 588, 170 U. S. 272, 42 L. Ed. 1033.

75. Restricting obligation as to loading or stowing.—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516.

Damage to wool stowed on the forward side of a temporary wooden bulkhead, by drainage from sugar stowed aft of the bulkhead, when it results from the fact that for a short time the vessel was trimmed by the head after discharging a part of the cargo, until she was again trimmed by the stern at another port, arises from negligence in loading or stowage of the cargo, which makes the vessel liable under Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], notwithstanding any stipulations to the contrary in the bills of lading; and it is not a damage from fault or error in the navigation or management of the ship. Decree, Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326, affirmed in 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

Failure to provide fit lighter.—If taking a cargo to a vessel in lighters be part of the loading of the vessel, a stipulation in the bill of lading relieving the carrier from failure to provide a fit lighter is prohibited by Harter Act Feb. 3, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], declaring it unlawful for the owner of a vessel engaged in transporting merchandise to stipulate against liability for loss from negligence in loading. Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

76. Stipulations against neglect in care or delivery of cargo.—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102; The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516.

Delay in delivery due to negligent stowing.—A stipulation in a bill of lading that, if any goods can not be found during the steamer's stay at the port of delivery, they shall be forwarded at the earliest opportunity, without liability of the ship for delay or otherwise, is invalid, under the Harter Act, as applied to a case where goods were negligently stowed and no effort was made to find them, and they were subsequently lost at sea. Decree, 69 Fed. 574, 16 C. C. A. 332, reversed in Calderon *v.* Atlas Steamship Co., 18 S. Ct. 588, 170 U. S. 272, 42 L. Ed. 1033.

mission or omission on the part of his servants,[77] are within the prohibition of the first and second sections of the Harter Act and void.

Stipulations against Loss While on Quay or Loss by Thieves.—A general clause in a bill of lading, exempting a shipowner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid, under § 1 of the Harter Act (27 Stat. 445), providing that "any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void," nor is it rendered void, under such provision, by a subsequent clause extending all exemption provisions to cases of negligence, the two clauses being separable; but the carrier is entitled to the benefit of the exemption, unless it is found that its negligence or fault contributed to the loss.[78]

Latent Defects in Refrigerating Apparatus.—A stipulation, in a contract for the transportation of frozen meat, exempting the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus, which is not due to any fault or negligence on his part, is not in violation of section 2 of the Harter Act.[79]

§ 4534. Effect on Stipulations in Passenger Tickets.—The United States circuit court of appeals has held that the provisions of § 2 of the Harter Act as to the limiting of liability by bills of lading or shipping documents do not apply to passenger tickets,[80] but the supreme court declined to decide this point in The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102.

§§ 4535-4547. Loss or Damage to Which Applicable—§ 4535. Losses for Which Carriers Liable Generally.—The carrier is liable under the first section of the Harter Act from loss or damage arising from negligence, fault or failure,[81] in proper loading,[82] stowage,[83] custody, care,[84] or

77. **Neglect of servants.**—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 S. Ct. 102.

78. **Stipulations against loss while on quay or loss by thieves.**—Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

79. **Latent defects in refrigerating apparatus.**—The Prussia, 93 Fed. 837, 35 C. C. A. 625, affirming decree, 88 Fed. 531.

80. **Effect on stipulation in passenger tickets.**—The Kensington, 94 Fed. 885, 36 C. C. A. 533, affirming decree, 88 Fed. 331, which is reversed in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

81. **Losses for which carriers liable generally.**—Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30.

Where the negligence of the carrier in failing to make delivery is clearly proven, he is liable under the Harter Act. Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588.

"Loss or damage" arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of cargo within § 1 of the Harter Act. See Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Germanic, 196 U. S. 589, 49 L. Ed. 610, 25 S. Ct. 317.

82. Where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel within § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), but from unseaworthiness, or from negligence, fault, or failure in proper loading within § 1, for which the vessel is liable. Donaldson *v.* Perry Co., 138 Fed. 643, 71 C. C. A. 93.

83. **Negligence in loading and stowage.**—Bales of wool stowed in the forward compartment of a steamship were damaged by the drainage of wet sugar next aft, caused by a change in the trim of the ship through changes in loading at a port of call. Held, that the negligence in permitting the ship, in the absence of forward scuppers or a tight bulkhead, to get down by the head at the port of call, so that the wool would become damaged by the sugar drainage forward, was negligence in the general loading and stowage of cargo, within section 1 of the Harter Act, and not "in the management of the vessel," within the third section of that act. Botany Worsted Mills *v.* Knott, 76 Fed. 582, decree affirmed in 82 Fed. 471, 27 C. C. A. 326, and 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

Mere stowage is an altogether different

proper delivery [85] of cargo. It is the duty of a ship to pay attention to any extraordinary circumstances that evidently affect her stability while discharging, and to regulate her mode of discharge accordingly, so as not to endanger the cargo. Negligence in such regard, which results in damage to cargo, is not a fault in the "management of the ship," within the exemption of the third section of the Harter Act, but rather in the care or proper delivery of the cargo, within the meaning of the first section, from which she is not exempt from liability.[86] The unloading of cargo in the port of discharge by stevedores has no relation to the "management of the vessel," within the meaning of the third section of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), not being an act done with any view to such management, but relates to the "care or delivery of cargo," within the meaning of the first section; and where by the negligent and improper manner in which it was done it brought about a condition of instability in a ship, which, owing to a large accumulation of ice above her upper deck, rendered her topheavy, and she rolled over and sank at her dock, injuring the remaining cargo, she is liable for the damage, although other acts done or omitted in the management of the vessel may have contributed to the injury.[87]

Liability as Bailee.—Congress by the Harter Act merely intended to relieve shipowners of certain liabilities as common carriers, leaving untouched their liability as bailees.[88]

§§ 4536-4539. Loss from Latent Defects, Fault or Error in Navigation or Management of Ship—§ 4536. In General.—Where a shipowner has discharged the obligation imposed upon him by the Harter Act, neither the vessel nor the owner in charge is liable for loss or damage among other things, for faults or errors in navigation or in the management of the vessel,[89] over

matter from the management of the vessel. Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7.

84. Permitting oil leaking from barrels to remain in bilges.—The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel," within § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946], but injury to other cargo from such oil arose from "failure in proper care of the cargo," within § 1, for which the vessel was liable. The Persiana, 185 Fed. 396, 107 C. C. A. 416, reversing decree, 156 Fed. 1019.

85. Words "in case the goods can not be found for delivery," in stipulation seeking to limit liability construed, see Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 42 L. Ed. 1033, 18 S. Ct. 588.

86. The Germanic, 107 Fed. 294, modified in 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

87. Decree, 107 Fed. 294, modified in The Germanic, 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from faults or errors in navigation or in the management of said vessel within the meaning of Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946], exempting the owner of the vessel from liability, but arises from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery of merchandise, under § 1 of that act, so as to preclude any stipulation of exemption. Decree, The Germanic, 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

88. Liability as bailee.—Mallory Steamship Co. *v.* Bahn, etc., Optical Co. (Tex. Civ. App.), 154 S. W. 282.

Where a steamship company receives a consignment for which it is not liable as a carrier by reason of Rev. St. U. S., § 4281 (U. S. Comp. St., 1901, p. 2942), exempting a carrier from liability for goods wrongfully marked, it is still liable as a private bailee for hire for failure to exercise ordinary care in transporting and delivering the goods. Mallory Steamship Co. *v.* Bahn, etc., Optcal Co. (Tex. Civ. App.), 154 S. W. 282.

89. Loss from latent defects, fault or error in navigation or management of ship.—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Chattahoochee,

which he has not direct control[90] for loss or damage resulting from latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence, to make his vessel seaworthy;[91] or for loss from inherent defect, quality or vice of the thing carried.[92]

§ 4537. Seaworthiness as Condition Precedent.—The relief afforded by the Harter Act, to the owner of a vessel, is conditional or depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. It is incumbent upon the shipowner to furnish a seaworthy vessel at the commencement of the voyage or use due diligence to make her so.[93] This rule should not be relaxed by judicial interpretations or constructions.[94] Even if the loss occurred through fault or error in management, the exemption can not be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised.[95] A shipowner is not exempted by the Harter Act from liability for damage to cargo resulting from her unseaworthy condition at the commencement of the voyage, although it is shown that he exercised due diligence to make her in all respects seaworthy.[96] The statute does not so change the maritime law as to relieve the owner from his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy.[97]

173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467; The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831.

Failure to close covers of port holes.—See The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7.

Careless opening of valve.—See The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467.

90. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467.

91. The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

92. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

93. Limitation of liability for latent defects.—The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467; The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181, 18 S. Ct. 753; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831.

94. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

95. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467.

"**The word 'management'** is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing." International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591.

96. The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421, affirming decree, 117 Fed. 279; The Sandfield, 92 Fed. 663, 34 C. C. A. 612, affirming decree 79 Fed. 371.

97. The provisions of the Harter Act making it unlawful to insert in the contract a provision exempting from liability for damage from unseaworthiness where due diligence has not been used (§ 2), and also exempting from loss from faults or errors in the navigation or management of the vessel, if due diligence has been used to furnish a seaworthy ship properly manned, equipped and supplied (§ 3), do not so change the general maritime law as to relieve the owner from his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy. The Carib Prince, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 Fed. 254, 15 C. C. A. 385.

Section 3 of the Harter Act (2 Supp. Rev. St., p. 81) does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, nor affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy, etc. There is no expressed intention in the statute to replace the carrier's obligation under the general maritime law to furnish a seaworthy vessel by the less extensive obligation to exercise due diligence to that end, and it can not be extended by construction beyond its terms. Farr, etc., Mfg. Co. *v.* International Nav. Co., 94 Fed. 675, reversed 98 Fed. 636, 39 C. C. A. 197, affirmed in 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

In respect to losses from causes other than those designated.—Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S.

What Constitutes Seaworthiness.—To constitute a ship seaworthy she must be fit in design,[98] structure,[99] condition,[1] and equipment. Thus, a vessel can not be said to be seaworthy where there is a leake in a water ballast tank at the inception of the voyage,[2] where a hatch is not properly closed;[3] or when the coverings of a port hole are not properly closed,[4] or are unsecurely portholed[5] before sailing. It is, of course, not to be understood that failure to

Comp. St., 1901, p. 2946], providing that if the owner of a vessel engaged in transporting merchandise exercise due diligence to make it in all respects seaworthy, and properly manned, equipped, and supplied, it or the owner shall not be liable for loss from faults or errors in navigation or in the management of it, or the dangers of the sea, does not lessen the owner's obligation to furnish a seaworthy ship at the inception of the voyage in respect to losses arising from causes other than those designated. It is not enough that he uses due diligence, but the ship must be seaworthy. Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973, affirmed in 110 Fed. 420, 49 C. C. A. 1.

98. Design.—Farr, etc., Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197, affirmed 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

99. Structure.—A barge held unseaworthy, from the manner of her construction, for a voyage between St. Michael and Nome, Alaska, in October, and her owner for that reason not entitled to exemption, under § 3 of the Harter Act, from liability for the loss of cargo taken on board for such a voyage. Parsons *v.* Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302.

1. Farr, etc., Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197, affirmed in 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

2. Leak in water-ballast tank.—Sugar cargo stowed in a hold was damaged during a voyage by seawater, which leaked from a water-ballast tank, through a manhole, opening into the hold. After the vessel sailed, the valve admitting water to the tank was opened, and negligently allowed to remain open longer than necessary to fill the tank, and it was during the time it was so open that the leak was discovered. But it appeared that while in port the manhole cover had been taken off and replaced, and it was not shown that before sailing it was tested with such pressure as it was afterwards subjected to. Held, that the damage must be attributed to the unseaworthy condition of the vessel at the commencement of the voyage, due to negligence, for which the owners were not exempted from liability by the Harter Act (27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]). American Sugar Refin. Co. *v.* Rickinson, 120 Fed. 591, decree reversed in 124 Fed. 188, 59 C. C. A. 604.

3. Failing to cover hatch.—The provisions of the Harter Act do not relieve a ship from liability for damages to cargo resulting from negligence in failing to properly cover a hatch to prevent leakage. The Mississippi, 120 Fed. 1020, 56 C. C. A. 525, affirming decree 113 Fed. 985.

4. Failure to close ports.—If a ship starts on a voyage with a port negligently left open, causing damage to the cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by § 3 of the Harter Act (Act Feb. 3, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded. Decree 137 Fed. 443, affirmed in The Tenedos, 151 Fed. 1022, 82 C. C. A. 671.

Negligence in failing to have the portholes in a compartment of a vessel closed when the voyage begins, whereby the vessel is rendered unseaworthy, and in consequence injury is sustained to cargo by water coming through such portholes during the voyage, renders the shipowner liable under Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946] since the negligence is not a mere fault or error in navigation or in the management of the vessel, but amounts to a failure to exercise due diligence to make the vessel seaworthy. Decree, Farr, etc., Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197, affirmed in 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

5. Failure to properly close and secure portholes in a vessel before the commencement of a voyage constitutes unseaworthiness. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591, explaining The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7.

Whether the term "management of the ship," within the third section of the Harter act, does or does not include the care of the ports in the immediate preparation for the voyage, negligence in the care of the ports, so far as necessary to seaworthiness, is not excused by that section, because the shipowner is himself made answerable by that section for due diligence in the fitness of the cargo compartments, including the closing of the

close port holes necessarily creates unseaworthiness under all conditions. That depends on circumstances, and the supreme court will accept the finding of the district court, and of the circuit court of appeals, that it do so under the circumstances of the case.[6]

What Constitutes Due Diligence to Make Vessel Seaworthy.—A shipowner does not exercise due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship in all respects seaworthy, and that means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced.[7] Due diligence to make a vessel seaworthy at the commencement of her voyage, which will entitle the carrier to the exemptions given by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat., 445 [U. S. Comp. St., 1901, p. 2946], must be exercised in the work itself, and not merely in the selection of agents to do the work, and must be adequate to accomplish the result intended, except as to latent defects not discoverable by the utmost diligence.[8] To constitute due diligence on the part of a shipowner to make the vessel "in all respects seaworthy" at the beginning of a voyage so as to entitle him to the benefit of the exemption contained in § 3 of the Harter Act, it is not sufficient to provide her with proper structures and equipment, but due diligence must also be exercised by the owner's servants in the use of such equipment before and up to the time of the beginning of the voyage.[9] The obligation to exercise due diligence is not discharged when the vessel sailed with a hole in her side;[10] where the vessel's seams were improperly calked;[11] where there was a failure to have a mechanical fog horn in good condition for use at the commencement of a voyage;[12] where a pipe leading into a tank usable for

ports or other acts necessary to seaworthiness of the vessel, so that he is answerable or a failure by any of his servants in that regard. The Manitoba, 104 Fed. 145.

A ship can not be said to be fit, as to condition, when both the iron and glass coverings of a port, which it is the usual custom to close and fasten before sailing, though structurally fit, are, through inadvertence, insecurely fastened, so that, although the vessel does not encounter bad weather or rough seas, such covers become open, and admit sea water, which damages the cargo. In such case the damage must be held to result from the unseaworthiness of the ship, and not from any fault or error in navigation, or in the management of the vessel, for which the owners are exempted from liability by § 3 of the Harter Act, as the master was justified in supposing that the port had been securely closed before sailing, in accordance with the usual custom, and was not chargeable with fault in failing to cause it to be thereafter examined, although the cargo was so stored that it was accessible. Decree 94 Fed. 675, reversed in Farr, etc., Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197, affirmed in 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

6. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591.

7. What constitutes due diligence to make vessel seaworthy.— International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

8. Nord-Deutscher Lloyd *v.* Insurance Co., 110 Fed. 420, 49 C. C. A. 1.

9. The Manitou, 116 Fed. 60, affirmed in 127 Fed. 554, 63 C. C. A. 109.

A shipowner does not comply with the requirement of § 3 of the Harter Act, so as to be entitled to the exemptions therein provided, by merely furnishing proper equipment of the vessel prior to the commencement of the voyage, but he is bound to see that his servants exercise due diligence in its use to make the vessel seaworthy at the time the voyage actually commences. The C. W. Elphicke, 117 Fed. 279, decree affirmed in 122 Fed. 439, 58 C. C. A. 421.

10. International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591.

11. Seams improperly calked.—Due diligence was not exercised to make a lighter seaworthy and fit for the business in which it was employed, where the seams were so improperly calked that they opened and admitted water into the hold when the boat was rocked by a slight swell from a passing steamer; the defect being one which could have been discovered by examination. Nord-Deutscher Lloyd *v.* Insurance Co., 110 Fed. 420, 49 C. C. A. 1.

12. Failure to have a mechanical fog horn in good condition for use at the

water ballast is not screened to prevent the entrance of foreign substances which might foul the valves connecting the pipe with the sea;[13] where there is a failure to properly inspect the cement lining over the limber spaces;[14] where there is no inspection to see that portholes properly closed, made the last thing before access to the ports were cut off;[15] and where refrigerating

commencement of a voyage shows want of due diligence in equipping the vessel, and is not a fault in her management, so as to excuse the owners from liability under the Harter Act. The Niagara, 77 Fed. 329, affirmed in 84 Fed. 902, 28 C. C. A. 528.

13. Failure to screen pipe connecting valve with sea.—A ship was equipped with a tank usable for cargo or water ballast, into which extended a pipe 5½ inches in diameter, reaching nearly to the bottom, and having its lower end open. This pipe could be connected by valves with the sea, and was used both for filling the tank and pumping it out. During a voyage on which sugar was stowed in the tank, the valve closing such pipe became obstructed by a stick 5 inches long, which the evidence tended to show was drawn into the pipe from the tank when the pumps were being tried; and sea water entered through the opening, which damaged the cargo. Held, that the failure to place a rose or screen on the lower end of the pipe to prevent the entrance of foreign substances which might foul the valve was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and which rendered her liable for the damage, under § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]). Decree 138 Fed. 743, affirmed in The Brilliant, 159 Fed. 1022, 86 C. C. A. 671.

A ship had a distribution box in the pumproom, containing three valves; one closing a pipe leading into a water-tight tank usable for cargo or for water ballast. Such valve was controlled by a spindle, and could be used to fill or empty the tank, but, when the spindle was disconnected, became a nonreturn valve, through which the tank could be pumped out, but which would not permit water to enter. There was a pipe connecting the distribution box with the sea, containing a sea valve. On the termination of a long voyage at New York, it was found that sea water had entered the tank, and damaged sugar cargo stowed therein. A survey showed that the sea valve had become incrusted and leaked slightly; also that the tank valve was obstructed by a stick five inches in length, which prevented it from closing tightly. There was also evidence that the spindle was unshipped. Held, that whether or not it was so disconnected was immaterial, since, if it was, the valve was equally effective to prevent the entrance of water, and the ship would not be for that reason unseaworthy. Held, also, on the evidence, that the obstruction lodged in the valve while the pumps were being tried during the voyage, and that the ship was not unseaworthy at the beginning of the voyage because of the defective condition of either valve; it being shown that they were properly constructed, and were in good condition at that time. Decree 138 Fed. 743, affirmed in The Brilliant, 159 Fed. 1022, 86 C. C. A. 671.

14. Failure to inspect lining.—Sugar in the hold of an iron steamship was damaged by water coming in through a small hole made by corrosion of the acid of sugar drainage and sea water, which reached the plate through cracks in the lining of Portland cement. The evidence was insufficient to show that the cracks were caused by any accident after sailing. Respondents relied on an exception in the bill of lading of damage from unseaworthiness, provided "all reasonable means have been taken" to make the ship seaworthy, and also on the Harter Act, which exempts the carrier if he has exercised "due diligence" to make the ship seaworthy, etc. Held that, in the inspection prior to the voyage, a failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which the leak occurred, in order to examine the cement, was a lack of "due diligence" and "reasonable means" to make the ship seaworthy, and the carrier was not exempted under the statute. The Alvena, 74 Fed. 252, affirmed in 79 Fed. 973, 25 C. C. A. 261.

15. A steamship originally constructed for passengers, but later used for the carriage of goods, had ports in the lower between-decks, which were submerged when she was fully loaded. They were equipped with glass bull's-eyes, and shutters for properly closing the same. On commencing to load cargo at Batoum the ports in a compartment were examined and found properly closed, and the compartment was then partially filled with wool. The vessel stopped at a number of other ports on the Black Sea and the Mediterranean, and took on more cargo; the hatchway leading to such compartment being used, and finally closed when she started on the voyage for New York. Shortly afterward water was discovered in the hold under such compartment, and on examination it was found that one of the glass bull's-eyes had been stolen, and that the water had entered through such port and damaged the cargo. The brass pins holding the bull's-eyes in a number

apparatus in good order and competent for the transportation of the cargo is not furnished.[16] But reasonable care of a vessel does not require docking for examination more than once a year, in the absence of some known necessity for it.[17]

Failure of Responsible Agent of Corporation to Inspect.—In an action for loss of cargo, a contention on the part of respondent that its liability should be limited to the value of the boat will not be sustained, where the responsible agent of the company neglected to avail himself of an opportunity to ascertain the unseaworthy condition of the boats.[18]

Affirmative Proof of Fact of Seaworthiness.—The immunity afforded by the Harter Act by reason of the third section can not be had upon a presumption of law that the vessel was seaworthy at the beginning of the voyage.[19] But the burden is on the shipowner to prove, to establish by testimony, that the vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so.[20] This is the rule in all cases and

of the other ports had also been removed. No inspection of the ports had been made after the loading commenced at Batoum. Held, that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that such inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable. Decree 137 Fed. 443, affirmed in The Tenedos, 151 Fed. 1022, 82 C. C. A. 671.

16. **Refrigerating apparatus.**—See The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as provided therein. Judgment, The Southwark, 108 Fed. 880, 48 C. C. A. 123, reversed in 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

17. **Docking.**—The Sandfield, 79 Fed. 371, decree affirmed in 92 Fed. 663, 34 C. C. A. 612.

18. **Failure of responsible agent of corporation to inspect.**—Sanbern *v.* Wright, etc., Lighterage Co., 171 Fed. 449, decree affirmed in 179 Fed. 1021, 102 C. C. A. 666.

19. **Affirmative proof of fact of seaworthiness.**—The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467, saying: "It is not a case where there is either the necessity or propriety of resorting to presumptions."

It, therefore, became incumbent upon the shipowner to show that a due and proper inspection had been had and the vessel ascertained to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467. See, also, The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1.

20. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467; The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1; International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, 14 S. Ct. 823.

A carrier by water can only avail himself of the exemptions from liability for errors of management and navigation provided by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946], by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, and such affirmative proof cannot be supplied by inferences or presumption. Decree 145 Fed. 569, affirmed in Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426.

Where, in an action against a shipowner for merchandise lost, the shipowner set up exemption from liability by Act Cong. Feb. 13, 1893, c. 105, § 3 27 Stat. 445 (U. S. Comp. St., 1901, p. 2946), commonly known as the "Harter Act," and assumed the burden of proof, and the evidence was conflicting as to whether the shipowner exercised "due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied" at the commencement of the voyage, a charge that, in order for the sinking of a vessel a few hours after leaving port to raise a presumption of unseaworthiness at the time it left port, it would be necessary for the evidence to show that the vessel sank because of some fault in its construction, or the stowage of its cargo, or of fault in some respect which would make it unseaworthy at the time it left port, or that it was not properly manned or equipped or supplied, was confusing, and tended to

is not limited to cases of conflicting proof.[21] But a shipowner is not deprived of the protection given by § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat., 445 [U. S. Comp. St., 1901, p. 2946]) against liability for injury to cargo resulting from a broken suction pipe because it was not proved that the pipe was inspected at the commencement of the voyage, where it is shown that it was in good condition after the voyage commenced, that the break was new, and it was sufficiently accounted for by the straining of the ship during very rough weather on the voyage.[22]

§ 4538. Instances of Fault or Error in Navigation or Management of Vessel.—Neglect to open the sluice gates designed to empty the bilges,[23] or failure by reason of the sickness and death of the engineers during the voyage,[24]

impress on the jury that it was incumbent on the shipper to show that the vessel was unseaworthy, rather than on the shipowner to show that it had exercised due diligence to make the vessel in all respects seaworthy, etc. Levy's Son & Co. *v.* Gibson Line, 61 S. E. 484, 130 Ga. 581.

Where, in an action against a shipowner for merchandise lost, the loss is admitted, the burden is on the shipowner setting up exemption from liability, under Act Cong. Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St., 1901, p. 2946), commonly known as the "Harter Act," providing that, if a shipowner shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, he shall not be responsible for loss resulting from errors in navigation or in the management of the vessel, to prove that it exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied at the commencement of the voyage. Levy's Son & Co. *v.* Gibson Line, 61 S. E. 484, 130 Ga. 581.

Under a contract of affreightment to carry wheat to the port of New York and there deliver it on board a vessel for export, where the wheat on reaching that port was loaded into a canal boat for transport and delivery to the designated vessel by the carrier's tug, the carrier is liable for its loss through the sinking of the canal boat, whether resulting from unseaworthiness or from the negligence of the towing tug or of the master of the boat; its seaworthiness not being affirmatively shown. Decree, 145 Fed. 569, affirmed in Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426.

21. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467, citing and approving International Nav. Co. *v.* Farr, etc., Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 S. Ct. 591, and The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1. But see The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491, in which it is said: "By the third section of that (the Harter) act, the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management."

22. The Indrani, 177 Fed. 914, 101 C. C. A. 194.

23. Neglect to open sluices.—The opening of a sluice gate designed to empty the bilges was neglected for 20 days, during heavy weather. The accumulating water overflowed the bilges, and damaged the cargo properly stowed in the hold. Held, that the neglect to open the sluices, if a fault, was one pertaining to the "managing of the ship," within § 3 of the Harter Act, and that the ship and owners were exempted thereby from liability for the resulting damage. Decree 79 Fed. 371, affirmed in The Sandfield, 92 Fed. 663, 34 C. C. A. 612.

24. Failure to pump out hold or bilge.—A cargo of hides and similar articles shipped from South American ports to New York was found at the conclusion of an unusually long voyage, during warm weather, to be seriously damaged from decay. The bills of lading recited that the cargo was received in apparent good order and condition. The cargo owners alleged that the damage was caused by sea water entering the ship through some defect or unfitness, or by want of proper care, while the defense was that the injury resulted from sweating, heat, or natural decay, or from latent defects or dampness existing prior to shipment. The voyage was without storms or unusual weather. Held, upon a consideration of all the evidence, that there was no damage by sea water through any leaks or imperfection of the ship, which was shown to be in good condition and thoroughly equipped for the removal of any accumulation of water in the bilges, which nothing in the circumstances of the voyage rendered excessive; that the damage was due either to an excess of moisture in the cargo before shipment, which procured the decay during the long voyage, or to an accumulation of water in the bilges because of their not having been given proper attention by reason of the sickness and death of three of the engineers from yellow fever during the voyage, in which case the failure to

to use the pumps to prevent accumulation of water in the hold,[25] or in the bilge; lack of attention to vessel's pumps which might have disclosed a leak;[26] failure to test the valves before removing water ballast through a pipe passing through cargo compartments;[27] allowing water to escape from a pipe in trimming a vessel by pumping out water ballast;[28] failure to close sea valve connecting with a pump used to pump out a cargo at port of destination;[29] leaving open a valve while water was being pumped into the engine tank;[30] the tipping of a vessel by the head while discharging cargo for the purpose of examining her propeller;[31] are acts of management of the vessel for which the owner is not liable under the Harter Act. The failure of the master to ascer-

use the pumps was a fault in the management of the vessel, for which the owners were exempted from liability by § 3 of the Harter Act. The Merida, 107 Fed. 146, 46 C. C. A. 208.

25. The ballast tank of an ocean steamer sprung a leak during a voyage, and the water accumulated in the hold above in sufficient quantity to damage the cargo stowed therein. The leak was known to the engineer and carpenter, who failed to report it to the chief officer, to give it a proper examination, or to use the pumps with sufficient frequency to prevent the accumulation of water in the hold. The pump was sufficient, and the proper use of it would have prevented injury to the cargo. Held, that such negligence was the direct cause of the injury, and constituted negligence in the "management of the ship," for which the carrier was exempted from liability by § 3 of the Harter Act. The Ontario, 106 Fed. 324, affirmed in 115 Fed. 769, 53 C. C. A. 199.

26. Lack of proper attention to a vessel's pumps, which might have disclosed a leak, and prevented damage which resulted therefrom to the cargo, was negligence in the "management of the ship," for which the ship was not liable under the Harter Act. Decree 89 Fed. 872, affirmed in The British King, 92 Fed. 1018, 35 C. C. A. 159.

27. Failure to test valves before removing water ballast.—Failure of those in charge of a vessel, before removing water ballast through a pipe passing through cargo compartments, to test the valves by the means provided to ascertain whether they were closed, is a neglect in the "management of the ship," within the meaning of the Harter Act, and the vessel is not liable for resulting damage to cargo. Decree The Mexican Prince, 82 Fed. 484, affirmed in 91 Fed. 1003, 34 C. C. A. 168.

28. Escape of water from pipe in trimming vessel.—Damage to cargo from water allowed to escape from a pipe in trimming the vessel by pumping out water ballast held due to a fault or error in the management of the vessel within the meaning of § 3 of the Harter Act, for which the owner was not liable. Jay Wai Nam *v.* Anglo-American Oil Co., 202 Fed. 822, 121 C. C. A. 130.

29. Failure to close sea valves when pumping out cargo.—Damage to a cargo of molasses, through its dilution by sea water while being pumped out at the port of destination, held to have been due to a sea valve connecting with one of the pumps having been left partially open, which was a fault in the management of the vessel, from liability for which the owner was protected by Harter Act Feb. 13, 1893, c. 105, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St., 1901, p. 2946); it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage. Sun Co. *v.* Healy, 163 Fed. 48, 89 C. C. A. 300.

30. Leaving valve open while water pumped into engine tank.—Where a ship was at the commencement of a voyage in all respects seaworthy, and properly manned, equipped, and supplied, damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the management of the vessel, for which she is exempted from liability by § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]). The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, affirmed in 26 S. Ct. 467, 201 U. S. 378, 50 L. Ed. 794; S. C., 124 Fed. 631, rehearing denied, 126 Fed. 229.

31. Tipping vessel to examine propeller.—The tipping of a vessel by the head by the master while discharging cargo for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship within § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), and, where the owner had complied with the requirements of said section at the commencement of the voyage neither he nor the vessel is liable for a resulting injury to the cargo. The Indrani, 177 Fed. 914, 101 C. C. A. 194.

tain or heed warnings of the weather bureau [32] and his determination to change his course and complete the voyage by another route after encountering rough weather and without putting in for repairs,[33] are faults or errors in navigation. So, also, the injury of a cargo by water by reason of the failure to close a port for which an iron shutter was provided, after the glass cover had been broken out by the seas, where the cargo was so placed that the port was readily accessible, was due to a fault or error in navigation or in the management of the vessel, within the Harter Act (27 Stat., 445, c. 105, § 3); and neither the vessel nor her owners are liable therefor.[34]

§ 4539. Loss before Commencement of Voyage.—Section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat., 445 [U. S. Comp. St., 1901, p. 2946]), which exempts the owner of a vessel from liability for loss or injury to cargo resulting from faults or errors in navigation or in the management of the vessel if he has exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, applies only to the vessel after the voyage has commenced, and can not be invoked by an owner to relieve him from liability for cargo lost while the vessel is loading, through the negligence of those in charge in permitting her to settle on the bottom and list until deck cargo fell overboard.[35]

§ 4540. Loss from Negligent Loading and Stowage or Unloading.—The provisions of the Harter Act do not relieve a ship from liability for dam-

32. Failure to ascertain or heed warnings of weather bureaus.—The navigation and management of a vessel within the meaning of § 3 of the Harter Act, Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946), includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage. Hanson *v.* Haywood Bros., etc., Co., 152 Fed. 401, 81 C. C. A. 527.

33. Change of course—Failure to put in for repairs.—A ship bound from Antwerp to San Francisco with a cargo of cement encountered such rough weather in attempting to round Cape Horn and was subjected to such strain that her deck seams opened and a part of the cargo was damaged by water. She finally abandoned the attempt and completed the voyage by way of the Cape of Good Hope and Australia. At the time of her change of course she was 370 miles distant from Port Stanley, where she could have been repaired; but she did not put in for repairs, and before she reached Australia the cargo received further damage by reason of the open seams. Held, that the change of course and also the determination of the master to proceed without putting in for repairs were matters pertaining to the "navigation and management of the vessel," within Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946], and not to the custody, care, or proper delivery of the cargo, within the meaning of § 2, and that, assuming the vessel to have been in all respects seaworthy, and properly manned, equipped, and supplied at the beginning of the voyage, she was exempted by the act from liability for the damage caused or contributed to by the failure to repair. Corsar *v.* Spreckels & Bros. Co., 141 Fed. 260, 72 C. C. A. 378.

34. The Silvia, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment 68 Fed. 230, 15 C. C. A. 362, which affirms decree 64 Fed. 607.

35. Loss before commencement of voyage.—Steamship Wellesley Co. *v.* Hooper & Co., 185 Fed. 733.

Section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), which exempts the owner of any vessel transporting property from liability for loss or damage thereto resulting from faults or errors in navigation, or in the management of the vessel, if he has exercised due diligence to make such vessel in all respects seaworthy and properly manned, equipped, and supplied, applies only to a vessel after the voyage has commenced, and can not be invoked by an owner to relieve him from liability for loss of cargo through the careening and sinking of a vessel at the pier before she was fully loaded, due to the negligence of a watchman in failing to adjust her lines to permit her to drop with the tide. Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

ages to cargo resulting from negligence in stowage [36] or loading [37] at the port of loading or negligent unloading at the port of destination,[38] as, for instance, where the ship is rendered topheavy by improper loading [39] and lists and sinks, thereby damaging her cargo, or where a ship topheavy by reason of a coating of ice above her deck is unloaded without regard to the ice above her deck lists so as to bring her port below the water.[40] And negligence in loading and stowing at a port of call, whereby the ship gets down by the head, so that sugar stowed next to wool, with a temporary bulkhead between, drains forward, and damages the wool, is not negligence "in the management of the vessel," within the meaning of the Harter Act, so as to relieve the owners from liability.[41]

§ 4541. Loss of Tow and Cargo by Tug.—Section 3 of the Harter Act, exempting vessel owners from liability for loss or damage to cargo under certain conditions, does not exempt the owner of a tug from liability for loss of a tow and its cargo, through negligent towage, because it was also charterer of the tow and carrier of its cargo.[42]

36. Loss from negligent loading and stowage or unloading.—Decree 113 Fed. 985, affirmed in The Mississippi, 120 Fed. 1020, 56 C. C. A. 525.

The provision of the Harter Act exempting a vessel from liability for damage or loss to cargo arising from faults or errors of navigation or the management of the ship does not concern the proper stowage of cargo at the port of lading. The Palmas, 108 Fed. 87, 47 C. C. A. 220.

37. Improper loading.—The Oneida, 128 Fed. 687, 63 C. C. A. 239, reversing 108 Fed. 886.

38. Unloading.—The Germanic, 107 Fed. 294, modified in 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

39. Ship topheavy from improper loading.—A ship started on her voyage with a list of 8 or 9 degrees, which increased to such an extent, in consequence of her improper loading, that it was imprudent to proceed, and she put in at an intermediate port. Having opened a port to readjust the cargo while lying at a pier, the ship gave a sudden lurch, which brought the port under water, and she sank, damaging the cargo. Held, that the damage was attributable to her initial instability, which rendered her unseaworthy at the beginning of the voyage, and for the consequences of which the owners were not exempted from liability by the Harter Act. Decree 108 Fed. 886, reversed in The Oneida, 128 Fed. 687, 63 C. C. A. 239.

40. A ship on entering port at New York during extremely cold weather in February was coated above her deck with some 200 tons of ice, which rendered her topheavy and gave her a list to starboard of 4 to 5 degrees even when laden. Being several hours late, in order to be ready for her outward voyage the master commenced discharging immediately and rapidly, at the same time taking in coal on both sides, the most of which was stowed above the water line. After most of her cargo in the lower hold had been discharged, and her list had increased to about 8 degrees, she rolled over to port; and in doing so the cover of a coal port on that side was broken off, leaving the opening only about a foot above the water. By shifting cargo and stopping the loading of coal on the port side, she was again rolled back, but no means were taken to close the open port, and the loading of coal proceeded until she was nearly filled to the main deck. The wind had been strong all day, and in the evening increased to a velocity of 52 miles, but the ship was protected on either side to a considerable extent by buildings on the piers. About 5 hours after she first rolled to port, and when her list to starboard had greatly increased, she again went over, and, carrying the open port below the water, filled and sank, damaging the cargo on board. Held, that the damage could not be attributed to the wind to such an extent as to relieve the ship from liability, since she would not have been endangered but for her unstable and topheavy condition, due to negligent and inconsiderate manner of unloading her cargo, without any regard to the great weight of ice above her deck, and to the equally negligent loading of the coal and failure to close the open port, all of which was negligence of the ship in handling the cargo, for which she was not exempted either by the Harter Act or her bills of lading. The Germanic, 107 Fed. 294, modified in 124 Fed. 1, 59 C. C. A. 521, affirmed in 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

41. Decree 76 Fed. 582, affirmed in Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326; S. C., 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

42. Loss of tow and cargo by tug.—The Murrell, 200 Fed. 826, decree affirmed in

§ 4542. Collision.—The Harter Act has no application to a collision between two vessels, and does not therefore affect the liability of a vessel to another with which it may come into collision, notwithstanding one or both of such vessels be laden with a cargo.[43]

§ 4543. Personal Injuries and Death by Wrongful Act.—Injuries to passengers are not within the exemptions of the Harter Act.[44]

§ 4544. Liability for Passengers' Effects.—Claims for loss or damage to passenger's personal baggage, not shipped as merchandise and not paying freight, are not within the exemptions of the Harter Act.[45]

§ 4545. Right to General Average Contribution.—The exemption of a shipowner who has exercised due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, from liability for the negligence of master and crew, which is declared in the Harter Act of February 13, 1893 (27 Stat., at L., 445, chap. 105, U. S. Comp. Stat., 1901, p. 2946), § 3, does not of its own force entitle the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of ship,[46] but it leaves such owner free to make a valid contract with the cargo owners under which contribution in general average may be enforced for sacrifices made subsequent to the negligent stranding of the vessel, in a successful effort to save the vessel, freight, and cargo.[47] So far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated.[48]

Baltimore, etc., Barge Co. *v.* Eastern Coal Co., 195 Fed. 483, 115 C. C. A. 393.

Section 3 of the Harter Act, exempting the owner of a vessel transporting merchandise, where he has exercised due diligence to make her in all respects seaworthy, from liability for loss resulting from faults or errors in navigation, governs the relation between the vessel and the cargo with which she is herself laden, and does not exempt the owner of a tug from liability for loss of the cargo of a barge through negligent towage, though such owner was also the owner pro hac vice of the barge, and was in fact the carrier of her cargo. Baltimore, etc., Barge Co. *v.* Eastern Coal Co., 195 Fed. 483, 115 C. C. A. 393.

43. **Collision.**—The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516; The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751, 20 S. Ct. 595.

44. In re California Nav., etc., Co., 110 Fed. 678; The Rosedale, 88 Fed. 324, judgment affirmed in 92 Fed. 1021, 35 C. C. A. 167; The Kensington, 88 Fed. 331, decree affirmed in 94 Fed. 885, 36 C. C. A. 533, and reversed in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190. See The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133. See ante, "Personal Injuries and Death by Wrongful Act," § 4504.

45. **Liability for passenger's effects.**—In re California Nav., etc., Co., 110 Fed. 678; The Rosedale, 88 Fed. 324, judgment affirmed in 92 Fed. 1021, 35 C. C. A. 167; The Kensington, 88 Fed. 331, decree affirmed in 94 Fed. 885, 36 C. C. A. 533, and reversed in 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

46. **Right to general average contribution.**—The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831; The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491.

"The point of the decision in The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130, 18 S. Ct. 831 (and as an authority the case goes no further), is, that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence." The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

47. The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

48. The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

§ 4546. Duty of Master of Stranded Vessel.—The duty resting upon the master of a negligently stranded vessel, irrespective of whether the negligence falls within the exemption from liability made by the Harter Act of February 13, 1893, § 3, or not, demands only the exercise of every reasonable effort to save the imperiled property, and does not extend so far as to call for a sacrifice of part of the owner's property, if necessary to save the cargo.[49]

§ 4547. Application to Foreign Vessels.—It is settled that the Harter Act will be applied to foreign vessels in suits brought in the United States.[50] The third section of the Harter Act (27 Stat., 445), exempting the owner of a seaworthy vessel from responsibility to the cargo for loss or damage occurring through faults or errors of navigation, which is expressly applicable to "any vessel transporting merchandise or property to or from any port of the United States," includes a foreign vessel carrying cargo from a foreign to an American port.[51]

§§ 4548-4576. Proceedings to Limit Liability—§ 4548. Nature of Proceedings.—The proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee,[52] but is an equitable action, not in any sense inconsistent with the admiralty jurisdiction.[53] Such proceedings are admiralty cases.[54]

§ 4549. Forms and Rules of Procedure.—The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rules thus adopted by congress, and for securing to shipowners its benefits, was strictly within the powers conferred upon the supreme court.[55] In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the de-

49. Duty of master of stranded vessel.—The Jason, 225 U. S. 32, 56 L. Ed. 969, 32 S. Ct. 560.

50. Application to foreign vessels.—The Germanic, 196 U. S. 589, 49 L. Ed. 610, 25 S. Ct. 317; The Chattahoochee, 173 U. S. 540, 43 L. Ed. 801, 19 S. Ct. 491; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, 21 S. Ct. 30; The Silvia, 171 U. S. 462, 43 L. Ed. 241, 19 S. Ct. 7; The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181, 18 S. Ct. 753. See, also, The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Frey, 92 Fed. 667.

51. The Chattahoochee, 19 S. Ct. 491, 173 U. S. 540, 43 L. Ed. 801, affirming decree 74 Fed. 899, 21 C. C. A. 162.

The provisions of § 3 of the Harter Act (27 Stat. 445, c. 105), which relieves vessels and their owners from liability for loss or damages to the cargo resulting from faults or errors in navigation or in the management of the vessel, where the owners have exercised due diligence to make her seaworthy, and have her properly equipped, manned, and supplied, applies to foreign vessels carrying goods to or from ports of the United States. The Silvia, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment 68 Fed. 230, 15 C. C. A. 362, which affirms decree 64 Fed. 607; Doherr *v.* The Etona, 64 Fed. 880, decree affirmed in 71 Fed. 895, 18 C. C. A. 380.

52. Nature of proceedings.—In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246.

53. In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

54. Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

55. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

The power of the supreme court to prescribe rules regulating proceedings under the act of 1851, was first recognized in the case of Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585, at December term, 1871, and has been reaffirmed in many subsequent cases, to wit: The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; and In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

These rules will be found at the commencement of 13 Wall. xii, xiii, Rules of Practice in Admiralty.

finitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals.[56]

Power of District Courts to Supplement.—By the act of Congress which authorized it to prescribe the forms of proceeding in equity and admiralty causes; and where the general regulations adopted by that court do not cover the entire ground, it is undoubtedly within the power of the district courts, as courts of admiralty, to supplement them by additional rules of their own.[57]

Rules Extend to Circuit Courts on Appeal.—The supreme court has announced a general rule, extending to the circuit courts on appeal the regulations which have heretofore been adopted for the district courts in cases of proceeding to obtain the benefit of a limited liability under the act.[58]

Do Not Preclude Other Remedy.—The admiralty rules were not intended to prevent an owner from availing himself of any other remedy or process which the law itself entitles him to adopt, but to aid him in bringing into concourse those having claims against him arising from acts of the master or crew.[59]

Rules of Decision as to Speed Permissible in Fog.—The international rule as to speed permissible in a fog, as interpreted by the courts of the United States, and not by the practice under that rule prevailing in the French courts, must be applied in a proceeding by the owner of a French vessel lost in a collision with a British ship on the high seas, to obtain, in the courts of the United States, the benefit of the law of the United States for the limitation of liability of shipowners.[60]

§ 4550. Jurisdiction, Venue and Courts.—The courts of admiralty jurisdiction have power to enforce the Limited Liability Act.[61]

District Court.—The proper district court, designated by the rules of the supreme court or otherwise indicated by circumstances, has full jurisdiction and plenary power as a court of admiralty to entertain and carry on all proper proceedings for the due execution of the law, in all its parts.[62]

The circuit courts of the United States have no jurisdiction of such cases.[63]

56. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

57. Power of district courts to supplement.—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

58. Rules extend to circuit courts on appeal.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

59. Do not preclude other remedy.—Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066; The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

60. Rules of decision as to speed permissible in fog.—Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

61. Jurisdiction, venue and courts.—In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246; Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; The Benefactor, 103 U. S. 239, 26 L. Ed. 351; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

62. District court.—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28. See, to the same effect, Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

"The jurisdiction to limit the liability of shipowners was conferred upon the district courts by the act of congress of March 3, 1851, 9 Stat. 635, c. 43, carried forward into §§ 4282 to 4229 to the Revised Statutes." Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28.

63. Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

The state courts have not the requisite jurisdiction.[64] The value and efficiency of the law would be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.[65]

Venue.—The district court of the district in which the vessel is libeled[66] or in which the owner is sued[67] was designated as the proper court in which to institute the proceedings for obtaining a decree of limited liability; and the presence of the vessel within the district is not essential to the court's jurisdiction.[68] When cases arise in which the vessel and freight have been totally lost, and no district court has, or can have, possession of any fund to distribute, resort may probably be had with propriety to the district court of the district in which the owners reside, or where the vessel perished.[69] Also jurisdiction accrues to the district court of the district comprising the port to which the vessel was bound, although she had been sunk in the lake and only a few fragments were washed ashore, the proceeds of which, however, amounting to a trifling sum, were deposited in the court.[70]

Divestiture of Jurisdiction.—The filing of the libel and petition of the owner of the vessel at fault in a collision with the offer to give a stipulation, conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction.[71]

Effect of Limited Liability Act.—Whether or not Employer's Liability Act April 22, 1908, c. 149, 35 Stat., 65 (U. S. Comp. St., Supp., 1909, p. 1171), by implication repeals the statutory provisions permitting shipowners to limit their liability in so far as they might be used by a railroad company engaged in interstate commerce to limit its liability for injuries to employees on its vessels used in such commerce, it does not deprive a court of admiralty of the general jurisdiction over limitation of liability because such a claim is involved, nor of jurisdiction to hear and determine a claim on its merits therein with the consent of the claimant, or where the proceeding was begun before the passage of the statute and where any objection to jurisdiction on such ground had been waived.[72]

64. Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

65. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664, following Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

66. **Venue.**—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

67. A proceeding by a shipowner for limitation of liability under Rev. St., § 4283 et seq., as amended by 24 Stat., c. 421, and under the admiralty rules, may be brought in the district court for any district in which said owner may be sued in that behalf, on payment into court of, or stipulation to pay, the appraised value of the vessel, or upon the transfer of his interest to a trustee. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

68. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

69. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

In The Benefactor, 103 U. S. 239, 26 L. Ed. 351, the cause of damage was a collision on the high seas, and the petition for limitation was filed in the same district court in which the offending vessel was libeled. In The Scotland, 105 U. S. 24, 26 L. Ed. 1001, and S. C., 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174, there was a like course of action, and the limitation was claimed by an answer to a libel in personam in a district court. Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25.

Total loss.—In Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617, the petition for limitation was filed in the district court of the district where the fire occurred and where the remnants of the vessel remained. Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25.

70. Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

71. **Divestiture of jurisdiction.**—In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 13 S. Ct. 246.

72. **Effect of Limited Liability Act.**—The Passaic, 190 Fed. 644.

§ 4551. Time of Taking Proceedings and Laches.—Institution of Proceedings before Suit.—The owner of a vessel may, before he is sued, institute appropriate proceedings in a court of competent jurisdiction, to obtain a limited liability, without waiting for suit to be begun against him or his vessel for the loss out of which liability arises.[73]

Claiming Benefit after Trial of the Merits.—A shipowner may claim the benefit of a limited liability after a trial of the cause of collision.[74]

Estoppel by Judgment in Personam in State Courts.—A shipowner is not estopped by a judgment in personam rendered against him by a state court for damages sustained in a collision from thereafter instituting proceedings in a court of admiralty for a limitation of his liability in respect to such damages under the statutes of the United States, although in such proceeding the fact of liability and the amount of damages sustained by the injured party are matters rendered res judicata by the former judgment.[75]

Laches.—Proceedings for a limitation of liability must be taken within a reasonable time.[76] The doctrine of laches, as applied in admiralty courts, is applicable to such a case.[77] The shipowner is not debarred by laches from maintaining such proceeding because the same was not instituted until after he had prosecuted an appeal from the judgment for damages, and the same had been affirmed, nor by the fact that he gave a supersedeas bond, as required by statute, to enable him to safely present his contention to the appellate court.[78]

Failure to Claims in Reference to Particular Party.—But the ommission to take the benefit of the law in reference to a particular party ought not to preclude the owners of a ship from claiming its benefit as against other parties suffering loss by the same collision.[79]

Conditions to Granting Relief—Payment of Costs in Previous Proceeding in State Court.—Relief under the Limited Liability Act should not be granted where the claimant delays to claim its benefits till after the other party has instituted proceedings to enforce his liability, except upon condition of compensating the other party for any costs and expenses he may have incurred by reason of the delay in claiming the benefit of the law.[80] Where a shipowner who has prosecuted an appeal from a judgment in personam rendered against him by state court for damages sustained in a collision, thereafter institutes proceedings in a court of admiralty for a limitation of his liability in respect to such damages, under the statutes of the United States; he should be required as a condition to the granting of the relief sought, to pay the costs adjudged against him in the state court, which might have been, to a large extent, avoided by his more timely action.[81]

§ 4552. Time for Filing Claims.—Effect of Injunctional Order as Suspending Running of Statute of Limitations.—An injunction granted in proceedings for limitation of liability restraining the further prosecution of pending actions for damages is in fact a removal of such actions into the admiralty court, where they are to be considered as continued for all purposes of the

73. Institution of proceedings before suit.—Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066; Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25. So held notwithstanding admiralty rules Nos. 54, 55, 56, and 57. Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066.

74. Claiming benefit after trial of the merits.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

75. Estoppel by judgment in personam in state courts.—Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

76. Laches.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

77. The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

78. Prosecuting appeal from judgment of state court—Supersedeas.—Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

79. Failure to claim in reference to particular party.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

80. Conditions to granting relief—Payment of costs in previous proceeding in state court.—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

81. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

statute of limitation. In other words, such restraining order suspends the running of the statute.[82] And the dismissal of such suits for want of prosecution after the entry of the restraining order by the several courts in which they were pending, works no prejudice to the plaintiff therein.[83]

Laches of Claimant.—A libelant who delayed filing a petition for limitation of liability for nearly three years and did not commence taking testimony for nine years thereafter, is not in position to charge damage claimants, who were enjoined from prosecuting pending actions, with laches for not proving their claims until later, where no order was made requiring it.[84]

§ 4553. Modes in Which Limited Liability May Be Claimed.—Limited liability may be claimed, first, merely by the way of defense to an action;[85] and may be set up by plea or answer;[86] or, second, by surrendering the ship or paying her value into court. The latter method is only necessary when the shipowner desires to bring all the creditors claiming damage into concourse for distribution.[87]

§§ 4554-4556. Scope of Remedy—§ 4554. Ascertainment of Co-Existing Claims.—The shipowner must either admit the claims for damage which he sets up, against libelants or must ask the court to have them adjudicated. It is, at least, necessary that proceedings should be instituted for ascertaining the coexisting claims which are to antagonize and operate as a means of reducing the claim of the libelants.[88]

§ 4555. Contesting All Liability.—A shipowner seeking the benefit of the Limited Liability Act is accorded the privilege not only of seeking the benefit of the act, but also of contesting his liability in any sum whatever.[89] The

82. Effect of injunctional order as suspending running of statute of limitations.—Union Steamboat Co. *v.* Chaffin, 122 C. C. A. 598, 204 Fed. 412; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864.

83. Union Steamboat Co. *v.* Chaffin, 122 C. C. A. 598, 204 Fed. 412.

84. Laches of claimant.—Union Steamboat Co. *v.* Chaffin, 122 C. C. A. 598, 204 Fed. 412.

85. Modes in which limited liability may be claimed.—The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

The limitation of shipowner's liability to value of his interest in the vessel (Acts Cong. March 3, 1851, § 3 [9 Stat. 635; Rev. St. 1878, § 4283], and June 26, 1884, § 18 [23 Stat. 57; 1 Supp. Rev. St. (Ed. 1891) p. 443]) may be set up as a defense in an action in a state court, being general and absolute, and there being no restriction as to how it may be availed of. Loughin *v.* McCaulley, 40 Atl. 1020, 186 Pa. 517, 48 L. R. A. 33, 65 Am. St. Rep. 872.

Ship lost.—Shipowners can avail themselves of those benefits, by way of defense alone, where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617. See ante, "Loss of Ship," IX, D, 1, i, (7).

86. May be set up by plea or answer.—Shipowners may avail themselves of the defense of limited responsiblity by answer of plea. The Scotland, 105 U. S. 24, 26 L. Ed. 1001. See, also, Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25; The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174.

It is not necessary that shipowners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in, or confessing, fault, may abide a decree against them for the value of ship and freight as found by the proofs. The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

87. The Great Western, 118 U. S. 520, 30 L. Ed. 156, 6 S. Ct. 1172. See, also, Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

88. Ascertainment of coexisting claims.—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

89. Contesting all liability.—"Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the absence of privity or knowledge, the benefits of the statute should be awarded. It is true that, under the rules promulgated by the supreme court, the petitioner is accorded

fifty-sixth admiralty rule declares that in proceedings to obtain a decree for a limited liability, the owners may contest all liability on their part or that of their vessel, as well as claim a limitation of liability under the statute; provided, that in their libel or petition they shall state the facts and circumstances by reason of which exemption from liability is claimed.[90] This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States, to test whether, in virtue of the laws of the United States, it should be relieved, in part, at least, of liability from the consequences of the acts of its agents, and as the international rules have the force of a statute, the issues presented of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise.[91]

§ 4556. Claims Provable in Proceedings to Limit.—Where the vessel owner has, under the statutes of the United States, transferred its liability to a fund and to the exclusive jurisdiction of the admiralty, and that fund is being distributed, all claims to which the admiralty does not deny, existence must be recognized, whether admiralty liens or not. This is not only a general principle[92] but is the result of the statute which provides for, as well as limits, the liability, and allows it to be proved against the fund.[93]

§ 4557. Process to Bring Vessel into Court.—It is not material in limited liability proceedings, where the vessel has been brought into court, and her owner has stipulated to pay her appraised value, whether or not she was brought in by the appropriate process.[94]

Power of Court to Seize Vessel Which Was Not Surrendered.—Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, under Rev. St., §§ 4283, 4284, and, having thereby secured the stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent.[95]

§ 4558. Power of Court to Shape Course of Proceedings.—See ante, "Abandonment to Underwriters," § 4512; post, "Evidence," §§ 4567-4570.

§ 4559. Consolidation of Suits.—The act of congress of July 22, 1813, c. 14, Rev. Stat., § 921, authorizing the consolidation of certain causes "when it

the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

90. The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

91. La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

92. **Claims provable in proceedings to limit.**—The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133, citing Andrews *v.* Wall (U. S.), 3 How. 568, 11 L. Ed. 729; The J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345, 13 S. Ct. 498; admiralty rule 43; The Galam, 2 Moore, P. C. C. N. S. 216, 236.

93. The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133, citing The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751, 20 S. Ct. 595, and Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314, 21 S. Ct. 212.

94. **Process to bring vessel into court.**—Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

95. **Power of court to seize vessel which was not surrendered.**—Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

appears reasonable to do so," applies to proceedings under the Limited Liability Act.[96]

§§ 4560-4565. Effect of Institution of Proceedings—§ 4560. Superseding Other Actions.—Proceedings in the district court of the United States to limit the liability of shipowners for loss or damage supersede all other actions and suits for the same loss or damage in the state or federal courts, upon the matter being properly pleaded therein.[97]

Nonmaritime Torts.—If thus the owner's liability for a tort permitted or incurred through the master or crew, although nonmaritime, because due to a collision between the ship and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper district court of the United States, "all proceedings," by the express terms of § 4285, Rev. Stat., "against the owner, shall cease." The procedure in any such case is prescribed by the 54th and 55th rules in admiralty, where it is said that the court shall, "on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims."[98]

Liabilities Not Affected by Proceeding.—Formerly the pendency of a petition to obtain the benefits of the limitation under the statute providing for a limited liability does not operate to draw into such a proceeding an action for a liability which could in no wise be affected by it.[99] And so it still is, except as amended by the Act of June 26, 1884 (23 Stat., 55, c. 121), which amended §§ 4283, 4284, Rev. Stat., U. S., so as to include "any and all debts and liabilities" of the owner incurred on account of the ship without his privity or fault.[1]

Libel by Salvage Claimants.—All further proceedings on a libel instituted by salvage claimants, who towed to port a vessel disabled in a collision, must stop upon pleading the pendency in the same court of a separate proceeding by the owners of the vessel, claiming the benefits of the limited liability provisions of U. S. Rev. Stat., §§ 4283-4285, U. S. Comp. Stat., 1901, pp. 2493, 2944, as amended by the Act of June 26, 1884 (23 Stat. at L. 57, chap. 121, U. S. Comp. Stat., 1901, p. 2945), § 18, in which, conformably to admiralty rule 54, there has been an appraisement of the vessel and her pending freight,

96. **Consolidation of suits.**—The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41.

97. **Superseding other actions.**—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

The case of Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617, was a suit in a state court against the owner of a steamship to recover for goods lost by the burning of a steamer. After a consideration of the meaning and purpose of the Limited Liability Act of 1851 (9 Stat. at L. 635, chap. 43, U. S. Comp. Stat., 1901, pp. 2943, 2944), §§ 4283, 4284, 4285, Rev. Stat., and of admiralty rule 54, the court said: "We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the Act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution pari passu of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose." The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

98. **Nonmaritime torts.**—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612; Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

99. **Liabilities not affected by proceeding.**—Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 S. Ct. 25; Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

1. Richardson *v.* Harmon, 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27; The San Pedro, 223 U. S. 365, 32 S. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221.

and a stipulation entered into for the payment of the appraised value into court, and a monition duly issued, requiring all persons to present their claims and make proof.[2]

§ 4561. Duty of Other Courts to Suspend Proceedings.—Proceedings under the act having been duly instituted the court acquired full jurisdiction of the subject matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims.[3] When the procedure provided by rule 54 has been followed and a monition has issued "against all persons claiming damages * * * citing them to appear before said court and make proof of their respective claims," etc., it is the duty of every other court, when the pendency of such a liability petition is pleaded, to stop.[4] The operation of the act, in this behalf, can not be regarded as confined to cases of actual "transfer" (which is merely allowed as a sufficient compliance with the law), but when its reason and equity and the whole scope of its provisions is considered, it must be regarded as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owner's interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested.[5]

§ 4562. Staying or Restraining Proceedings in Other Courts.—Where a petition seeking a limitation of the owners' liability to the value of the ship and freight is filed, the libelants and intervenors should be restrained, by order of the court, from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal, in any other manner than by the pro rata distribution of the fund standing by stipulation in place of the ship and freight.[6] The issuance of an injunction

2. **Libel by salvage claimants.**—The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

3. **Duty of other courts to suspend proceedings.**—The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221, approving Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

4. The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

"The appellant, owner of the San Pedro, appears to have proceeded strictly in compliance with the fifty-fourth admiralty rule. There was a due appraisement of the San Pedro and her pending freight, and a stipulation entered into, with sureties, for the value so appraised, and a monition duly issued, requiring all persons to present their claims and make proof. In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, federal or state, to stop all further proceedings in separate suits upon claims to which the Limited Liability Act applied." The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

5. The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221, quoting Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617.

6. **Staying or restraining proceedings in other courts.**—The Benefactor, 103 U. S. 239, 26 L. Ed. 351. See Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

Proceedings in state court—Injunction.—See Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617; Moran *v.* Struges, 154 U. S. 256, 38 L. Ed. 981, 14 S. Ct. 1019.

The federal supreme court will refuse an application for injunction to stay proceedings begun in a state court before the filing of a libel to obtain the benefit of the Limited Liability Act, Rev. Stat., §§ 4283-4-5, when it appears that both courts below decided against the petitioner's right to the benefit of the act, and that no cause for granting the petition is shown except the expense consequent upon trials in the state court pending the appeal. The Mamie, 110 U. S. 742, 28 L. Ed. 312, 4 S. Ct. 194.

is not necessary to stop proceedings in separate or independent suits upon such claims. Power to grant an injunction exists under § 4285, Rev. Stat., when necessary to maintain the exclusiveness of the jurisdiction.[7] The very nature of the proceeding and the monition has the effect of a statutory injunction. Indeed, that is the express declaration of the statute.[8]

Modification of Injunctional Order.—A court of admiralty, in a proceeding for limitation of liability, will not modify its preliminary injunctional order, so as to permit damage claimants to institute suits in other courts.[9]

§ 4563. Bar to Subsequent Suit.—Where limited liability proceedings are properly instituted by shipowner and monitions issued and published, it is then the duty of all claimants to appear in such cause, and to contest there the question whether, in the particular case, the owners were or were not entitled to the benefit of the law.[10] In such case such proceedings are a bar to an action for personal injuries resulting from stranding and sinking of the vessel.[11]

§ 4564. Application of Doctrine of Res Adjudicata.—A second trial on the merits, between the same parties, is not contemplated by the rule.[12] Where a shipowner does not institute proceedings for limitation of liability until after the damage claimant has recovered a judgment against it in a state court, it is concluded in such proceedings by the decision of the state court on all the issues involved in the action before it.[13] In other words a proceeding by a

7. The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

It was urged in Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617, that by virtue of § 720, Rev. Stat. (U. S. Comp. Stat., 1901, p. 581), the district court had no authority to issue an injunction. But as to this, the court said: "This view of the statutory injunction, and of its effect upon separate actions and proceedings, renders it unnecessary to determine the question as to the legality of the writ of injunction issued by the district court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it. As the writ was issued prior to the adoption of the Revised Statutes, the power to issue it was not affected by any supposed change of the law introduced into the revision, by the 720th section of which the prohibition of the Act of 1793 (1 Stat. at L. 334, chap. 22, U. S. Comp. Stat., 1901, p. 581), in regard to injunctions against proceedings in state courts, has this exception appended to it: 'Except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Under the rule of expressio unius this express exception may be urged as having the effect of excluding any other exception, though it is observable that the injunction clause in the Act of 1851 is preserved without change in § 4285, Rev. Stat., and will probably be construed as having its original effect, due to its chronological relation to the Act of 1793." The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

8. The San Pedro, 223 U. S. 365, 56 L. Ed. 473, 32 S. Ct. 275, Ann. Cas. 1913D, 1221.

9. **Modification of injunctional order.**—The Titanic, 204 Fed. 295, decree modified 204 Fed. 260.

10. **Bar to subsequent suit.**—Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

11. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

12. **Application of doctrine of res adjudicata.**—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

13. In re Ross, 204 Fed. 248, 122 C. C. A. 516, reversing decree 196 Fed. 921; Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

Where a judgment was recovered in a state court, against a corporation, owner of a floating pile driver, for the death of an employee thereon, in which action the plaintiff alleged that the death was caused by the fault and negligence of the defendant in failing to provide a proper and safe appliance, and evidence was received on such issue, in a subsequent proceeding by such defendant for limitation of liability, the only question to be determined is whether such fault or negligence was with its privity or knowledge, and being a corporation, to entitle it to the benefit of the statute, it is required to show affirmatively that the absence of the appliance was without the privity or knowledge of its superintendent, who was charged with the duty of seeing that the vessel was properly equipped. In re Ross, 204 Fed. 248, 122 C. C. A. 516.

vessel owner for limitation of liability after the recovery against him of decrees for damages in collision suits does not affect the status of such decrees as final adjudications both as to liability and amount of damages.[14]

§ 4565. Effect on Course of Appeal.—The proceedings for a limitation of liability can not prevent the due course of appeal in the primary cause of collisions; though, by the exercise of the court's authority, they may prevent the parties from attempting, by execution or other process, to collect any moneys recovered by them beyond the amount awarded in the said proceedings.[15]

§ 4566. Pleading.—It is at least questionable whether the benefit of the statute can be accorded to any shipowner or owners, in the absence of any claim therefor in the pleadings.[16]

Allegation That Owner Personally in Fault.—Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, for that is one of the principal issues to be tried in such a cause.[17]

Allegation of Specific Negligence.—In a proceeding for limitation of liability for claims for cargo lost, cargo owners are not required to allege any specific negligence of petitioner in their answers, but make a prima facie case by proof of the shipment and nondelivery of their goods.[18]

Sufficiency of Claims for Death by Wrongful Act.—Where, in a proceeding to limit the liability of the owners of certain vessels for damages resulting from the death of passengers and crew caused by a collision, the statutes of the state to which the vessels belonged created a right of action for death in the widow of the deceased person, a claim filed by M., "widow and executrix" of one of the persons killed in the collision, was sufficient; the allegation that she was executrix being mere descriptio personæ and surplusage.[19]

Amendment of Claim.—An amendment of the claim, so as to charge that petitioner claimed as widow, was not erroneous, as permitting the filing of a new cause of action.[20]

Petition Where All Liability Contested.—See ante, "Contesting All Liability," § 4555.

Pleading Limited Liability or Defense to Action.—See ante, "Modes in Which Limited Liability May Be Claimed," § 4553.

§§ 4567-4570. Evidence—§ 4567. Presumptions and Burden of Proof.—Burden of Proof of Seaworthiness.—The burden of proving that a vessel was seaworthy and properly manned at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the shipowner claiming the benefit of the exemption provided in Harter Act, Feb. 13, 1893, c. 105, § 3, 27 Stat., 445 [U. S. Comp. St., 1901, p. 2946], against errors of management or navigation, whether or not there is any evidence to the contrary.[21]

14. Monongahela River Consol. Coal, etc., Co. *v.* Hurst, 200 Fed. 711, 119 C. C. A. 127.

15. **Effect on course of appeal.**—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

16. **Necessity for claims.**—The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41.

17. **Allegation that owner personally in fault.**—Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017, 9 S. Ct. 612.

18. **Allegation of specific negligence.**—The John H. Starin, 191 Fed. 800.

19. **Sufficiency of claims for death by wrongful act.**—The Hamilton, 146 Fed. 724, 77 C. C. A. 150.

20. **Amendment of claim.**—The Hamilton, 146 Fed. 724, 77 C. C. A. 150.

21. **Burden of proof of seaworthiness.**—The Wildcroft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467, affirming 130 Fed. 521, 65 C. C. A. 145; The C. W. Elphicke, 117 Fed. 279, decree affirmed in 122 Fed. 439, 58 C. C. A. 421; The Fri, 140 Fed. 123, reversed on another point in 154 Fed. 333, 83 C. C. A. 205.

The casting of the burden of proof on

Privity or Knowledge of Owner of Negligence of Servants.—The right of a shipowner to limit its liability for a casualty is dependent on its want of complicity in the acts causing the disaster, and the burden of proof is therefore on it to show affirmatively that it had properly officered and equipped the vessel for the contemplated service.[22] But the claimants in proceedings by a steamship company to limit its liability for claims arising out of a collision are charged with the burden of proving that the regulations promulgated by the steamship company for the conduct of its business, which exacted compliance by the captains of its vessels with the international rules, were not promulgated in good faith, or that a willful departure from their requirements was indulged in, and was brought home to, or was countenanced by, the company.[23] Privity and knowledge of the habit of running its vessels at an immoderate speed in a fog can not be imputed to a steamship company so as to defeat its right to limit its liability for claims arising out of a collision in a fog, from the provisions of the contract for subsidy with the French government, which requires vessels, which are only obliged to develop, under forced

one party or the other in a given case does not destroy the presumptions in favor of a party which exist under the general law of evidence. So a shipowner, claiming exemption from liability for cargo damage under section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), has the burden of proving the seaworthiness of the vessel; but, in the absence of evidence to the contrary, such burden is met prima facie by the presumption that he performed his duty in making her seaworthy at the commencement of the voyage. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, affirmed in 26 S. Ct. 467, 201 U. S. 378, 50 L. Ed. 794.

Sufficiency of Refrigerating Apparatus.—The burden of proof which rests upon the shipowner to show the discharge of his initial duty under the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), to use due diligence to provide a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which he has undertaken to carry, is not sustained by evidence of a superficial inspection shortly, before sailing, which disclosed no defect, where the testimony also shows that the machinery broke down very shortly after leaving port, and after being repaired broke down again, and during the voyage did not reduce the temperature sufficiently to preserve the meat, and tends to show that the proper temperature had not been produced when the cargo was received, and that the breakdown occurred in an attempt to reduce it to the proper degree. Judgment The Southwark, 108 Fed. 880, 48 C. C. A. 123, reversed in 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

Damage by leakage from steam valves.—Cargo stowed in a hold was damaged on a voyage from London to New York by steam which escaped into the hold through valves placed in an iron box on the deck above for use in case of fire. These valves were located on one branch of a steam pipe, the other branch of which led to a winch and a windlass. The admission of steam into the main pipe was controlled by a valve in the engine room, which was closed shortly after the ship sailed, and remained closed until she was nearly to New York, when it was opened for the purpose of testing the windlass preparatory to its use in discharging cargo. It was conceded that the damage occurred thereafter. The box in which the three fire valves were placed was locked before the ship sailed, and it was supposed that the valves were closed. The admission of the steam to the valves in the box was further controlled by another valve in the branch pipe leading to them, and after the presence of steam in the hold was discovered such valve and two of those in the box were found to be partially open. Held, that such facts made it incumbent on the ship, in order to escape liability, to show that such valves were properly and thoroughly inspected and closed before the voyage began, and that, in the absence of direct and credible evidence establishing such facts, the leakage must be attributed to the unseaworthy condition of the ship in that respect at the beginning of the voyage, and she was not exempt from liability under the Harter Act. The Manitou, 116 Fed. 60, affirmed in 127 Fed. 554, 63 C. C. A. 109.

22. **Privity or knowledge of owner of negligence of servants.**—Decree, In re Michigan Steamship Co., 133 Fed. 577, reversed in McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518.

Burden of Proof of Want of Privity or Knowledge.—See ante, "Application of Doctrine of Res Adjudicata," § 4564.

23. Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

draft, on their trial, a maximum speed of 17½ knots, to maintain a mean average annual speed of 15 knots, with a premium for exceeding that speed, and a penalty for a failure to maintain it.[24] And privity or knowledge by a steamship company of the fault of its servants in maintaining an excessive rate of speed in a fog is not to be presumed from a failure to comply, in proceedings to limit liability, with an order for the production of certain log books, where the claimant made no attempt to introduce secondary evidence, and did not ask a dismissal of the proceedings or such other action for the alleged contumacy as the case required.[25]

Time and Place of Death.—The burden rests on a claimant of damages for a death in proceedings for limitation of liability to prove the time and place of the death where such facts are material.[26]

§ 4568. Admissibility of Evidence.—Evidence Taken in Suit against Vessel or Owner.—If suit against the vessel or the owners has been commenced and evidence has been taken, though no trial had, it will be in the discretion of the court to require that such evidence shall be received and used in the limitation proceedings. The flexibility of admiralty proceedings will enable the court, in most cases, so to shape their course as to attain justice between the parties.[27]

§ 4569. Weight and Sufficiency.—Instances in which the evidence was held sufficient to show that the hatches were sufficient and securely closed,[28] that a manhole joint was a good, tight joint,[29] that the owners had actual

24. Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

25. Judgment, La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed in 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.

26. **Time and place of death.**—Thompson Towing, etc., Ass'n *v.* McGregor, 207 Fed. 209, 124 C. C. A. 479.

27. **Reception of evidence taken in suit against vessel or owner.**—The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

28. **Hatches sufficient and securely closed.**—A new steel steamship, admittedly firstclass in construction and equipment in every other respect, can not be held liable for damage to a cargo of wheat by water, on the ground of unseaworthiness at the beginning of the voyage, because of the insufficiency of the hatch coverings, under § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901, p. 2946]), where the wooden covers were tight and well fitted, and over them were fastened two canvas covers of No. 1 hard duck—one new, and the other nearly so—such as were usually considered a sufficient covering, and which were specifically approved by the underwriter's surveyor under whose inspection the loading was done, and where shortly after sailing the vessel encountered a three-days hurricane, during which the seas broke over her, dismantling her steering gear and producing a general straining and leakage, resulting in injuries which it cost $14,000 to repair. Under such evidence, the damage must be attributed to perils of the sea. Decree 118 Fed. 85, affirmed in The Hyades, 124 Fed. 58, 59 C. C. A. 424.

29. **Manhole joint good tight joint.**—Sugar cargo stored in a hold was damaged during the voyage by sea-water, which entered from a water ballast tank through a manhole. The ship's carpenter, who made the manhole joint some three weeks before the vessel was loaded, testified without contradiction that he made a good tight joint, and that it was tested several times before sailing by the filling of the tank, and did not leak. The top of the tank was some 17 feet below the water line, and it was shown that shortly after sailing the sea cock was opened for the purpose of filling the tank, and negligently left open for 7½ hours, although 2 hours was sufficient to fill the tank, by reason of which the tank was subjected to great pressure. As to whether or not such pressure was sufficient to cause the packing to blow out of the manhole joint if properly constructed there was a conflict of testimony. Held, that it was not incumbent on the owners to test such joint by a pressure greater than it would be subjected to under conditions of good navigation, and that the evidence was not sufficient to show that the ship was unseaworthy at the beginning of the voyage, but rather showed that the leakage was caused by leaving the sea valve open, which was a fault in the management of the ship, for the consequence of which the owners were exempted from liability by § 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St., 1901,

knowledge of the illegal carriage of gasoline, etc., on the vessel,[30] and an instance in which the evidence was held insufficient to show that a port was securely covered and closed[31] before the commencement of the voyage are given in the footnotes.

§ 4570. Cross-Examination of Petitioner.—In a proceeding for limitation of liability for claims for cargo lost, where cargo owners who are not required to allege any specific negligence of petitioner in their answers, make a prima face case by proof of the shipment and nondelivery of their goods; and the petitioner undertakes to excuse such nondelivery on the ground of perils of the sea, they are entitled to cross-examine as to the seaworthiness of the vessel, and also to offer proof on the subject.[32]

§§ 4571-4574. Decree—§ 4571. In General.—Decrees of a district court in limited liability proceedings in cases subject to its jurisdiction are valid and binding in all courts and places.[33]

If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing said amount pro rata amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute.[34]

§ 4572. Reopening Decree to Permit Other Claimants to Come in.—Where proceedings in a court of admiralty by a shipowner for limitation of liability have been terminated, so far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims. If for any reason the decree is not binding on such claimants, their remedy is by an independent suit.[35]

§ 4573. Allowing Interest on Appraised Value.—In cases of limited

p. 29461). Decree, American Sugar Refin. Co. *v.* Rickinson, 120 Fed. 591, reversed in 124 Fed. 188, 59 C. C. A. 604.

30. Knowledge of illegal carriage of gasoline.—A vessel owner held, while not having actual knowledge of the illegal carriage of gasoline, etc., on the vessel, which exploded and killed and injured a number of stevedores, and therefore entitled to a limitation of liability, chargeable with such negligence in the premises as to render it liable for the death and injury claims. Union Steamboat Co. *v.* Chaffin, 204 Fed. 412, 122 C. C. A. 598.

31. That port security closed.—After a vessel had been out of port only four or five days, and had encountered no severe weather or known accidents, both covers of one of her ports were found to be open, and water had entered and damaged cargo in the compartment into which the port opened. Neither the covers nor the surroundings of the port were injured, and the hatches had been battened down since the beginning of the voyage. Held, that neither evidence that the vessel was inspected the day before sailing and the port believed to be closed, nor even the positive testimony of witnesses that the covers were closed and screwed fast when the vessel sailed, was sufficient to establish such fact, but that, under the rule laid down in The Silvia, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, the condition of the port did not render the vessel unseaworthy, and the failure to close it before the injury was received by the cargo was a fault or error in the management of the vessel during the voyage, for which the owners are relieved from liability under section 3 of the Harter Act. Farr, etc., Mfg. Co. *v.* International Nav. Co., 94 Fed. 675, reversed in 98 Fed. 636, 39 C. C. A. 197, affirmed in 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830. See ante, "Instances of Fault or Error in Navigation or Management of Vessel," § 4538.

32. Cross-examination of petitioner.—The John H. Starin, 191 Fed. 800.

33. Decree.—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038, 3 S. Ct. 379, 617. See ante, "Forms and Rules of Procedure," § 4549.

34. The Scotland, 105 U. S. 24, 26 L. Ed. 1001. See post, "Apportionment or Distribution of Proceeds," § 4575.

35. Reopening decree to permit other claimants to come in.—Dowdell *v.* United States Dist. Court, 139 Fed. 444, 71 C. C. A. 288.

liability, interest will only be allowed on the appraised value from the date of the decree until payment, and in the event of an appeal by the owners, which is unsuccessful, such interest will be decreed against them, in personam, and not against the stipulators.[36]

§ 4574. Res Adjudicata.—Where the court in a suit by shipowners, under the statute, to limit their liability to certain libelants of vessels, adjudicated the claims of the defendants, and distributed between them the fund in court and an appeal was taken by the defendants, and the decree reversed, on the ground that the petitioners had not surrendered all the property liable, but no question was raised on each appeal as to the validity of the claims allowed to the several defendants, nor was such question raised by new pleadings after the case was remanded; the validity of the claim of each defendant, or between themselves, was res judicata, and could not be questioned by any of the other defendants on a subsequent appeal.[37]

§ 4575. Apportionment or Distribution of Proceeds.—Under Rev. St., § 4284 (U. S. Comp. St., 1901, p. 2943), the proceeds of a vessel surrendered in proceedings for limitation of liability is to be distributed pro rata among all claimants who establish a right to share therein.[38] The amount recovered, whether before the limitation proceedings are commenced, or afterwards, and whether in the court of first instance, or an appellate court, will stand as the recoverer's basis for pro rata division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in ordinary course.[39]

Collisions, One Vessel at Fault.—If a collision happens between two vessels at sea, and one of them is in fault without the privity or knowledge of her owners, and the amount of their interest in the vessel and her freight then pending is paid into court, it will, if insufficient to pay all the damages caused, be apportioned pro rata amongst the owners of the injured vessel and of the cargoes of both vessels in proportion to their respective losses.[40] Where cargo shipped under bill of lading exempting the carrier from damage by collision, was damaged by or a result of a collision with another vessel which was greatly in fault, and the owner of each vessel filed a petition praying for a limitation of its liability for damages growing out of the collision, the underwriter of the cargo and the owners of the vessels not at fault can only recover of the owners of the vessel at fault pro rata to the extent of the bond filed by the owners of the latter vessel in their limitation proceedings. The fact that the underwriters of the cargo are compelled to bear a portion of their own loss is the result of the limitation of liability act, the value of the vessel at fault not being sufficient to pay the entire damage sustained. "Collision" was an exception in all the bills of lading and as the damage was occasioned by collision and within the exception, it rested upon the underwriter to defeat the operation of the exception by proof of such negligence on the part of the vessel carrying such cargo as would justify a decree against her if sued alone.[41]

Both Vessels in Collision in Fault.—In proceedings brought by two separate vessels to limit liability for a collision, and in which both are found in fault, the cost of raising one which was sunk in the collision in a place where

36. **Allowing interest on appraised value.**—The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

37. **Res adjudicata.**—Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

38. **Apportionment or distribution of proceeds.**—Boston Marine Ins. Co. *v.* Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

39. The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134, 6 S. Ct. 1150.

40. **Collisions, one vessel at fault.**—Norwich Co. *v.* Wright (U. S.), 13 Wall. 104, 20 L. Ed. 585.

41. The Victory, 168 U. S. 423, 42 L. Ed. 519.

it was an obstruction to navigation is a proper claim against the fund for distribution although it exceeds the value of the raised vessel.[42]

Priority of Claims of Third Parties to That of Owner of Chartered Vessel.—Under Rev. St., § 4286 [U. S. Comp. St. 1901, p. 2944], relating to proceedings for limitation of liability, which provides that for the purpose of such proceedings a charterer who is required to man, victual, and navigate a vessel at his own expense shall be deemed the owner, and that a vessel under such a charter "shall be liable in the same manner as if navigated by the owner thereof," where in proceedings by such a charterer both vessels had been found in fault for a collision, and each condemned to pay half the damages, and the charterer has been required to contribute the value of his vessel and pending freight, and also the cause of action against the other vessel, the claims of third party claimants arising out of the collision are entitled to priority of payment from the fund over the claim of the owner for loss or damage to his vessel.[43]

Right of Owner to Complain of Error in Distribution.—Where, in proceedings on the petition of shipowners to limit their liability to libelants of a vessel, their petition is granted, and the fund in court is insufficient to pay in full the amount found due to one defendant, the petitioners can not complain that a portion of it is erroneously distributed to other claimants.[44]

§ 4576. Costs and Expenses of Administration.—In limited liability proceedings, the costs arising on every contested issue should fall on the losing party; but the expenses of administration, including the fees and other carges of the officers of the court and of the commissioner, should be paid from the fund, unless and so far as parties have made issues, and as to this exception the owner stands in the same condition as any other party. All such costs of adverse issues should be taxed without reference to the fund or its existence, the same as the costs of any entirely independent litigation.[45]

Costs of Monition.—In proceedings for limitation of liability, the cost of issuing and publishing the monition is an expense to be paid out of the fund.[46]

Docket Fees.—In a proceeding for limitation of liability, where there is an appraisal, and a stipulation for value given, the petitioner is entitled to a single docket fee, and may deduct from the fund the expenses of administration, but this may not include the cost of procuring the stipulation, nor the expense of giving the same, nor of the appraisal; each person claiming damages, and recovering the same, is entitled to a separate proctor's fee, payable herein by the stipulators for costs, and not out of the fund.[47] Rev. St., § 824 (U. S. Comp St., 1901, p. 632), entitles a proctor who represents several claimants who recover in a proceeding for limitation of liability to but a single docket fee.[48]

42. **Both vessels in collision in fault.**—The Mauch Chunk, 139 Fed. 747, affirmed in 154 Fed. 182, 83 C. C. A. 276.

43. **Priority of claims of third parties to that of owner of chartered vessel.**—The Mauch Chunk, 139 Fed. 747, affirmed in 154 Fed. 182, 83 C. C. A. 276.

44. **Right of owner to complain of error in distribution.**—Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

45. **Costs and expenses of administration.**—The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

46. **Cost of monition.**—Boston Marine Ins. Co. *v.* Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

47. **Docket fees.**—In re Excelsior Coal Co., 136 Fed. 271, affirmed in 142 Fed. 724, 74 C. C. A. 56.

48. Boston Marine Ins. Co. *v.* Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

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